QUEENSLAND COURTS

CHILD PROTECTION BENCHBOOK

Department of Justice and Attorney-General

Published in Brisbane by —

Childrens Court of Queensland
Supreme and District Court
415 George Street Brisbane QLD 4000

PO Box 15167
City East Qld 4002

Office of the Chief Magistrate
Magistrates Courts Service
Level 10, 363 George Street
Brisbane QLD 4000

GPO Box 1649
Brisbane QLD 4001

www.courts.qld.gov.au

Second Edition

Published 11 October 2023

Foreword

The Child Protection Benchbook is intended to provide practical and informative assistance to magistrates sitting in the child protection jurisdiction. The work undertaken in this jurisdiction is unique with 21 specialist Childrens Court Magistrates appointed around the State.

As at the time of publishing this Benchbook is up to date to include the second tranche of amendments to the *Child Protection Act 1999* in the *Child Protection Reform and Other Legislation Amendment Act 2022*.

I would like to thank Judge Richards, President of the Childrens Court of Queensland and members of the Magistrates' Youth Justice and Child Protection Committee who have provided valuable feedback during this most recent update to the Child Protection Benchbook.

I also acknowledge and thank Kate Grant for her significant contribution to the update as well as the stakeholders who have contributed to this version.

Her Honour Judge Janelle Brassington
Chief Magistrate
MAGISTRATES COURT OF QUEENSLAND

Disclaimer

The Childrens Court Child Protection Benchbook contains information prepared and collated by the Magistrates Court Service, Court Services Queensland. The Magistrates Court Service does not warrant or represent that the information contained within this publication is free of errors or omissions. The Child Protection Benchbook is considered to be correct as at the date of publication, however, changes in circumstances after the time of issue may impact the accuracy and reliability of the information within.

The Magistrates Court Service takes no responsibility for and makes no representation or warranty regarding the accuracy, currency, reliability and correctness of any information provided to the Magistrates Court Service by third parties. The Magistrates Court Service, its employees, consultants and agents will not be liable (including, but not limited to, liability by reason of negligence) to persons who rely on the information contained in the Child Protection Benchbook for any loss, damage, cost or expense whether direct, indirect, consequential or special, incurred by, or arising by reason of, any person using or relying on the publication, whether caused by reason of any error, omission or misrepresentation in the publication or otherwise.

Index

1 INTRODUCTION

1.1 *Childrens Court Act 1992 and Childrens Court Rules 2016*

The Childrens Court is established under the *Childrens Court Act 1992* (Qld) (Childrens Court Act) and operates under the Childrens Court Act and the *Childrens Court Rules 2016* (Qld) (Childrens Court Rules). The Childrens Court is constituted by a member who is a Childrens Court Judge (or, if one is not available, a District Court Judge) or a Childrens Court Magistrate (or, if one is not available, a magistrate or two justices of the peace).[1] Among other things, the Childrens Court has jurisdiction over child protection and youth justice matters.

The Childrens Court Rules govern the procedure of the Childrens Court.[2] The President of the Childrens Court is a District Court Judge who has the function of ensuring the orderly and expeditious exercise of the jurisdiction of the Court when constituted by a Childrens Court Judge. The Childrens Court Act provides that the Chief Magistrate has the function of ensuring the orderly and expeditious exercise of the jurisdiction of the Court when constituted by a Childrens Court Magistrate, Magistrate or Justices.[3] This Childrens Court Act also allows the Chief Magistrate to issue practice directions of general application with respect to the procedure of the Court when constituted by a Childrens Court Magistrate, Magistrate or Justices.[4]

1.1.1 **Comment**

Re whether the Childrens Court is a Magistrates Court:

In *Compass Health Group v KD* [2012] QCHCM 2 the Childrens Court (Magistrate) had cause to consider whether the Childrens Court is a Magistrates Court for the purpose of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR). The Court, considering whether or not the provisions of the UCPR would apply to the Childrens Court proceedings, said:[5]

> "*[T]hose rules apply to civil proceedings in the Supreme, District and Magistrates court. The Rules will only apply to the Childrens Court exercising jurisdiction under the Child Protection Act 1999 if a Magistrates Court in the Rules includes a reference to a magistrate constituting the Childrens Court*."

In answering the question, Her Honour reviewed some recent judicial decisions and comments on whether a Childrens Court constituted by a District Court Judge is a District Court.

In *Cousins v HAL & Anor* [2008] QCA 49 Fraser JA considered the question of whether the Childrens Court of Queensland established by the *Childrens Court Act 1992* may also be regarded as the District Court for the purposes of the right of appeal conferred by section 118(3) of the *District Court of*

[1] s 5 *Childrens Court Act 1992* (Qld) (*CCA*).
[2] s 7 *CCA*.
[3] s 8A *CCA*.
[4] s 8 *CCA*.
[5] *Compass Health Group v KD* [2012] QChCM 2 at [9].

Queensland Act 1967 (Qld). In that case His Honour said the conclusion was unavoidable that these were different courts, established by separate legislation with a different albeit overlapping membership:[6]

> "*It follows that I must conclude that the Childrens Court is not the District Court for the purpose of s 118(3) so that no appeal lies from a decision of the Childrens Court, constituted by a District Court judge under s 118(3) of the District Court of Queensland Act 1967*."

In *CAO v Dept of Child Safety* [2009] QCA 169 Keane JA (with whom the Chief Justice and Fraser JA agreed) expressed his agreement with the views of Fraser JA in *Cousins v HAL.*[7] In *CAR v Department of Child Safety* [2010] QCA 27 the Court of Appeal unanimously followed *Cousins v HAL.*

Her Honour applied the reasoning of Fraser JA in Cousins v HAL to conclude that the fact that a Magistrate constitutes a Childrens Court does not make that court a Magistrates Court for the purpose of the UCPR.

1.2 *The nature and context of the jurisdiction*

Decisions in the child protection jurisdiction have a significant impact on children, their families and the broader community.

Court processes dealing with the protection of children must not delay in reaching decisions and must, as far as practicable, allow children to have a voice in the decisions that will profoundly affect them.[8]

The courts sit at the far end of the continuum of intervention in child protection and are usually dealing with a relatively small proportion of cases in the overall system, but they are often the most complex cases.

In Queensland, Aboriginal and Torres Strait Islander children were 8.5 times more likely to be placed in out-of-home care than non-indigenous children, with 43.5% not placed with kin or other indigenous carers when placed in out-of-home care – being disconnected from family and community means a loss of cultural connection – and their human right to cultural inheritance.[9]

Notably, while the over-representation of Aboriginal and Torres Strait Islander children in cases of substantiated child neglect or abuse has not increased significantly in recent years, the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care has continued to climb. This is linked to factors including the higher rates of removal of Aboriginal and Torres Strait

---

[6] *Cousins v HAL* [2008] QCA 49 at p 9.
[7] *Cousins v HAL* [2008] QCA 49.
[8] Queensland Child Protection Commission of Inquiry (QCPCI), *Taking responsibility: A Roadmap for Queensland Child Protection* (2013), vol 1 and 2, p xxiv.
[9] Secretariat of National Aboriginal and Islander Child Care (SNAICC) and the University of Melbourne, *The Family Matters Report 2021: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait islander children in out-of-home care In Australia*, 9 December 2021, p 12.

Islander children following substantiation of child harm, the lower rates at which they are reunified with parents and family members, and the longer periods they spend in care.[10]

Many studies have shown strong links between social disadvantage and child abuse and neglect. For more information refer to **Appendix 1.**

1.3 *The purpose and scope of this Benchbook*

The Child Protection Benchbook deals specifically with the child protection jurisdiction of the Childrens Court. In practice, the significant majority of applications for child protection orders are heard and determined in the Childrens Court by a Magistrate – this Benchbook is directed at those Magistrates.

This resource has been prepared for Magistrates that may be new to the Childrens Court and child protection proceedings.

1.4 *Terminology*

Chief Executive – the Chief Executive of the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA)

Department – the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA)

DCPL – Director of Child Protection Litigation

OCFOS – Office of the Child and Family Official Solicitor

OPG – Office of the Public Guardian

QCAT – Queensland Civil and Administrative Tribunal

QCPCI – Queensland Child Protection Commission of Inquiry

QCPCI Report – *Taking Responsibility: A Roadmap for Queensland Child Protection, Volumes 1 and 2;* Queensland Child Protection Commission of Inquiry, June 2013.

Registrar – is the registrar of each Magistrates Court.

Tribunal Registrar – is the principal registrar under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

[10] Secretariat of National Aboriginal and Islander Child Care (SNAICC) and the University of Melbourne, *The Family Matters Report 2021: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait islander children in out-of-home care In Australia*, 9 December 2021, p 25.

All references to sections in this document, unless otherwise stated, are references to the *Child Protection Act 1999* (Qld). Note that the reference to section numbers is correct at the time of publication but these may change as further amendments are made to the Act.

1.5 *Resources (referred to herein or for further reference)*

1.5.1 QLD

- *Child Protection Act 1999* (Qld)
- *Childrens Court Rules 2016* (Qld)
- *Childrens Court Act 1992* (Qld)
- *Director of Child Protection Litigation Act 2016* (Qld)
- *Human Rights Act 2019* (Qld)
- *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*
- Queensland Childrens Court Decisions, Supreme Court Library of Queensland, published & unpublished judgments Childrens Court (District Court) and Childrens Court (Magistrates Court).
- *Taking Responsibility: A Roadmap for Queensland Child Protection, Volumes 1 and 2;* Queensland Child Protection Commission of Inquiry, June 2013;
- *Queensland Government response to the Queensland Child Protection Commission of Inquiry final report*;

1.5.2 Australian Institute of Judicial Administration

- *Bench Book for Children Giving Evidence in Australian Courts*, especially *Chapter 2, Child Development, Children's Evidence and Communicating with Children*; Australian Institute of Judicial Administration

1.5.3 NSW

- Judicial Commission of New South Wales, *Local Court Bench Book , [47 000] Children's Court Care and Protection Jurisdiction*
- Judicial Commission of New South Wales, *Children's Court of NSW Resource Handbook, [1-0050] Care and Protection*
- Children's Court of New South Wales, *Children's Law News*, http://www.childrenscourt.justice.nsw.gov.au/Pages/publications/lawnews/lawnews.aspx

1.5.4 Victoria

- Judicial College of Victoria, *Children's Court Bench Book, Part B – Family Division* (2017)
- Children's Court of Victoria Research Materials, *Chapter 5 Family Division – Care and Protection*, (December 2013)

1.5.5 Online Databases

- LexisNexis
- Austlii[11]

2 CHILD PROTECTION ACT 1999 (THE ACT)

The *Child Protection Act 1999* (Qld) (the Act) was assented to on 30 March 1999 and commenced on 23 March 2000 (some minor sections were proclaimed to commence earlier). In 2018, amendments came into force with an emphasis on providing permanency and stability for children and young people in out-of-home-care.

2.1 *Purpose and Principles of the Act*

The purpose of the Act is to provide for the protection of children, promote the safety of children and to the extent appropriate, to support families caring for children.[12] Magistrates must be cognisant of the paramount and guiding principles found in Chapter 1 Part 2 Division 1 of the Act. The Childrens Court is specifically required to have regard to the principles set out in sections 5A to 5C of the Act to the extent that they are relevant in exercising its jurisdiction or powers.[13] The Act is to be administered under the principles set out in Division 1, however all principles in the Act are subject to the paramount principle.[14]

Adherence by the Childrens Court, and others, to the principles underpinning the Act are of special importance given that the Childrens Court is not bound by the rules of evidence.[15]

Section 5D of the Act sets out other principles relevant to the exercise of a power or making of a decision under the Act. While these principles may be relevant to the Childrens Court in reviewing the actions of the Department or other parties, the section states specifically that it does not apply to a court or tribunal.[16]

2.2 *Paramount principle*

The main principle for administering the Act is that the **safety, wellbeing and best interests of the child, both through childhood and for the rest of the child's life, are paramount**.[17]

The main principle was amended in October 2018 to include the words '*both through childhood and for the rest of the child's life*'. The purpose of this is to encourage decision-makers to consider the long-term impact on the child, and not just the short-term consequences of decisions. Being a child in the child protection system can be a traumatic experience, with long lasting effects that could

[11] Including Austlii NoteUp Search.
[12] s 4 *Child Protection Act 1999* (Qld) (*CPA*).
[13] s 104 *CPA.*
[14] s 5 *CPA.*
[15] s 105(1) *CPA.*
[16] s 5D(2) *CPA.*
[17] s 5A *CPA.*

impact upon them for the rest of their lives. Decisions in this jurisdiction should not be taken lightly and the interests of the child should always be put first.

2.3 *Other guiding principles*

Other general principles that are relevant to making decisions relating to the safety, wellbeing and best interests of the child are set out in section 5B of the Act:

a) A child has a right to be protected from harm or risk of harm;
b) A child's family has primary responsibility for their upbringing, protection and development;
c) The preferred way of ensuring a child's safety and wellbeing is through supporting the family;
d) if a child does not have a parent who is able and willing to protect the child, the State is responsible for protecting the child;
e) The State should only take action warranted in the circumstances when protecting a child;
f) If a child is removed from their family, support should be given to the child and the child's family for the purpose of allowing the child to return to the child's family if the return is in the child's best interests;
g) The child should have long-term alternative care if they do not have a parent willing and able to give them ongoing protection in the foreseeable future;
h) If a child is removed from their family consideration should first be given to placing the child in the care of kin (defined below);
i) The child should be placed with siblings to the extent that is possible;
j) A child should only be placed with a parent or other person who has the capacity and is willing to care for the child (including a parent or other person with capacity to care for the child with assistance or support);
k) A child should be able to maintain connection with parents and kin if appropriate;
l) A child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;
m) A delay in making a decision in relation to a child should be avoided unless appropriate for the child; and
n) A child as the right to express the child's views about what is, and is not, in the child's best interests.

Kin, in relation to a child, is defined to mean the following persons:[18]

(a) a member of the child's family group who is a person of significance to the child;
(b) if the child is an Aboriginal child—a person who, under Aboriginal tradition, is regarded as kin of the child;
(c) if the child is a Torres Strait Islander child—a person who, under Island custom, is regarded as kin of the child;
(d) another person—
(i) who is recognised by the child, or the child's family group, as a person of significance to the child; and

[18] Schedule 3 *CPA*.

(ii) if the child is an Aboriginal or Torres Strait Islander child—with whom the child has a cultural connection

2.4 *Permanency Principles*

The principles for achieving permanency for a child are set out in section 5BA. For ensuring the wellbeing and best interests of a child, the action or order that should be preferred, having regard to the principles in section 5B and 5C, is the action or order that best ensures the child experiences or has:

a) Ongoing positive, trusting and nurturing relationships with persons of significance to the child, including the child's parents, siblings, extended family members and carers; and
b) Stable living arrangements, with connections to the child's community, that meet the child's developmental, educational, health, intellectual and physical needs; and
c) Legal arrangements for the child's care that provide the child with a sense of permanence and long-term stability, including, for example, a long-term guardianship order, a permanent care order or an adoption order for the child.

When deciding whether an action or order best achieves permanency for a child, the following principles apply, in order of priority:[19]

a) the first preference is for the child to be cared for by the child's family;
b) the second preference is for the child to be cared for under the guardianship of a person who is a member of the child's family, other than a parent of the child, or another suitable person;
c) if the child is not an Aboriginal or Torres Strait Islander child—the next preference is for the child to be adopted under the *Adoption Act 2009*;
d) the next preference is for the child to be cared for under the guardianship of the chief executive;
e) if the child is an Aboriginal or Torres Strait Islander child—the last preference is for the child to be adopted under the *Adoption Act 2009*.

2.5 *Aboriginal and Torres Strait Islander Principles*

Additional principles for Aboriginal and Torres Strait Islander children are set out in section 5C (1) of the Act:

a) Aboriginal and Torres Strait Islander people have the right to self-determination; and
b) The long-term effect of a decision on the child's identity and connection with their family and community should be taken into account.

Section 5C(2) contains the Aboriginal and Torres Strait Islander child placement principle:

a) the principle (the *prevention principle*) that a child has the right to be brought up within the child's own family and community;
b) the principle (the *partnership principle*) that Aboriginal or Torres Strait Islander persons have the right to participate in

[19] s 5BA(4) *CPA*.

a. (i) significant decisions under this Act about Aboriginal or Torres Strait Islander children; and

(ii) decisions relating to the development and delivery of services, provided by the department, that –

(A) support Aboriginal or Torres Strait Islander families; or

(B) provide for the care or protection of Aboriginal or Torres Strait Islander children

c) the principle (the *placement principle*) that, if a child is to be placed in care, the child has a right to be placed with a member of the child's family group;
d) the principle (the *participation principle*) that a child and the child's parents and family members have a right to participate, and be enabled to participate, in an administrative or judicial process for making a significant decision about the child;
e) the principle (the *connection principle*) that a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person.

When exercising a power in relation to an Aboriginal or Torres Strait Islander child, section 5G of the Act **requires** the Childrens Court have regard to Aboriginal tradition and Island custom relating to the child and the Aboriginal and Torres Strait Islander child placement principle in relation to the child.

The *Acts Interpretation Act 1954*, schedule 1, contains definitions of *Aboriginal tradition* and *Island custom*. Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships. Island custom is known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.

2.5.1 **Comment**

Re 'Best Interests';

Dickey QC[20] has made some relevant points about the best interests principle, though drawn largely from Family Court cases:

- Best interests are subjective: The best interests principle does not involve an objective standard - the decision ultimately depends upon the judge's personal perception of where the best interests of a child lie in light of the particular facts and circumstances of the case. The High Court has observed that in cases depending upon the best interest principle, the same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges and that best interests are values not facts.[21]

[20] Dickey, A. 2014. *Family Law*, 6th Edition, Lawbook Co., pp 306-308.
[21] *C.D.J v. V.A.J* (1998) 197 CLR 172 at 214, 219, 231 cited in Dickey 2014, p 402

- Best interests are to be considered in a pluralist and multicultural society: In considering the best interests, or welfare, of a child, court naturally have to face the fact that opinions differ within the community, and especially within Australia's present day pluralist and multicultural society, on what is conducive to the good either of children generally or of classes of children in particular (for example, children belonging to a particular ethnic group). .. The courts attempt to consider the welfare of a child in light of contemporary standards at large, and not from the point of view of the standards of particular parents or of one section of society only… The courts seek to be impartial to the relative merits of the practices, beliefs and ways of living of different cultural, ethnic, social, minority, and religious groups within society. This does not mean that courts ignore such differences or seek to minimise the significance being part of a particular social group may have on the welfare of the child. Rather it means that the courts do not regard any one social community as better than, or superior to, any other.[22]

- Best interests in the longer term: Primarily the courts will generally have regard to what is in the best interests of the child in the longer term, not the short term, if this is possible.[23]

The term 'best interests' has long been part of the *Family Law Act 1975* (Cth). While the considerations differ where there are two parents competing rather than also with a Department (given the provisions of section 5B of the Act), it is relevant to consider the concept of 'best interests' in a Family Law context.

In *Re Hamilton* [2010] CLN 2 His Honour Judge Marien considered the concept in the context of considering contact with a father who ultimately conceded the children would not be placed with him, stating:[24]

> "*In determining whether a contact order should be made in favour of the father I must bear in mind, pursuant to section 9(1) of the Care Act,*[25] *that in making that determination with respect to a particular child, the safety, welfare and well-being of the child are paramount. As the High Court said in M v M* [1988] HCA 68 *in the context of parenting orders made under the Family Law Act 1975* (Cth)*,*
>
> *The court is concerned to make such an order for custody or access which will be in the opinion of the court best to promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in the child's best interest to maintain a filial relationship with both parents… (at page 76).*
> *See also B v B* [1988] HCA 66"

The 2018 amendments to the Act considered the concept of best interests and how this may be achieved. The result was an emphasis on long-term stability and security for children and young

[22] Dickey, A. 2014. *Family Law*, 6th Edition, Lawbook Co., p 308.
[23] Dickey, A. 2014. *Family Law*, 6th Edition, Lawbook Co., p 308.
[24] *Re Hamilton* [2010] CLN 2 at [44].
[25] *Children and Young Persons (Care and Protection) Act 1998* (NSW).

people in the child protection system. These amendments include introducing the concept of permanency by defining it to include the experience of the child of having ongoing relationships, stable living arrangements and legal arrangements that provide a sense of permanence and long-term stability. The amendments also provided dedicated principles to promote decision making that prioritises timely permanency outcomes for children. The principles specifically reference relational, physical and legal aspects of permanency, and establish a hierarchy of preferred care arrangements for best achieving permanency for a child to guide decision makers.[26]

The best interest consideration is also reflected in Article 3 of the UN Convention on the Rights of the Child:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

On the 29 May 2013, the United Nations (UN) published UN General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (article 3, paragraph 1).

In relation to article 3 the UNGC No. 14 includes:[27]

- The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes **describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision**.
- The Committee recalls that article 12, paragraph 2, of the Convention provides for the **right of the child to be heard**, either directly or through a representative, in any judicial or administrative proceeding affecting him or her.
- In case of separation, the State must guarantee that the situation of the child and his or her family has been assessed, where possible, by a multidisciplinary team of well-trained professionals with appropriate judicial involvement, in conformity with article 9 of the Convention, ensuring that **no other option can fulfil the child's best interests**.
- The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be **provided with a legal representative**, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

The QCPCI examined the history of the meaning of 'best interests' in decision-making in the child protection context, which is also referenced the UN Convention on the Rights of the Child (UN Convention):

---

[26] Explanatory Notes, pg. 4.
[27] Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 62nd session, 14 January – 1 February 2013.

> *"it created a new status of the child based on the recognition that s/he is a person and has the right to live a life of dignity and since the promulgation 1989 [sic] the child has been understood to be a subject of rights.*

It is clear that the *Child Protection Act 1999 was directly and specifically attempting to reflect the principles set out in the 1989 United Nations Convention. As stated in a Queensland Parliamentary Library research paper at the time:*

> *The Bill is similar in its approach, to that of the other States and Territories around Australia, all of which also attempt to reflect the principles espoused by the United Nations Convention on the Rights of the Child. These principles are seen by many as appropriate guidelines for the protection of children.*

2.6 *Basic Concepts*

Key terms used in the Act are set out in Chapter 1 Part 3 Division 1.

A **child** is an individual under 18 years.[28]

A child **in need of protection** is a child who has suffered significant harm, is suffering significant harm or is at **unacceptable risk** of suffering significant harm and does not have a parent able and willing to protect the child from the harm.[29]

Harm is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.[30] It is immaterial how the harm is caused.[31] Harm can be caused by physical, psychological or emotional abuse or neglect; or sexual abuse or exploitation.[32] Harm can be caused by a single act, omission or circumstance or a series or combination of acts, omissions, or circumstances.[33]

Parent is defined generally in section 11 of the Act to include the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child. It includes a person who under Aboriginal tradition or Torres Strait Island custom is regarded as the parent of the child but does not include a person standing in place of a parent on a temporary basis. This wider definition of parent applies to negotiations between the Department and parents on a range of voluntary agreements, such as interventions with parental agreement and child protection care agreements. The wider definition also applies when the chief executive takes action to give help, including ongoing help under the Act.[34]

[28] s 8 *CPA*.
[29] s 10 *CPA*.
[30] s 9(1) *CPA*.
[31] s 9(2) *CPA*.
[32] s 9(3) *CPA*.
[33] s 9(4) *CPA*.
[34] See for example ss 73(3) and 82(2) *CPA*.

A narrower definition of parent applies to court proceedings including an application for a temporary assessment order;[35] a court assessment order;[36] a temporary custody order,[37] case planning, or a child protection order.[38] These definitions are all in the same terms and include:[39]

- The child's mother or father;
- A person in whose favour a parenting order operates;
- A person, other than the chief executive, having custody or guardianship of the child under another Act or a law of another State;
- A long-term guardian of the child; or
- A permanent guardian of the child.

A **Cultural Recognition Order** can be made under the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld).

The legal outcomes of a Cultural Recognition Order include[40]:

- the person's parentage being transferred from the birth parents to the cultural parents; and
- the person becoming a child of the cultural parents; and
- the cultural parents becoming the parents of the person; and
- the person stops being a child of the birth parents; and
- a birth parent stops being a parent of the person.

Custody granted to the chief executive or another person under the Act provides the right to have the child's daily care and the right and responsibility to make decisions about the child's daily care.[41]

Guardianship under a child protection order is the right to have the child's daily care; the right and responsibility to make decisions about the child's daily care; and all the power, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility for making decisions about the long-term care, wellbeing and development of the child.[42]

2.6.1 Comment

Re Harm:

The QCPCI noted that there is a tendency to confuse 'harm types' (i.e. physical harm, psychological harm, emotional harm) with 'abuse types' (i.e. physical abuse, sexual abuse, emotional abuse, and neglect).

[35] s 23 *CPA*.
[36] s 37 *CPA*.
[37] s 51AA *CPA*.
[38] s 52 *CPA*. See also s 51F *CPA* definition of "parent" for the purposes of case planning and family group meetings.
[39] Schedule 3 *CPA*.
[40] s 66(1) *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld).
[41] s 12 *CPA*.
[42] s 13 *CPA*.

"*To explain with reference to the* Child Protection Act*, section 14 is the pivotal threshold provision for entry into the system, and so the drafting, interpretation and application of this provision are critical determinants of who enters the system and who does not. The section states that if the chief executive becomes aware of 'alleged harm or alleged risk of harm' to a child and reasonably suspects the child is 'in need or protection' the chief executive must either investigate or take other appropriate action.*

A key term embedded in section 14 is 'harm', which is defined in section 9 as:

> *…any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.*

While stating that 'it is immaterial how the harm is caused', section 9 also sets out the main (not exhaustive) causes of harm as being: physical, psychological or emotional abuse or neglect, or sexual abuse or exploitation. It goes on to say that the harm can be caused by a single act, omission or circumstance, or a series or combination of acts, omissions or circumstances.

In other words, abuse is the action (or lack of action in the case of neglect) while harm is the effect. It is possible, for example, that an abusive action may not result in harm — when we speak of a matter being substantiated, it is the harm that is substantiated.

Arguably, if it is immaterial how harm is caused, the provisions in the Act that list the possible causes of harm are superfluous, as they add nothing to the definition of 'harm' or the broader threshold test in section 14. However, a review of the historical context for the legislation reveals that the Act was introduced, in part, as a response to increased international and local recognition of the prevalence of child abuse in all of its forms — hence, the emphasis on the wide range of possible types of abuse that can cause harm to a child.

….The Act recognises that emotional harm may be caused by physical, psychological or emotional abuse or neglect, or by sexual exploitation. In fact, there may be no significant physical harm caused by continued and ongoing sexual abuse of a child by a parent, but emotional harm could be expected to be extreme.

Comments in the Second Reading speech on introduction of the Child Protection Bill emphasise that a new Act was needed to replace the Children's Services Act 1965 *because 'that Act was drafted in a period when there was little recognition of child abuse as we understand it today'. The Act was also specifically designed to implement the principles in the United Nations Convention on the Rights of the Child, which was ratified by Australia on 17 December 1990 and came into force in this country on 16 January 1991. The UN Convention states in Article 19 that:*

> *State Parties shall take all appropriate … measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse …*

> *…There were some comments when the Bill was originally debated that 'emotional harm' was too broad a category. However, almost 15 years later we can now see how these terms and the section 14 threshold are interpreted and applied in practice….. emotional harm is rarely sustained through one single cause but is almost always mixed with physical abuse and neglect. Parental dysfunction, when it occurs, usually reveals itself through more than one type of abusive or non-protective behaviour."*[43]

For a discussion of the meaning of "significant harm" in the context of child protection, see the article by Phillip Swain, 'The significance of 'significant' – when is intervention justified under child abuse reporting laws' (2000) 14(1) *Australian Journal of Family Law* 26.

Re 'unacceptable risk' of harm:

In relation to the definition of harm, a child will be a child in need of protection if at the very least, they are at an unacceptable risk of suffering harm if an order is not made.

Guidance as to what is meant by 'unacceptable risk of harm' in the child protection context may be found in the context of Family Court cases and in the context of bail applications.

In *Re Hamilton* [2010] CLN 2, His Honour Judge Marien SC discussed some Family Court cases as well as other NSW Childrens Court cases, stating:[44]

> *"45. In M v M the High Court went on to say (in the context of an allegation against a father of sexual abuse of his daughter) that in achieving a proper balance between the risk of harm to the child from sexual abuse and the possibility of benefit to the child from parental access, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of harm. The High Court held that in applying the unacceptable risk of harm test it is necessary to determine firstly whether a risk of harm exists and, secondly, the magnitude of that risk. Once it is found that a risk does exist and the magnitude of the risk is assessed, in determining whether the risk of harm is unacceptable the court must balance against that risk the risk that the child may be harmed by lack of contact with the parent.*
>
> *46. The balancing process involved when the court comes to determine whether a risk of harm is "unacceptable" may be illustrated by the following examples. If, in a particular case, the court determined that the risk of harm to the child at contact from sexual abuse by the parent is very low but the risk of psychological harm to the child from having no contact with the parent is very high then the court may well determine that contact should be granted on the basis that the risk of harm to the child from sexual abuse is, in all the circumstances, not an unacceptable risk. In such a case it would be likely that the court would only allow supervised contact because some risk of harm from sexual abuse does still exist, albeit a very low risk.*

[43] Queensland Child Protection Commission of Inquiry (QCPCI), *Taking responsibility: A Roadmap for Queensland Child Protection* (2013), vol 1 and 2, pp 108-109.
[44] *Re Hamilton* [2010] CLN 2 at [45]-[49].

47. However, if in a particular case the court determined that the risk of harm to the child at contact from sexual abuse by a parent is very high and the risk of psychological harm to the child from having no contact with the parent is low then the court no doubt would determine that any contact should be refused on the basis that the risk of harm to the child from sexual abuse in the circumstances is an unacceptable risk.

48. The unacceptable risk of harm test propounded by the High Court in M v M has been extended to risks of harm other than sexual abuse: see Orwell v Watson [2008] FamCAFC 62 where Dessau J said:

> *"It is entirety of the evidence that satisfies me that [Mr Orwell]'s manipulative and over-bearing behaviour, his disrespect for boundaries, his preparedness to do whatever it takes to get his way goes beyond just being problematic for the mother in dealing with him. I am satisfied that his behaviour has impinged on his close relationships and it poses **an unacceptable risk of psychological abuse to [the child]**". At [257]. (emphasis added).*

49. The unacceptable risk of harm test is regularly applied by the Childrens Court in making determinations in care proceedings: see for example, Re Maree [2007] CLN 6 (an allegation of sexual abuse) and Re Anthony [2008] CLN 8 (non-accidental brain injury) both decisions of former Senior Childrens Magistrate Mr Mitchell."

A paper by Federal Magistrate Keith Slack, entitled *The Forensic Investigation of Child Abuse,* provides further guidance on the interpretation of unacceptable risk in the context of child abuse. In that paper he noted:[45]

> *"25. It is vital to recognise and understand that the unacceptable risk test is a separate and distinct question for the Court that takes into account other considerations apart from those taken into account when considering the question whether the alleged abuse occurred or did not occur.*
>
> *26. It requires an identification of the risk factors and an assessment of the magnitude of the risk. The Court is then required to make a specific finding that there is an unacceptable risk of harm before contact is terminated or curtailed. In doing so, the Court is confronted with the fact that it was not able to determine whether the abuse occurred or not. Efforts have been made to define with greater precision the circumstances under which the finding can and should be made but it is unlikely that any further precision will occur."*

He also referred to the following text of Professor Parkinson to explain what he referred to as the essential dilemma for Courts and lawyers:[46]

[45] At [25]-[26].
[46] See paragraph 28.

"Perhaps the most serious criticism is that the test is fundamentally inconsistent with the fundamental premise of all adjudications that legal determinations ought to be made on the basis of facts, not suspicions. To some extent, of course, this is a false dichotomy. In the context of the evidence available to support an allegation of child sexual abuse in legal proceedings, there is a spectrum of 'facts' and 'suspicions', rather than a contrast. Even where the abuse has not been proven to the satisfaction of the Court, the Court may well have much more than a mere suspicion.

Nonetheless the issue is an important one. All decisions of Courts ought to be based on findings of fact, including discretionary decisions. Even where the task of the Court is one of assessing risk which necessarily has elements within it of prediction, the Court ought to make its assessment on the basis of a substratum of fact as found by the Court….

This is the central dilemma in applying the unacceptable risk test. There is no such thing in law as an unestablished fact, for if it is unestablished then in law, it does not represent a fact at all. Findings of fact are binary in nature.

Either a fact is proven or it is not. An event occurred, or it did not. The abuse happened, or it did not. The father or step-father either molested the child or he did not…

The binary nature of legal fact finding does not readily accommodate a way in thinking which allows an assessment of what might have happened to be the basis of such severe consequences as denying a father contact to his children perhaps for the duration of their childhood…

The unacceptable test risk on this analysis becomes a test about the extent to which the Judge feels comfortable with his acceptance of one body of evidence over another. In no other context, a Judge is called upon to evaluate the chances that something may have happened, rather than deciding whether or not it did happen."

He also referred to the decision of Justice Fogarty in *In the Marriage of N and S* (1995) 19 Fam LR 837 where His Honour said:[47]

"In asking whether the facts of the case do establish an unacceptable risk the Court will often be required to ask such questions as: What is the nature of the events alleged to have taken place? Who has made the allegation? To whom have the allegations been made? What level of detail do they involve? Over what period of time have the allegations been made? Over what period of time are the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of the allegation? Are the allegations reasonably based? Are the allegations genuinely believed by the person making them? what expert evidence has been provided? Are there satisfactory explanations of the allegations apart from sexual abuse? What are the likely future effects on the child?

[47] *In the Marriage of N and S* (1995) 19 Fam LR 837 at 860.

This is not a catalogue of the correct questions, but a reminder that it is questions such as those which are required to be considered in deciding whether an unacceptable risk may be shown. For weight to be attached to the various answers to the relevant questions will inevitably vary from case to case. But it is essential that questions like these be asked."

In the Queensland context, defining unacceptable risk of harm has been the subject of multiple appeals to the Childrens Court of Queensland ('CCQ'), so there are multiple legal authorities for reference on the topic. In *AF & MJ v Department of Communities, Child Safety and Disability Services & Ors* [2016] QChC 7, Morzone QC DCJ stated:

"The concept of "significant harm" connotes harm that the court considers as considerable, noteworthy or important. The concept of "unacceptable risk" was considered by the High Court In the marriage of M and M (1988) 166 CLR 6. At 76-78 the Court held:

> *"After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access. In access cases, the magnitude of the risk may be less if the order in contemplation is supervised access. Even in such a case, however, there may be a risk of disturbance to a child who is compulsorily brought into contact with a parent who has sexually abused her or whom the child believes to have sexually abused her.*
>
> *…*
>
> *Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm", "an element of risk" or "an appreciable risk", "a real possibility", a "real risk", and an "unacceptable risk". This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding." (References omitted.)*

In Marriage of R (1998) 146 FLR 267 the Court held that there is nothing which limits the concept of "unacceptable risk" to abuse cases and that it is a useful test in many circumstances. However, the level of risk must be more than a "bare possibility" that something may be done or omitted to be done by the carers of a child before an order which removes a child from a long-term caregiver is made.

It seems to me that the concept should be broadly considered such that risks can be actual or potential abuse or neglect. Each area of abuse must be considered on the basis of whether the current and future risk is unacceptable, and this requires a consideration of the child's exposure to actual and potential risk in the context of the particular case.

See further CCQ cases on the subject of significant harm:

- *ASW & ECW v Director General, Department of Communities (Child Safety)* [2011] QChC 23 and subsequently confirmed again in *DCPL v PAV & HOK (No. 2)* [2016] QChC 14 at paragraph [17]:
    - *"In summary, a "child in need of protection" is a child who has suffered, is suffering or is at risk of suffering harm, whether physical, psychological, emotional, or from sexual abuse, which is significant, and does not have a parent able and willing to protect the child from harm.*
    - *"Significant harm" requires probative evidence, on the balance of probabilities, of not insignificant or trivial harm, sufficient to justify the intervention of the State to remove a child from the custody and guardianship of their parents. The risk needs to be assessed at the point at which protective intervention was initiated, and where the child is not in the parent/guardian's care at the child protection hearing requires an examination of the anticipated risk, which must be more than a bare possibility of significant harm. A child may still be exposed to a significant risk of harm "where the parent does not have the capacity to care safely for the child despite a desire to do so."*
    - *In short, a court assessing a child protection application needs to assess the nature and degree of the risk, in the context of the harm that may be caused, and decide whether, in the light of that assessment, the State should intervene and remove a child from the custody and guardianship of the parent(s)."*

- *AG & TG v DCPL & Anors* [2017] QChC 14
    - It is not necessary for the Court to make a positive finding that sexual abuse occurred, in order for the Court to find there is a significant risk of suffering harm by way of sexual abuse. A Magistrate may find there is an unacceptable risk based on risk factors and lack of protective mechanisms, even if they cannot conclude positively whether the abuse alleged did or did not occur previously.

- *MDS v DCPL & Ors* [2017] QChC 6
    - This case involved discussion of the principles in *Briginshaw v Briginshaw (1938) 60 CLR 336.* That is, depending on the nature and gravity of the allegation against a party, the strength of the evidence required to meet the standard of proof may vary (see **Chapter 8.3** for further discussion of Briginshaw principles).
    - *"The grave consequences of sustaining the case here included the removal of a child from a parent's care and destroying or impairing the relationship between a child and a parent. In my view, the seriousness of the allegations in this case, and the gravity of their consequences, warranted a higher degree of certainty to be satisfied on the balance of probabilities"* at paragraph [37].

- *DCPL v PMK & Ors (No. 2)* [2018] QChC 4
    - Discussed risk of harm in the context of long-term emotional stability for children and whether it is better to make a long-term order, even if there is the bare possibility that parent may address child protection concerns in the period of a short-term order. In this matter, it was accepted by all parties the children were in need of protection, the question was whether long or short-term orders were appropriate. It was found that Magistrate should have given more weight to the long-term stability of the children

and the fact they were settled in stable placements with carers who were able to meet their complex needs, and the potential changes required for reunification were not in the children's best interests and would put them at risk of significant emotional harm.

- *DCPL v YDO & Ors* [2017] QChC 1
    - In this matter, the learned Magistrate had decided not to grant temporary custody to Child Safety, which meant the children were reunified to their mother's care. The child protection concerns involved significant physical, verbal and emotional abuse by the father, and the mother being unable to protect the children from this. On appeal filed by DCPL, it was held the Magistrate failed to give sufficient weight to the evidence of the prospect of significant harm being caused to each of the children. His Honour Shanahan DCJ found it was clearly established on the evidence that there was an unacceptable risk of suffering significant harm both physical and emotional. The evidence also indicated it was clear that the mother was not in a position to protect the children from the father.

See also discussion of 'unacceptable risk' in the bail context in Queensland per Carmody J in *Landsdowne v ODPP (Qld)* [2013] QMC 19 at paragraphs [62] – [84]:

> *"An unacceptable risk finding in a bail context is at best a forecast about what a defendant would (not might) do, founded on an informed opinion or discretionary judgment about what he may have done. The ultimate conclusion is as to a potential as distinct from an actual event (M & M (1988)166 CLR 69 at 75)."*

2.7 *Interface with Family Law Act 1975 (Cth)*

It is not uncommon for child protection authorities to become involved with a family after proceedings have commenced in the Federal Circuit and Family Court of Australia (FCFCOA), especially if there are safety concerns for the children residing with, or having contact with, a particular parent.

For the avoidance of doubt, the Childrens Court may make any child protection order it considers appropriate for the best interests of the child, regardless of any parenting orders that may be in place under the *Family Law Act 1975* (Cth) (Family Law Act). An order made within in a State child protection jurisdiction takes precedence over the parenting order/s.

Section 69ZK of the *Family Law Act* provides:

(1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:
    a. the order is expressed to come into effect when the child ceases to be under that care; or

b. the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.

(2) Nothing in this Act, and no decree under this Act, affects:
   a. the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or
   b. any such order made or action taken; or
   c. the operation of a child welfare law in relation to a child.

(3) If it appears to a court having jurisdiction under this Act that another court or an authority proposes to make an order, or to take any other action, of the kind referred to in paragraph (2)(a) in relation to a child, the first-mentioned court may adjourn any proceedings before it that relate to the child.

2.7.1 **Comment**

See *DCPL v PAV & HOK (No. 2)* [2016] QChC 14 where a Magistrate was found to have fallen into error, by declining to make a custody order for children because they were under parenting orders made by the Federal Circuit Court of Australia (FCC), and the Magistrate decided the FCC should deal with any concerns raised by Child Safety. His Honour Dearden DCJ found it was clear from section 69ZK of the *Family Law Act* that child protection proceedings take precedence and, in any event, the issues in respect of the children arise specifically because of the steps the mother has taken in respect of the children in that litigation. Therefore, the Magistrate had fallen into both discretionary and legal error, and the decision not to grant temporary custody was set aside.

2.8 *Interface with Human Rights Act*

The *Human Rights Act 2019* (Qld) (Human Rights Act) was passed on 27 February 2019 and commenced on 1 January 2020. Government departments and public service employees have a responsibility to undertake functions in a manner that is consistent with human rights principles enshrined in the Human Rights Act. Part 3 Division 3 of the Human Rights Act provides that all statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.[48] The Childrens Court is bound to apply these rights through section 5(2)(a) of the Human Rights Act.

2.8.1 **Comment**

Key sections of the Human Rights Act that intersect with the Act include:

Right to fair hearing[49]

- Parties to be served with application and supporting affidavit material[50]

[48] s 48(1) *Human Rights Act 2019* (Qld) *(HRA).*
[49] s 31 *HRA.*
[50] Rule 25 *Childrens Court Rules 2016* (Qld) *(CCR).*

- Right of public guardian to appear in a proceeding on an application for an order for a child to support the child by presenting the child's views and wishes to the Childrens Court[51]
- Right of parties to appear and have legal representation[52]
- Parents given reasonable opportunity to obtain legal representation[53]
- Ensure parents understand the nature, purpose and legal implications of the proceeding and any order or ruling made by the court[54]
- Court may allow non-parties to take part in proceedings[55]

Rights of family and children[56]

- the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount[57]
- a child has a right to be protected from harm or risk of harm;
- a child's family has the primary responsibility for the child's upbringing, protection and development;
- if a child does not have a parent who is able and willing to protect the child, the State is responsible for protecting the child and in protecting a child, the State should only take action that is warranted in the circumstances;
- if a child is removed from the child's family, support should be given to the child and the child's family for the purpose of allowing the child to return to the child's family if the return is in the child's best interests;
- if a child does not have a parent able and willing to give the child ongoing protection in the foreseeable future, the child should have long-term alternative care;
- if a child is removed from the child's family, consideration should be given to placing the child, as a first option, in the care of kin;
- if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent that is possible;
- a child should only be placed in the care of a parent or other person who has the capacity and is willing to care for the child (including a parent or other person with capacity to care for the child with assistance or support);
- a child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child;
- a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;
- a delay in making a decision in relation to a child should be avoided, unless appropriate for the child.[58]

Right to education[59]

[51] s 108 *CPA*.
[52] s 108 *CPA*.
[53] s 109 *CPA*.
[54] s 106 *CPA*.
[55] s 113 *CPA*.
[56] ss 26, 27, 28, 36, 37, *HRA*.
[57] s 5A *CPA*.
[58] s 5B *CPA*.
[59] s 36 *HRA*.

- the child will receive education, training or employment opportunities relevant to the child's age and ability.[60]

Right to health services[61]

- the child will receive dental, medical and therapeutic services necessary to meet his or her needs.[62]

Cultural Rights[63]

- a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;[64]
- for an Aboriginal and Torres Strait Islander child:
    - a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person (the **connection principle**);[65]
    - the case plan is to be consistent with the connection principle stated in section 5C(2)(e);[66]
    - when making a significant decision the Department **must** do so in consultation with the child and the child's family, and arrange for an independent Aboriginal or Torres Strait Islander entity for the child to facilitate the participation of the child and the child's family in the decision-making process;[67]
    - the Department **must** make active efforts to apply the Aboriginal and Torres Strait Islander child placement principle.[68]

Refer to Chapter 16 – *Human Rights Act 2019* (Qld) for further information regarding the Human Rights Act and the potential intersect with decisions made under the Act.

3 LITIGATION MODEL

The *Director of Child Protection Litigation Act 2016* (Qld) was assented to on 25 May 2016 and commenced on 1 July 2016.

The Director of Child Protection Litigation (the DCPL) is an independent statutory agency established to conduct child protection legal matters.

---

[60] s 122(f) *CPA.*
[61] s 37 *HRA.*
[62] s 122(h) *CPA.*
[63] s 27 *HRA.*
[64] s 5B *CPA.*
[65] s 5C(2)(e) *CPA.*
[66] s 51B(2)(c) *CPA.*
[67] s 5F(2)(b) *CPA.* Note: under section 5H CPA the child or the child's family can choose not to consent to the Aboriginal or Torres Strait Islander independent entity carrying out a relevant activity.
[68] s 5F(2)(a) *CPA.* Note: section 5F(6) defines active efforts to apply the Torres Strait Islander child placement principle, in this section, to mean purposeful, thorough and timely efforts to apply the principle.

On 1 July 2016 the Office of the Child and Family Official Solicitor (OCFOS) was established to provide legal advice and assist Child Safety Officers prepare for court. OCFOS is responsible for applying to the court for preliminary orders.

The Director of Child Protection Litigation (DCPL) is responsible for applying to the court for child protection orders, and only Child Safety, through OCFOS, can refer a child protection matter to the DCPL.

Other principles under the *Director of Child Protection Litigation Act 2016* (Qld) require the DCPL to:

- work collaboratively with the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA); and
- only take action that is warranted in the circumstances; and
- consider whether there is sufficient, relevant and appropriate evidence before applying for a child protection order.[69]

3.1 *Office of the Child and Family Official Solicitor (OCFOS)*

OCFOS is the principal point of contact for the DCPL. Key responsibilities of OCFOS include:

1. providing legal services and advice to Child Safety Service Centres (CSSC) about Child Safety's statutory functions relating to the protection of children;
2. applying for temporary assessment orders, court assessment orders and temporary custody orders (emergency orders);
3. working with CSSCs to prepare briefs of evidence for child protection matters that are being referred to the DCPL;
4. working in partnership with the DCPL to prepare matters for filing in the Childrens Court and providing ongoing consultation in the review and management of those matters; and
5. liaising with CSSCs and the DCPL as necessary to progress child protection matters in a timely manner consistent with the safety, wellbeing.[70]

3.2 *Director of Child Protection Litigation (DCPL)*

The main functions of the DCPL are to:

1. prepare and apply for child protection orders (including applications to extend, vary or revoke child protection orders) and conduct child protection proceedings in the Childrens Court of Queensland;
2. prepare and apply for transfers of child protection orders or proceedings between Queensland and other participating States; and

[69] s 6 *DCPL Act 2016* (Qld).
[70] Director of Child Protection Litigation, *Director of Child Protection Litigation Director's Guidelines*, 1 July 2019, p 7.

3. prepare, institute and conduct appeals against decisions of the Childrens Court of Queensland on applications for child protection orders, and decisions to transfer a child protection order or child protection proceeding to a participating State.[71]

The DCPL also has the following functions on request:

1. to provide legal advice to Child Safety in relation to the functions of Child Safety under the Adoption Act 2009 and the Child Protection Act 1999 (CP Act) and other matters relating to the safety, wellbeing or protection of a child;
2. to represent the State in legal proceedings under the Adoption Act 2009 and the Child Protection Act 1999; and
3. to provide advice to the State about a matter to which that Convention of the Civil Aspects of International Child Abduction applications under the Family Law Act, section 111B, and to represent the State in proceedings relating to the matter.[72]

3.2.1 **Comment**

As well as applying the principles of the *Director of Child Protection Litigation Act 2016* (Qld), the DCPL, as a representative of the State, has a duty to exercise its statutory functions in accordance with model litigant principles.

Model litigant principles reflect the court's and the community's expectation that the State will conduct litigation in a way that is firm and fair. Model litigant principles state that fairness will be achieved when litigation is conducted promptly, efficiently, consistently and proportionately and in a manner that does not take advantage of another party's limited financial or other means. The model litigant principles are published on the Department of Justice and Attorney General's website and are available here: www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-servicedirections-and-guidelines/model-litigant-principles.[73]

Child protection proceedings are unique and should not be conducted in a manner that is overly adversarial. Similarly, court outcomes should not be thought of in terms of 'winning' or 'losing' the case. Instead, the DCPL's overarching obligation is to assist the court to make a fully informed decision in accordance with the provisions of the Act and the safety, wellbeing and best interests of the child, both through childhood and for the rest of the child's life.[74]

4 APPLICATIONS TO THE COURT: PRELIMINARY ORDERS

Preliminary orders to the court include:

1. Temporary Assessment Order pursuant to section 27 of the Act.

[71] s 9(1) *DCPL Act 2016* (Qld).
[72] s 9(2) *DCPL Act 2016* (Qld).
[73] Director of Child Protection Litigation, *Director of Child Protection Litigation Director's Guidelines*, 1 July 2019, p 8.
[74] Director of Child Protection Litigation, *Director of Child Protection Litigation Director's Guidelines*, 1 July 2019, p 8.

2. Temporary Custody Order pursuant to section 51AE of the Act.
3. Court Assessment Order pursuant to section 44 of the Act.
4. Child Protection Order pursuant to sections 59 and 61 of the Act (refer to Chapter 5 Applications to Court – Child Protection Orders).

The first three (3) of these preliminary orders are time limited and allow for the Department to take certain actions, pending the decision about whether or not to make an application for a child protection order.

While the applicant may seek a child protection order in the first instance, the majority of applications for a child protection order will have been preceded by a preliminary order.

See Procedure for Receiving and Listing Child Protection matters.

4.1 *Temporary Assessment Order*

A Temporary Assessment Order (TAO) is a short-term order that authorises certain actions necessary as part of an investigation to assess a child's protection needs where the parent/s' cooperation or consent is not forthcoming, or it is not practicable to obtain such consent.[75]

Note the specific definition of parent under this Part.[76]

4.1.1 Application for a Temporary Assessment Order

The application for a TAO is to be made by an authorised officer or a police officer to a Magistrate.[77] If the authorised officer takes action under section 18 where a child is at immediate risk of harm, the application must be made within 8 hours of taking a child into custody.[78]

Applications are made to a Magistrate under section 25 of the Act. The application must be supported by a sworn written statement stating the grounds on which it is made, the nature of the order sought and the proposed care arrangements (if taking the child into, or keeping the child in, the chief executive's custody is sought). The Magistrate can refuse to consider the application until the applicant gives the Magistrate all the information the Magistrate requires about the application in the way the Magistrate requires.[79]

Where the matter is urgent or there are other special circumstances, such as the officer's remote location, the application can be made by phone, fax, radio or another form of communication.[80] The officer must have prepared a written application prior to making the application but it need not be sworn. A Magistrate may make an order by phone, fax radio or another form of communication if satisfied that it was necessary and appropriate to make the application that way. If practicable, the

[75] s 24 *CPA*.
[76] s 23 *CPA*.
[77] s 25 *CPA*.
[78] s 18 *CPA*.
[79] s 25(4) *CPA*.
[80] s 30 *CPA*.

Magistrate must give the officer a copy of the order (e.g. by email). Otherwise the Magistrate must tell the officer the date and time the order was made and the other terms of the order and the officer must complete a form of the order, including by writing on it the Magistrate's name; date and time the Magistrate made the order; and, the other terms of the order.[81]

A Magistrate can decide an application for a temporary assessment order without notifying the child's parents or hearing them on the application.[82]

4.1.2 **Making an order**

The Magistrate can **only** make an order if satisfied:

- that an investigation is necessary to assess whether the child is in need of protection; and
- the investigation cannot be properly carried out in the absence of an order;[83] and
- reasonable steps have been taken to obtain appropriate parental consent to the doing of the things sought to be authorised under the order or it is not practicable to take steps to obtain the consent.[84]

The order must state the time when it ends which cannot be more than 3 business days after the order is made.[85] On application by an authorised officer or police officer this can be extended, only once, until the end of the next busines day after it would have otherwise ended if the Magistrate is satisfied the officer intends to apply for a court assessment order.[86] The order can also provide for any of the following if the Magistrate considers it appropriate:[87]

- Authority for the authorised officer or police officer to have contact with the child and to take the child into the Chief Executive's custody if it is necessary to provide interim protection for the child while the investigation is carried out;
- Authority for the officer to enter and search premises where entry has been denied and the officer believes the child is present;
- Authority for the child's medical examination or treatment;
- A direction that a parent not have contact with the child or have only supervised contact.

In addition, the order may authorise an authorised officer or police officer to enter and search any place the officer reasonably believes the child is, to find the child, if the magistrate is satisfied:[88]

- Entry to a place has been, or is likely to be, refused, or it is otherwise justified in particular circumstances. For example, the child's whereabouts are unknown; and
- The entry is necessary for the effective enforcement of the order.

[81] s 30(4)(b) *CPA*.
[82] s 26 *CPA*.
[83] s 27(1) *CPA*.
[84] s 27(2) *CPA*.
[85] s 29 *CPA*.
[86] s 34(4) *CPA*.
[87] s 28 *CPA*.
[88] s 28(2) *CPA*.

If the order gives this authority:

- On entering a place, an authorised officer or police officer may remain in the place for as long as the officer reasonably considerers necessary for exercising the officer's powers under this section; or
- An authorised officer or police officer may exercise powers under the order with the help, and using the force, that is reasonable in the circumstances.

4.1.3 **Comment**

Re compliance with section 27(1)

See *S v Chief Executive of the Department of Child Safety* [2007] QChC 2 in which Wall DCJ considered the validity of a temporary assessment order made under section 27 of the Act.

In that case, prior to 22 December 2006 temporary assessment and court assessment orders had been made in respect of the child S who was then living in Queensland with the child's mother, the appellant. A court assessment order was made on the 5th December granting temporary custody of the child to the respondent and it was to expire on 22 December 2006.

By 22 December the respondent had decided to make application for a child protection order and an application was prepared. When the departmental officer went to the registry office to file the application at around 4.00pm on Friday 22 December, registry staff refused to accept the Department filing as it was after 4.00pm on a Friday (despite the registry opening hours signage indicating that the registry was open to 4.30pm).

The respondent then sought a temporary assessment order from a magistrate by telephone as the court assessment order was expiring that day. In the application, the respondent stated that pursuant to section 27(1) of the Act, the Department believed that an investigation was necessary to assess whether S was in need of protection and the investigation could not be properly carried out unless the order was made. The respondent also stated that the Department could not secure the agreement of the mother to the order as the Department was given instructions only to communicate through her legal representatives and their office closed at 12 noon on 22 December.

At 5.55pm on 22 December the Magistrate made the order being satisfied that "an investigation is necessary to assess whether the child is a child in need of protection and that such investigation cannot be properly carried out unless the order is made". The temporary assessment order was to continue in force until the end of 23 December 2006 and the Department was advised to attend the Southport Arrest Court on 23 December 2006 to file the application for the child protection order.

In the appeal, the appellant challenged the temporary assessment order of 22 December contending that the Magistrate was wrong to consider that the conditions precedent to making such an order set out in sections 27(1) (a) and (b) had been satisfied because, in fact, the decision has already been made by the respondent that the child was in need of protection.

The respondent contended that the broader and longer term interests of the child's welfare could not be separated from the section 27(1) matters and those interests required further investigation of the type contemplated by section 27. His Honour rejected that argument stating that it was not supported by the respondent's own material:[89]

> "*The order was sought for a period of one day only, hardly time to make an assessment of whether the child was in need of protection and it was made after a decision had already been made that the child was, in fact, in need of protection. It also appears to be the case that no further investigation or assessment was made by the respondent between the time the order was made and the 23rd December, 2006… In my view, the reason the application was made was because the Court registry refused on the 22nd December, 2006 to accept for filing the application for a Child Protection Order and that is the conclusion the Magistrate should have reached.*"

His Honour found that the decision to make the temporary assessment order on 22nd December was not valid and that the order should be set aside.

Re compliance with section 27(2)

See *IP v Department of Communities and S.C.* [2009] QChC 2 for a discussion about compliance with section 27(2) of the Act. This was an appeal from the decision of a magistrate to grant a temporary assessment order in respect of two children.

On 18 December 2009 the Department, having had the opportunity to become a party to Federal Magistrates Court proceedings in Brisbane before Magistrate Spelleken that day, chose not to do so. On apparently receiving information as to the order made by Magistrate Spelleken, the Department then proceeded to bring an application for a temporary assessment order before a Magistrate later that day. The Magistrate granted the application.

His Honour Judge Dearden, hearing the appeal, noted the provisions of section 27(2) of the Act which required the Magistrate to be satisfied that reasonable steps had been taken to obtain the consent of at least one of the child's parents to the doing of things sought to be authorised under the order. His Honour expressed deep concern at the actions taken by the departmental officer in pursuit of the temporary assessment order:[90]

> "*[6] To put my assessment on this appeal at its bluntest, Ms Thompson has been, at best for the Department, woefully and, arguably wilfully inadequate in the affidavit material sworn in her application, and at worst, has been positively misleading.*
>
> *[7] I say that because it is clear, by inference, that Ms Thompson was fully aware of the federal Magistrates Court proceedings, was aware that the Department, for some unspecified reason,*

[89] *S v Chief Executive of the Department of Child Safety* [2007] QChC 2, p 9.
[90] *IP v Department of Communities and S.C.* [2009] QChC 2 at [6]-[10], [13]-[14].

had chosen not to become a party to those proceedings; was aware of Evidence Act s 93A interview with both subject children, was aware of Departmental interview with both subject children; was aware of a report by Mr Moriarty, a Court appointed expert, and was aware of the current status of those Federal Magistrates Court proceedings, including at least some information from the independent child lawyer representative… and that information, of course would have …no doubt set off red lights for the learned Childrens Court Magistrate had it been placed appropriately in the context of a full disclosure by Ms Thompson of her direct knowledge of the Federal Magistrates Court proceedings which was, for all practice purposes, missing from the application.

[8] The other material which is also completely missing from the application is Ms Thompson's knowledge (and this is her personal knowledge) of the details of all of the legal representatives involved in the litigation in the Federal Magistrates Court, and, of course, of her capacity to contact each and every one of those legal representatives (satisfying at least the requirement in section 27(2) to obtain the consent of at least one of the child's parents) but for reasons that are unexplained (other than Mr Sinclair's submissions that time was pressing) Ms Thompson does not appear on the material, at least to have taken any steps to ensure that the legal representatives (who were all present at the Federal Magistrates Court on the morning of 18 December 2009) could be present at the Beenleigh Childrens Court when the temporary assessment order application was made.

[9] Temporary assessment order applications, by their nature, are significant orders, they have the effect of temporarily placing the relevant children in the custody of the Chief Executive of the Department, they obviously do so in the interests of seeking to protect the children. Those orders, apart from anything else, cut firstly directly across parental rights and, secondly, cut directly across the order just made by the Federal Magistrate Spelleken in the proceedings that day.

[10] All of that was information which clearly should have been placed before the presiding Childrens Court Magistrate, and was not.
……

[13] The clear and obvious need to protect the interests of children (which I accept is a paramount requirement of the legislation and, of course, is always paramount in these matters) cannot override an obligation to be truthful in a full and complete sense to a court making orders under an ex parte basis, which have for the children and parents concerned significant and often traumatic consequences.

[14] In all of the circumstances, it is my view that the appeal should be upheld. The magistrate clearly, in my view, was led into error by the utterly inadequate information placed before the Court, which then meant that section 27(2) was not complied with; and the magistrate was not provided with the information necessary to allow her to be satisfied to the requisite degree that a temporary assessment order should be made…."

His Honour then ordered that the temporary assessment order be immediately discharged.

Re Effect of section 99:

In *IP v Department of Communities and S.C.* [2009] QChC 2 at [15] Dearden DCJ expressed the view that although a further assessment order application had been filed with the Childrens Court Beenleigh, and section 99 of the Act would continue the custody of the children with the Chief Executive, the custody can only continue pursuant to section 99 of the Act if there is a valid temporary assessment order underpinning it.

Wall QC DCJ expressed a similar view in the earlier case of *S v Chief Executive of the Department of Child Safety* [2007] QChC 2:[91]

> *"..[T]he decision to make the temporary assessment order on the 22nd of December, 2006 was not valid and should be set aside. The importance of doing this, notwithstanding that the order expired at "the end of the 23rd December, 2006", is apparent from a consideration of section 99 of the Act which provides as follows:*
>
> > *"99.* ***Custody or guardianship of child continues pending decision on application for order***
> > *(1) This section applies if -*
> > *(a) a child is in the chief executive's custody or guardianship or the custody of a member of the child's family, under an order; and*
> > *(b) before the order ends, an application is made for the extension of the order or for another order.*
> > *(2) The custody or guardianship continues until the application is decided unless the Childrens Court orders an earlier end to the custody or guardianship*."
>
> *The respondent contends that before the temporary assessment order made on the 22nd December, 2006 ended an application had been made for "another order", namely the application for a child protection order filed on the 23rd December, 2006. Because of the conclusion I have reached there was, in fact, no valid current temporary assessment order on the 22nd December, 2006 or the 23rd December, 2006 in which case the custody to the Chief Executive had ceased on the 22nd December, 2006."*

Section 99 was replaced in October 2022[92] and broadens the application of the section to also include orders made under Chapter 2 that do not grant custody or guardianship (the relevant order). According to the explanatory notes, this amendment prevents any gap in protection in the event that an applicant is made to extend an order that does not grant custody or guardianshop and the application is not heard before the order expires.

[91] *S v Chief Executive of the Department of Child Safety* [2007] QChC 2, pp 10-11.
[92] On October 31 2022 the first tranche of amendments in the *Child Protection Reform and Other Legislation Amendment Bill 2022* commenced, including the replacements of s99 of the *Child Protection Act 1999* (*Particular orders continue pending decision on application for extension, variation, revocation or substitution*).

The new section provides that the relevant order will continue when an application is made by the chief executive or litigation director, before the relevant order ends, for the extension, variation, revocation or substitution of the relevant order.[93] The relevant order, and any ancillary order for the relevant order, continues until the application is decided unless a magistrate or Childrens Court otherwise orders.[94]

According to the explanatory notes, as the previous section 99 did not provide for the continuation of orders that do not grant custody or guardianship there was the potential for a gap in protection if an application was made to extend an order that did not grant custody or guardianship, and the application was not heard before the order expired.[95]

Section 99 (Particular orders continue pending decision on application for extension, variation, revocation or substitution) provides:

> *(1) This section applies if—*
>
> *(a)an order made under this chapter (the **relevant order**) applies in relation to a child; and*
>
> *(b)before the relevant order ends, an application is made by the chief executive or litigation director for the extension, variation, revocation or substitution of the relevant order.*
>
> *(2) The relevant order, and any ancillary order for the relevant order, continues until the application is decided unless—*
>
> *(a)if the relevant order was made by a magistrate—a magistrate, or the Childrens Court, otherwise orders; or*
>
> *(b)if the relevant order was made by the Childrens Court—the Childrens Court otherwise orders.*
>
> *(3) This section does not affect the application of section 67 in relation to the child.*
>
> *(4) Despite subsections (1) and (2), the relevant order, and any ancillary order for the relevant order, ends when the child turns 18 years.*
>
> *(5) In this section—*
>
> ***ancillary order**, for a relevant order, means an order about any matter that is made to support the relevant order.*

4.1.4 Extension and variation of a Temporary Assessment Order

A Magistrate can only extend a temporary assessment order if satisfied that the order has not ended. The order can only be extended until the end of the next business day after the order would have ended, if the magistrate is satisfied the officer intends to apply for a Court Assessment Order or DCPL intends to apply for a Child Protection Order within the extension period.[96]

[93] s 99(1) *CPA*.
[94] s 99(2) *CPA*.
[95] Explanatory notes, *Child Protection Reform and Other Legislation Amendment Bill 2022* (Qld), page 35
[96] s 34(4) *CPA*.

According to the explanatory notes, the purpose of this provision is to allow an officer to apply for one extension of a temporary assessment order if it is decided that a court assessment order or child protection order is required to protect the child but it is not possible to apply for the court assessment order or child protection order before the temporary assessment order would end (for example because the decision is made on a Saturday and the order ends on a Sunday). Unless section 34(4) applies, the temporary custody order may not be extended to a time ending more than three business days after the day it was made.[97] According to the explanatory notes:[98]

> "*This may apply in circumstances where, for example, the period for a temporary assessment order authorising medical examination was initially six hours and the examination indicates that medical monitoring over a twenty-four hour period is required. The amendment is consistent with the intent of the original provision. It is a more appropriate alternative than the existing requirement of applying for a second order*"

A temporary assessment order may not be extended more than once.[99]

An authorised officer or a police officer may apply to a magistrate for an order to vary a temporary assessment order.[100] Again, according to the explanatory notes:[101]

> "*[T]his may be required where, for example, the original order authorised entry and contact with the child, and, as a result of that contact, the child is taken into protective custody. The ability to seek variation of the existing temporary assessment order to apply for the authority to keep the child in the custody of the chief executive is preferable to the alternative procedure of applying for a second temporary assessment order*".

4.2 *Temporary Custody Orders*

Temporary custody orders are designed to enable applications for a short-term order where the Department already holds the view that a child is in need of protection and does not need to conduct an assessment.[102]

The purpose of a temporary custody order is to authorise the action necessary to ensure the immediate safety of a child:

- if the chief executive has referred a matter relating to the child to the DCPL, while the chief executive works with the DCPL under section 53A of the Act, or
- otherwise, while the chief executive decides the most appropriate action to meet the child's care and protection needs.[103]

[97] s 34(5) *CPA*.
[98] Explanatory Notes, Child Protection Amendment Bill 2000 (Qld), p 9.
[99] s 34(4) *CPA*.
[100] s 35 *CPA*.
[101] Explanatory Notes, Child Protection Amendment Bill 2000 (Qld), p 9.
[102] Second reading speech 10 June 2010, Hansard, p 2033.
[103] s 51AB *CPA*, reflecting 2017 amendments.

4.2.1 Application for an order

A written sworn application is to be made by an authorised officer or police officer to a Magistrate, stating the grounds on which the application is made, the nature of the order sought and the proposed arrangements for the child's care.[104]

Where the matter is urgent or there are other special circumstances such as the officer's remote location, the application can be made by phone, fax, radio or another form of communication.[105] When an application is made in this way, the officer must have prepared a written application prior to making the application, but it need not be sworn prior to the application. A Magistrate may make an order by phone, fax, radio or another form of communication if satisfied that it was necessary and appropriate to make the application that way. If practicable, the Magistrate must give the officer a copy of the order (e.g. by email). Otherwise the Magistrate must tell the officer the date and time the order was made and the other terms of the order and the officer must complete a form of the order, including by writing on it the Magistrate's name; date and time the Magistrate made the order; and, the other terms of the order.[106]

A Magistrate can decide an application for a temporary custody order without notifying the child's parents or hearing them on the application.[107]

4.2.2 Making an order

The Magistrate can only make an order if satisfied that:

- the child will be at unacceptable risk of suffering harm if the order is not made; and
- DCPL or the chief executive (if a referral has not been made to DCPL) will be able, within the term of the temporary custody order, to decide the most appropriate action to meet the child's ongoing protection and care needs and start taking that action.[108]

In *Department of Child Safety v WTY* [2018] QChC 23, His Honour Butler AM SC DCJ found that the Magistrate failed to take into account all relevant considerations in exercising a decision not to grant a temporary custody order, and in those circumstances there was an error in the exercise of the judicial discretion. In that matter, Child Safety called the after-hours Magistrate at approximately 6pm to apply for a temporary custody order, as DCPL were not ready to file a child protection order application and sought an extension of time. The child was subject to a court assessment order that was due to expire at 11:59pm that night meaning protection for the child would cease following the termination of the existing order. When the authorised officer spoke to the after-hours Magistrate, the Magistrate declined to make the order sought and said "*one more night will be okay*" and advised the authorised officer to make an application to the Children's Court in the morning. This decision was overturned by His Honour on the basis the learned Magistrate failed to consider relevant

[104] s 51AC *CPA*.
[105] s 51AI *CPA*.
[106] s 51AI(4) *CPA*.
[107] s 51AD *CPA*. Note: "parent" is defined in s 51AA *CPA*.
[108] s 51AE *CPA*.

information, namely termination of the currency of the court assessment order within a few hours and that the child would be at unacceptable risk of harm should he be returned to his mother's care.

The order must state the time when it ends which cannot be more than 3 business days after the order is made.[109]

The order can also provide for any of the following if the magistrate considers it appropriate:

- Authority for the authorised officer or police officer to have contact with the child and to take the child or keep the child in the Chief executive's custody while the order is in force;
- Authority for the child's medical examination or treatment;
- A direction that a parent not have contact with the child or have only supervised contact.

In addition, the order may authorise an authorised officer or police officer to enter and search any place the officer reasonably believes the child is, to find the child, if the magistrate is satisfied:[110]

- Entry to a place has been, or is likely to be, refused, or it is otherwise justified in particular circumstances. For example, the child's whereabouts are unknown; and
- The entry is necessary for the effective enforcement of the order.

If the order gives this authority:

- On entering a place, an authorised officer or police officer may remain in the place for as long as the officer reasonably considerers necessary for exercising the officer's powers under this section; or
- An authorised officer or police officer may exercise powers under the order with the help, and using the force, that is reasonable in the circumstances.

Temporary custody order exception to the three-month rule: Court Arrangements (COVID-19) in the Childrens Court when constituted by a Magistrate

In *KP v Director of Child Protection Litigation & Anor* [2020] QChC 16 the appellant appealed against the making of a temporary custody order on 8 April 2020 in relation to a 4 month old. The matter was then adjourned to 1 July 2020 due to COVID-19. His Honour Smith DCJA found the lengthy adjournment to be an error in the circumstances and determined that the matter should have been dealt with earlier. At paragraphs [3] – [4] Smith DCJA, referring to the application of Practice Direction 4/2020, noted the urgency associated with temporary protection orders (see s 5B(m) of the *Child Protection Act 1999*) and that a 3 month delay in progressing the matter was not appropriate.

The directive issued by the Chief Magistrate on 27 March 2020 (paragraph 12C) and amended on 7 April 2020, contemplated that child protection matters of this sort were urgent and were an exception to the three-month rule.

[109] s 51AG *CPA*.
[110] s 51AF(2) *CPA*.

4.2.3 **Extension or variation of a Temporary Custody Order**

An authorised officer can apply to the court for an extension of the term of a temporary custody order.[111] A Magistrate may extend a temporary custody order if satisfied that the order has not ended.[112]

The order may be extended until the end of the next business day after the order would have otherwise ended, if the Magistrate is satisfied the DCPL intends to apply for a Child Protection Order within the extended period.[113] Unless section 51AH(4) applies, the temporary custody order may not be extended to a time ending more than three business days after the day it was made.[114] (The purpose of these provisions is the same as those in section 34 for a temporary assessment order. See explanation at para 3.1.4 above.)

A temporary custody order may not be extended more than once under section 51AH(4).[115]

An authorised officer may apply to a magistrate for an order to vary a temporary custody order.[116]

4.3 *Court Assessment Order*

A court assessment order is made to authorise actions necessary as part of an investigation to assess whether a child is in need of protection if the consent of a parent has not been obtained or it is not practicable to obtain that consent and more than 3 days is necessary to complete the investigation and assessment.[117]

Note the specific definition of parent for this Part.[118]

4.3.1 **Application for an order**

A written sworn application is to be made by an authorised officer or a police officer to the Childrens Court and filed in the registry of the Childrens Court. The application must state the grounds on which it is made, and the nature of the order sought.[119] The Registrar must immediately fix a time and place for the application to be heard recognising that it is in the best interests of the child for the matter to be heard as soon as possible.[120]

[111] s 51AH(1) *CPA*.
[112] s 51AH(3) *CPA*.
[113] s 51AH(4) *CPA*.
[114] s 51AH(5) *CPA*.
[115] s 51AH(6) *CPA*.
[116] s 51AL *CPA*.
[117] s 38 *CPA*.
[118] s 37 *CPA*.
[119] s 39 *CPA*.
[120] s 40 *CPA*.

The child's parents are respondents to the application[121] and the applicant must serve a copy of the application on them or the child's long-term guardians. The child must also be told about the application.[122]

If the applicant makes a reasonable attempt to personally serve, but does not personally serve a copy of the application, the applicant must document full details about the actions taken in making the attempt.[123]

The Childrens Court may only decide the application in the absence of the parents if the parents have been given reasonable notice and fail to attend or the court is satisfied it was not practicable to give the parents notice of the hearing.[124]

4.3.2 **Adjournment**

The Childrens Court may adjourn a proceeding for a court assessment order, but the total period of adjournments must not exceed 4 weeks after the day of the hearing of the application for the order is first brought before the court.[125] When deciding how long to adjourn the proceedings the court must take account that is in the child's best interests for the order to be decided as soon as possible. The court must state the reasons for the adjournment and may give the parties directions about things to be done during the adjournment.[126]

The Childrens Court has power under section 67 of the *CPA* to make the following interim orders on the adjournment of the proceedings for a court assessment order and the interim order has effect for the period of the adjournment:

- Granting temporary custody of the child to the chief executive;
- Directing a parent not to have contact or to have only supervised contact with the child;
- Authoring an authorised officer or police officer to have contact with the child;
- Authorising an authorised officer to enter a place and find a child.

See paragraph 5.4 for discussion of interim orders and sample directions.

4.3.3 **Making an order**

A Childrens Court may only make a court assessment order if satisfied:

- that an investigation is necessary to assess whether the child is in need of protection and
- the investigation cannot be properly carried out unless an order is made.[127]

[121] s 42 *CPA*.
[122] s 41 *CPA*.
[123] s 41(2), *CPA*.
[124] s 43 *CPA*.
[125] s 66(2) *CPA*.
[126] s 66(4) *CPA*.
[127] s 44 *CPA*.

The order must state the time when it ends which must not be more than 4 weeks after the day the hearing of the application for the order is first brought before the court.[128]

A court assessment order can provide for any of the following if the magistrate considers it appropriate:

- Authority for the authorised officer or police officer to have contact with the child;
- Authority for the child's medical examination or treatment;
- Authority to take the child into the Chief executive's custody if it is necessary to provide interim protection for the child while the investigation is carried out;
- Provision about the child's contact with the child's family while in the custody of the chief executive (the court is required to consider the views of the chief executive before making this order);
- A direction that a parent not have contact with the child or have only supervised contact.

In addition, the order may authorise an authorised officer or police officer to enter and search any place the officer reasonably believes the child is, to find the child, if the magistrate is satisfied:[129]

- Entry to a place has been, or is likely to be, refused, or it is otherwise justified in particular circumstances. For example, the child's whereabouts are unknown; and
- The entry is necessary for the effective enforcement of the order.

If the order gives this authority:

- On entering a place, an authorised officer or police officer may remain in the place for as long as the officer reasonably considerers necessary for exercising the officer's powers under this section; or
- An authorised officer or police officer may exercise powers under the order with the help, and using the force, that is reasonable in the circumstances.

4.3.4 Extension, variation and revocation of court assessment orders

An authorised officer may apply to the Childrens Court to extend the term of the order for not more than 4 weeks. The court may only extend the term of the order if satisfied that the order has not ended, and the extension is in the child's best interests. Only one extension may be granted.[130]

An authorised office may apply to the Childrens Court for an order to vary or revoke a court assessment order.[131]

Childrens Court Practice Direction No. 6 of 2018 states any application to extend a court assessment order must be filed, heard and decided prior to the first court assessment order ending in order to retain custody under section 99 of the Act.

[128] s 47 *CPA*.
[129] s 45(3), *CPA*.
[130] s 49 *CPA*.
[131] s 50 *CPA*.

5 APPLICATIONS TO THE COURT: CHILD PROTECTION ORDERS

A child protection order is made to ensure the protection of a child that the Childrens Court decides is a child in need of protection.[132] Refer to 2.2 (above) regarding who is a child in need of protection.

Provisions relating to applications for a Child protection Order are set out in Chapter 2 Part 4 of the Act. For the purposes of this Part of the Act, parent is defined in section 52.

The onus is upon the applicant to satisfy the court on the balance of probabilities of the matters that are set out in section 59 of the Act.[133]

5.1 *Application for a child protection order*

All applications for child protection orders must come from the DCPL, or a delegate of the DCPL.[134] DCPL are not instructed by Child Safety and are not required to agree with a Child Safety assessment, but it is expected that Child Safety will work collaboratively with DCPL by providing any information or material required for DCPL to fulfil their legislative functions.[135]

A written application is to be made by DCPL to the Childrens Court and filed in the court.[136] Rule 11 of the Childrens Court Rules states an originating application may be filed in a registry of a Magistrates Court[137]. The application must comply with applicable rules of court. The Childrens Court Rules state that a proceeding is started by filing in the court a written application in the appropriate approved form.[138] A Form 10 is used for a Child Protection Order application.

The application must state the grounds on which it is made, and the nature of the order sought.[139] There are a number of different child protection orders and the application should specify which of them is sought in the particular case (though the Court may choose to grant a different order). The type of order sought might be a:[140]

- Directive order;
- Supervision order;
- Short-term custody order;
- Short-term guardianship order;
- Long-term guardianship order; or
- Permanent care order.

[132] s 53 *CPA*.
[133] s 105 *CPA*.
[134] s 10 *DCPL Act*.
[135] s 16 *DCPL Act*.
[136] s 54 *CPA*.
[137] r 11 CCR.
[138] r 12 CCR.
[139] s 54 *CPA*.
[140] s 61 *CPA*.

These different child protection orders are explained in more detail at Chapter 7. The Court may also make a transition order in circumstances where they are declining to make a child protection order. This is discussed further in Chapter 8.

Once the application is filed, the registrar must immediately fix a time and place for the application to be heard recognising that it is in the best interests of the child for the matter to be heard as soon as possible.[141]

The child's parents are respondents to the application[142] and the chief executive must serve a copy of the application on each of the child's parents personally or by leaving it at or sending it to the last known address of the parents. The chief executive must also tell the child about the application.[143]

The Childrens Court may only decide the application in the absence of the parents if the parents have been given reasonable notice and fail to attend court or the court is satisfied it was not practicable to give the parents notice of the hearing.[144]

5.1.1 Comment

Re the application:

The originating application will be supported by an initiating affidavit (Form 25) with information supporting the application including[145]:

- What the child protection concerns are;
- Why the child is in need of protection;
- Why the order sought is the least intrusive;
- The case plan for the child;
- The evidence the applicant is relying on to support their decision-making; and
- Wherever possible the child's views and wishes in regard to the protection order sought.

The application must also be supported by an affidavit that exhibits source material in compliance with rule 13 of the Childrens Court Rules. Prior to 1 July 2019, rule 13 was complied with in a standalone affidavit filed after the initial affidavit (a 'Rule 13 affidavit'). As of 1 July 2019, acknowledging a need to reduce the volume of initial affidavit material, DCPL and Child Safety now file a single affidavit that both sets out child protection concerns and provides source material required under rule 13.

Quality of evidence

Affidavits prepared for Judges and Magistrates by applicants in child protection proceedings should:

[141] s 55 *CPA*.
[142] s 57 *CPA*.
[143] s 56 *CPA*.
[144] s 58 *CPA*.
[145] s 59 *CPA*.

- Be concise;
- Contain new information (that is, not an updated affidavit used previously that merely repeats material contained in earlier affidavits);
- Clearly address the relevant limbs of section 59 of the Act;
- Clearly state what evidence is relied on to establish the key issues; and
- Contain information that is both relevant and admissible.
    - See *MDS v DCPL* [2017] QChC 6 where a Magistrate was led into error by placing too much weight on historical information about the respondent mother 15 years prior to the hearing.

The Childrens Court is not bound by the rules of evidence[146] but that does not mean that the rules should be ignored (see discussion at para 10.2.1).

Re whether it was not practicable to give the respondent notice[147]

In *F v Sturrock* [2004] QChC 4 the Childrens Court of Queensland considered whether it was 'not practicable' to give the appellant notice of the hearing of an application for a child protection order because the applicant considered that the appellant, if forewarned of the application, might influence the children in such a way as to make taking them into temporary custody under an interim order impossible. O'Brien DCJ said at paragraphs [9]-[13]:

> "*[9] In my view the word "practicable" as it appears in s 58 of the Act should bear its ordinary meaning. The primary meaning of the word, as defined in the Oxford English Dictionary, is; capable of being put into practice, carried out in action, effected, accomplished, or done; feasible".*
>
> *[10] Section 58 is concerned with the actual act of giving notice of the hearing to the child's parents. The section requires that the application may only be heard in the absence of the parents if reasonable notice has been given or if the actual giving of such notice is not practicable – that is, cannot be effected or carried out.*
>
> *[11] The scheme of the Act contemplates that the giving of notice would ordinarily be achieved through the operation of s 56. That section…requires that the application must be either served personally on each of the parents, or if such personal service is not practicable, then a copy may be posted to the parent's residential address last known to the applicant. It is not without significance that s 56(3) requires that the notice serviced under the section must provide detail of when and where the application is to be heard and must advise that the application may be heard and decided even though the parent does not appear in court.*

[146] s 105 *CPA*.
[147] s 58 *CPA*.

[12] In my view, the requirements of ss56 and 58 are mandatory in their terms and they cannot be circumvented or ignored. To do so represents a denial of natural justice to the parents of a child the subject of an application.

[13] The Magistrate below gave no reasons for his decision to make the orders there sought in the absence of proper notice to the appellant. The matter was the subject of argument by counsel who appeared for the present respondent and clearly reasons should have been given. There is a well-established duty on the part of judicial tribunals to give reasons for their decisions and the failure to give reasons can itself amount to an appealable error. It would seem however that the learned Magistrate was influenced by the submissions of counsel for the respondent that any forewarning given to the appellant of the proposed application might prejudice the outcome of subsequent proceedings… Those concerns however, even if they could be shown to be well-founded, cannot justify a failure to comply with the requirements of the legislation."

His Honour noted that if concerns did exist about forewarning the appellant, he could see no reason why the Department could not have proceeded under the provisions of Part 1 of Chapter 2 of the Act and subsequently sought a temporary assessment order in respect of the children. That further investigation was needed seems to be confirmed by the fact that orders were in fact made on 16 August 2004 for further medical examination of the children.

In *SBD v Chief Executive, Department of Child Safety* [2007] QCA 318 (also discussed at **11.1.1**), Keane JA with whom Muir JA and Lyons J agreed, considered the application of sections 56 and 58 where the child's mother was allegedly not present in Queensland at the time of service:[148]

"*[36] The applicant also relies on the rule in Laurie v Carroll to argue that the applicant and the child's father were not served in Queensland with the application for the child protection order, and, therefore, the Childrens Court had no jurisdiction to make the orders the subject of this application. While the parents of a child said to be in need of protection are proper "respondents" to an application for a child protection order, it is something of a stretch of language to describe them as defendants within the rule in Laurie v Carroll. The applicant relies, in particular, on the provisions of s 56 and s 58 of the Act. Section 56(1) provides that "as soon as practicable after the application is filed, the applicant must–(a) personally serve a copy of it on each of the child's parents ..."*

[37] Section 58(1) provides that the Childrens Court:
"may hear and decide the application in the absence of the child's parents only if:
(a) the parents have been given reasonable notice of the hearing and fail to attend or continue to attend the hearing; or
(b) it is satisfied it was not practicable to give the parents notice of the hearing."

[38] These provisions, and especially s 58, clearly postulate a jurisdiction in the Childrens Court which, though its exercise is regulated by these statutory provisions, arises independently of

[148] *SBD v Chief Executive, Department of Child Safety* [2007] QCA 318 at [36]-[41].

compliance with them. These provisions clearly contemplate that the jurisdiction of the Childrens Court may be exercised, in some circumstances, without the child's parents being served with proceedings or even being given notice of them. That this should be so is hardly surprising. While the Act recognises and seeks to accommodate parental rights of custody and guardianship, the subject matter of the Act is children in need of protection. That need may, and often will, arise because of the unwillingness or inability of a parent to care for the child. It is not to be supposed that the protection conferred by the Act is to be denied to an abandoned child because the child's parents cannot be served with proceedings.

[39] So far as the failure to serve the applicant while she was in Queensland is concerned, in my respectful opinion, the applicant was served effectively pursuant to s 56(2) of the Act which provides:
"... if it is not practicable to serve the copy [of the application] personally, a copy of the application may be served on a parent by leaving it at, or by sending it by post to, the parent's residential address last known to the applicant."

[40] In this Court, it was accepted on the applicant's behalf that the application for the child protection order was left at her residential address in Queensland last known to the respondent. It was argued, however, that this service was not effective to give the Childrens Court jurisdiction because the applicant was not served while she was present in Queensland. This argument fails to recognise that the provisions of s 56 and s 58 are not concerned with the conferral of jurisdiction on the Childrens Court, but with the way in which that jurisdiction is exercised, and, in particular, with the need to accommodate the interests of, and accord procedural fairness to, the parents of a child in respect of whom an application for a child protection order is made.
[41] So far as the failure to serve the child's father with a copy of the child protection application is concerned, this point was not raised at any stage of the proceedings prior to oral argument in this Court. The applicant cannot seek to raise this argument now when, if it had been raised earlier, it might have been met by evidence from the respondent to show that it was neither practicable to serve a copy of the application on the child's father for the purposes of s 56, or to give him notice of the hearing for the purposes of s 58 of the Act."

5.2 ***First appearance***

On the first return date of a child protection application the parents will usually be present at court.

To ensure matters are progressed efficiently and effectively through the Childrens Court it is important to be aware of the delays that can occur with the scheduling of key events, such as holding a Family Group meeting, the appointment of a Separate Representative, and/or obtaining an expert report if required.

There is an opportunity to deal with a range of these procedural issues at the first mention stage.

Some of the matters that the court may wish to consider and give directions about at this stage or at a later mention are:

- The identification and service of parties to the application;
- If the proceedings relate to an Aboriginal or Torres Strait Islander;
    - consider whether there is an independent Aboriginal or Torres Strait Islander person for the child, and whether the name and contact details have been filed by the applicant[149] (per rule 14, Childrens Court Rules);
    - consider how the court is to be informed of, and whether to issue directions to ensure the court is informed of matters relevant to how specific principles (including the Aboriginal and Torres Strait Islander child placement principle) apply to the child;[150]
    - consider whether to issue directions to ensure the court is informed of the views of any of an independent Aboriginal or Torres Strait Islander person or a member of the child's family about Aboriginal tradition or Island custom relating to the child;[151]
    - Whether the Family Group Meeting should be held and whether it should be convened by a Private Convenor, Family Group Convenor or Family Participation Program Convenor;[152]
- Identification of any non-parties who may wish to make submissions or from whom the Court may wish to hear submissions;[153]
- Ensuring the parties' understanding of the nature, purpose and legal implications of the proceedings;[154]
- Any other Chapter 2 order pursuant to section 99 of the Act to which the child is subject;
- Any applications for review of placement or contact before QCAT while relevant proceedings are on foot in the Childrens Court (see chapter 8.10 for discussion on Court's interface with QCAT);
- The making of a protection order against the parent of a child and/or any existing orders or pending proceedings relating to domestic violence relevant to the proceedings;[155]
- Any adult criminal charges associated with the proceedings;
- Any youth justice charges associated with the proceedings;
- The parents' representation including that they have a reasonable opportunity to obtain legal representation;[156]
- The separate representation of a child;[157]
- The direct representation of a child;
- How the child's wishes or views, if able to be ascertained, will be put before the court;[158]

[149] r 14 *CCR*.
[150] r 72(2) *CCR*.
[151] r 72(3) *CCR*.
[152] s 51H *CPA*.
[153] s 113 *CPA*.
[154] s 106 *CPA*.
[155] s 43 *DFVPA*.
[156] s 109 *CPA*.
[157] s 110 *CPA*.
[158] s 59(1)(d) *CPA*.

- Whether it is appropriate for the applicant to seek that a Child Advocate be allocated to support the child to participate in the proceedings (see Appendix 6 for information on referring a Child Advocate);
- The appointment of an advocate for a child or parent if it is necessary or appropriate;
- Obtaining a social assessment report, including the issues to be addressed and the qualifications of the report-writer;[159]
- The medical examination or treatment of the child;[160]
- The transfer of the proceeding to another court or the joinder of the matter with other proceedings that should be heard with the matter;[161]
- The conference to be convened between the parties or family group meeting to be convened;[162]
- The disclosure of documents relevant to the proceedings;
- If the proceeding is a complex or lengthy one, any additional matters which will promote the expeditious finalisation of the proceeding; and
- The content and form of affidavits.

5.3 *Adjournment of an application*

The Childrens Court may adjourn an application for a child protection order for a period decided by the court, taking account of the principle that it is in the child's best interests for the application to be decided as soon as possible.[163] The court **must** state the reasons for the adjournment and **may give directions** to parties about things to be done by them during the adjournment.[164]

See also Childrens Court Child Protection Application Adjournment Checklist **(see Appendix 5**).

5.4 *Orders on adjournment*

Pursuant to section 67 of the Act, the Court can make the following interim orders on adjournment of a child protection application and they have effect for the period of the adjournment:

- Granting temporary custody of the child to the chief executive or a suitable member of the child's family;
- Directing a parent not to have contact or to have only supervised contact with the child (see below for sample direction);
- Authorising an authorised officer or police officer to have contact with the child;
- Authorising an authorised officer to enter a place and find a child.

[159] s 68(1)(a) *CPA.*
[160] s 68(1)(b) *CPA.*
[161] ss 114 and 115 *CPA.*
[162] s 68(1)(d) and 68(1)(e) *CPA.*
[163] s 66 *CPA.*
[164] s 66(4) *CPA.*

When making an interim order under the Act, the court need only be satisfied, on a prima facie basis, whether the child is in need of protection[165], pending determination of the substantive application.

Additionally, interim applications should be determined 'on the papers':

> *"…applications for a temporary order, by its very nature, must be determined on the affidavit material without the benefit of viva voce evidence from any of the witnesses, that is, when a Magistrate comes to determine the application for a temporary order he must, to some extent, accept the contents of the affidavit material."*[166]

Consistent with the overarching principles of the Act to provide for the protection, safety and well-being of the child, the court should exercise due caution and adopt a course which exposes the child to the least risk when making decisions, particularly on an interim basis when the evidence has not been tested. See Gee J in *Obrenovic and McCauley* (1985) FLC 91-655 at 27, citing Hogan J in *Brown and Brown* (1980) FLC 90-875 at 75,543:

> *"In some custody cases, of which type I am of the view this was one, it is necessary for the Judge in the exercise of his discretion to have regard to the guiding rule that if of two decisions available to the court one would expose the child to risk or more risk than another decision, then the course should usually be adopted which is the least likely to expose such child to such risk."*

Note *DCPL v SP & ZC* [2018] QChC 19, where the Magistrate declined to make a temporary custody order, thereby resulting in the child being immediately reunified to the respondent parents. DCPL appealed this decision, and appeal was allowed. His Honour Smith DCJA gave regard to the approach of *J v W* [1999] FamCA 1002:

> *"The Full Court of the Family Court noted at [45] that on an interim application the Court must have regard to the best interest of the child as the paramount consideration. The interests of the child will normally be met by ensuring stability pending the full hearing, as a general rule the interlocutory order should provide stability and if the child is living in a well settled environment then stability will usually be promoted by continuing that arrangement. It should also be borne in mind that in interim applications one should be cautious in making findings on disputed issues of fact."*

His Honour also noted that whilst this was an interim application there is still a requirement for a Court to give adequate reasons. However, these reasons may be brief due to the interim nature of the application.

Pursuant to section 68 of the Act, the Court can also make the following orders on adjournment:

---

[165] *Director of Child Protection Litigation v FGE & FPA* (No 2) [2018] QChC 17 at page 3.
[166] *Director of Child Protection Litigation v FGE & FPA* [2018] QChC 16 at page 11.

- Requiring a written **social assessment report** about the child and the child's family to be filed in the court. The court must state the issues the report is to address;
- Authorising **medical examination or treatment** of the child and requiring a report on that to be filed in the court. The court must state the particular issues the report must address;
- About the child's **contact** with its family during the adjournment. Without limiting this authority, this order may limit the child's contact with the child's family or provide for how it is to happen. Note that the court cannot order that contact be supervised by the chief executive unless the chief executive agrees to supervise the contact. See discussion at para 4.4.7 below re guidelines for contact decisions by Magistrates;
- Requiring the chief executive to convene a **family group meeting** to develop or revise a case plan and to file the plan in court, or convene a family group meeting to consider another matter relating to the child's needs;
- That **a conference be held** between the parties to decide the matters in dispute or try to resolve the matters; and
- That a child be separately legally represented (pursuant to section 110 of the Act).

5.4.1 Comment

Re meaning of 'on an adjournment'

In *L v Department of Communities* [2004] QChC 3 the Childrens Court of Queensland had reason to consider the meaning of "on adjournment of a proceeding" within the terms of section 67 of the Act. In that case the Childrens Court Magistrate made a number of orders and declined others according to the chronology set out below:

- On 25 April 2004 the Department obtained a temporary assessment order in respect of the child
- On 28 April 2004 the Department filed an application for a child protection order
- On 28 April 2004 the Department sought an interim order under s 67 granting short-term custody of the child to the Chief Executive which the Childrens Court Magistrate declined to make. The proceedings were adjourned to 14 May 2004
- On 14 May 2004 the proceedings were further adjourned to 18 August and the Court ordered a conference be held with the report on the conference to be provided to the Court no later than 18 August 2004.
- On 27 July 2004 the Department arranged to have the matter listed for the renewed purpose of seeking an order for interim custody pursuant to s 67 of the Act and the Childrens Court Magistrate made the order granting temporary custody to the Chief Executive. The matter was again adjourned to 18 August 2004
- On 9 August 2004 the appellant made application before the Magistrate for a variation of the order such that interim custody was granted to a member of the child's family but the Magistrate declined to make such an order.
- The orders of 27 July and 9 August 2004 were the subject of this appeal to the District Court.

The appellant argued, *inter alia*, that the Childrens Court Magistrate had no power to make the order on 27 July because such an order can only be made "on the adjournment of a proceeding" for a court assessment order or a child protection order. As the hearing had already been adjourned to 18 August, the proceedings of 27 July were not "an adjournment of a proceeding" and the court therefore had no power to make the interim order granting temporary custody of the child to the Chief Executive. O'Brien DCJ said in response to that argument:[167]

> "*This argument is plainly of a technical nature and in my view it is lacking in substance. The Court became seized of the matter on 28 April 2004 when the application for the child protection order was filed. As noted above the application was then adjourned to 14 May 2004 and subsequently to 18 August 2004. Throughout the whole of that period however the Court retained jurisdiction in the matter. The power to exercise that jurisdiction is not limited to those specific days to which the proceeding might, from time to time, be adjourned. In reality the hearing of 27 July 2004 could properly be seen as a re-listing of the application before the Court on the earlier occasion, if not a bringing forward of the mention proposed for 18 August 2004. This appears to be consistent with the approach taken by the Childrens Court Magistrate when, after granting the interim custody orders sought, he adjourned the proceeding to 18 August 2004. In my view the orders made were within the power of the Court*."

The meaning of "for the period of the adjournment" in section 67(5) was further considered by the Court of Appeal in *PAV v Director of Child Protection Litigation & Ors (No 2)* [2016] QChC 17 where Farr SC DCJ determined "period of the adjournment" refers to the passage of time until the final hearing, rather than the period until the next mention.[168]

5.5 *Temporary custody order*

Temporary custody order (s 67(1)(a))

- On adjournment of the proceeding/s. I make an interim order in respect of the child/ren ……. granting temporary custody of the child/ren to:
  - The chief executive OR
  - (insert name of suitable person who is a family member).

The order remains in force until…[date adjourned to]…….

5.6 *Contact by an authorised officer*

[167] *L v Department of Communities* [2004] QChC 3 at [12].
[168] See paragraphs 7 – 17 *PAV v Director of Child Protection Litigation & Ors* (No 2) [2016] QChC 17.

Contact by an authorised officer or police officers (s 67(1)(c))

- On adjournment of the proceeding/s I make an interim order authorising an authorised officer or a police officer to have contact with the child/ren…[insert name/s]….. The order remains in force until ….[date adjourned to]…

5.7 *Entry and search of place*

Entry and search of place (s 67(2))

- I make an interim order authorising an authorised officer or police officer to enter and search any place the officer reasonably believes the child is, to find the child, the court having been satisfied that:
  - entry to a place has been refused/ is likely to be refused / or it is otherwise justified to make this order and
  - that entry is necessary for the effective enforcement of an order under s 67(1)(c).

The order remains in force until …..[date adjourned to]…

5.8 *Social assessment report*[169]

Social Assessment Report:

- On adjournment of the proceeding/s I order that a written Social Assessment Report about the child/ren…[insert name/s]……. and the child/ren's family be prepared and filed in the Court on or before the …[insert date and time]….. The Report should address the following particular issues:
  - (Look at LAQ SAR template for some possible issues – see **Appendix 2**)

5.9 *Medical examination or treatment*

Medical examination or treatment

- On adjournment of the proceeding/s I make an order authorising the following medical examination or treatment of the child/ren…[insert name/s].. …[insert details of examination or treatment required]…… and that a report of that examination or treatment be filed in the court on or before …[insert date and time]…… The Report should address the following particular issues:
  - …….

5.10 *Contact*

As to whether a Magistrate can order contact that has the effect of residing with another person, see *The Department of Communities, Child Safety v M and S* [2013] QChC 27. In that case the Department

[169] Independent Social Assessment Report Referral Form (Childrens Court of Queensland) in Appendix 2.

filed an application in the Childrens Court of Brisbane on 10 July 2012 seeking child protection orders granting custody of three children to the chief executive for a period of 18 months.

On 18 December 2012 the applications were mentioned before the Childrens Court Brisbane where the learned Magistrate ordered under section 68(1)(c) of the Act that the respondent children reside with their grandmother on a day-to-day basis. That application was adjourned until 8 January 2013 when it was further mentioned, at which time the learned Magistrate ordered that, *inter alia* "the maternal grandmother will have such contact with the said children concerned in this application which means that they effectively reside in her care until further order in this matter".[170]

The Department appealed against those parts of the court orders as described in the previous paragraph on the grounds that:[171]

- the learned Magistrate did not have the authority to make those orders;
- by making these orders the Magistrate erred at law by fettering the statutory discretion vested in the chief executive pursuant to the concurrent order that temporary custody be granted to the chief executive;
- section 68(1)(c) of the Act does not vest power in the Magistrate to order the children reside with a nominated person;
- to the extent that the order of 8 January 2013 purported to modify the order of 18 December 2012, the order was in error in that it did not specify what contact the children were to have with the maternal grandmother;
- to the extent that the order of 8 January 2013 purported to modify the order of 18 December 2012 the order was in error in that section 68 of the Act does not vest in the Magistrate power to order that the children the subject of the application reside with a nominated person as part of a contact regime; and
- the learned Magistrate erred at law in not nominating a specific person with whom the children the subject of the application should reside.

His Honour referred to definitions in the Act including the definition of 'contact' in the dictionary to the Act where it is defined to include "to see and talk to the child" and went on to say:[172]

> "*[6]…In my view section 5A of the Act requires that when approaching decisions, the main principle is that the safety, well-being and best interests of a child are paramount. Section 68 provides the courts other powers on adjournment of proceedings for child protection orders, In subsection (1)(c) it provides that "Subject to subsection (5), an order about the child's contact with the child's family during the adjournment can be made by a magistrate". Subsection (4) of section 68 provides that: "Without limiting subsection (1)(c), an order mentioned in the paragraph may limit the child's contact with the child's family or provide for how the contact is to happen".*

[170] *The Department of Communities, Child Safety v M and S* [2013] QChC 27 at [1].
[171] *The Department of Communities, Child Safety v M and S* [2013] QChC 27 at [3].
[172] *The Department of Communities, Child Safety v M and S* [2013] QChC 27 at [6]-[8].

[7] While it may seem attractive to construe a contact as being something transient, I do not think it necessarily follows that in the context of this Act and the order than can be made on an interim basis that it is so limited. I see no basis for restricting contact such that it would not allow for resident to allow contact to take place. While section 12, subsection (2) gives the Chief executive rights when granted custody, in my opinion, it does not necessarily follow when one has regard to the paramount principle of the Act that the Chief Executive cannot have interim custody at the same time that some other person has contact which includes residence. I do not think the learned magistrate's orders were ineffective because the grandmother was not named or defined further the contact to be had between the children and the grandmother.

[8] While it can, from time to time, be spelt out I do not think the order the learned magistrate made fails for not spelling out the hours of contact or the days of contact. It was clear the intent of the orders that the learned magistrate was making. ***I have no doubt that the learned*** *magistrate* ***had power under the Act to make the orders she made and she exercised her discretion properly in the circumstances.*** *Clearly, she was trying to deal with a difficult situation as all these matters seem to be from time to time. I have no doubt she was concerned about conflicts that had arisen about other carers and while I am of the view she was legally correct in making these orders, in addition, the learned magistrate arrived as a practical result in the circumstances*."

See also Contact Guidelines for Magistrates in the Children's Court of NSW Resource Handbook, which may be of assistance to Queensland Magistrates.

Sample order - Contact with the child's family (s 67)(1)(b))

- On adjournment of the proceeding/s I make an interim order in respect of the child/ren …….. directing … [the named parent/s]… not to have contact, direct or indirect, with the child/ren. The order remains in force until…[date adjourned to]……
- On adjournment of the proceeding/s I make an interim order in respect of the child/ren …….. directing ……[the named parent/s]… not to have contact, direct or indirect, with the child/ren other than when [state person or category of person] is present. The order remains in force until…[date adjourned to]……

5.11 *Family group meeting*

Family group meeting

- On adjournment of the proceeding/s I make an order that the chief executive is to convene a family group meeting:
    - To develop/review a case plan/s for the child/ren ……with the plan/s to be filed in the court on or before ……; OR
    - To consider, make recommendations about, or otherwise deal with another matter relating to the child/ren's wellbeing, namely ……

Family group meeting – [Private Convenor or Family Participation Program]

- On adjournment of the proceeding/s I make an order that the chief executive is to convene a family group meeting to be held by [a Private Convenor or the Family Participation Program]:
    - To develop/review a case plan/s for the child/ren ……with the plan/s to be filed in the court on or before ……; OR
    - To consider, make recommendations about, or otherwise deal with another

5.12 *Court Ordered conference*

The Childrens Court may make a child protection order only if satisfied that, if the making of the order has been contested, a Court Ordered Conference (COC) has been held between the parties, or reasonable attempts to hold a conference have been made.[173]

The purpose of a COC is to identify issues in dispute, consider alternatives and try to reach an agreement over the action to be taken in the best interests of the child. This includes discussing the specific concerns of Child Safety departmental officers, the parents' understanding of and responses to these concerns, the child's views and preferences, the strengths of the family and possible options and strategies to ensure the future wellbeing and safety of the child.

Where the court orders a conference to be held, the matter is referred to the Child Protection Conferencing Unit within the Dispute Resolution Branch who arrange for the the conference to be convened as soon as practicable (some Magistrates appoint the conference date).[174] Anything said in the conference is inadmissible in a proceeding before any court except with the consent of all the parties.[175]

There are a number of matters to consider before directing a COC be held such as:

- if the matter is contested and whether a Separate Representative should be appointed

[173] s 59(1)(c) *CPA*.
[174] s 69 *CPA*.
[175] s 71 *CPA*.

- if a Separate Representative has been appointed, whether a Social Assessment Report has been completed and filed with the Court
- should the parties have separate court ordered conferences due to issues with family and domestic violence being present

When completed, the Child Protection Conferencing Unit will file a report of the conference (Form 20) with the Court, as soon as practicable after the conference is finished, containing the particulars prescribed under rule 111 of the Childrens Court Rules.[176]

Generally, at the time of listing the matter for COC, the Magistrate will also list the matter for mention as soon as practicable after the COC has occurred, so the Court may be advised as to the outcome and the matter can move forward.

Sample order - Court ordered conference

- On adjournment of the proceeding/s I order that a conference be held between the parties to decide the matter in dispute or to try and resolve the matters and direct the Registrar to appoint a chairperson for the conference and convene the conference as soon as practicable.

5.13 *Role of separate legal representative for a child*

The Childrens Court **may** order that the child be separately represented by a lawyer (the child's *separate representative*) if the court considers it is necessary in the child's best interests.[177]

The Court **must** consider making orders about the child's separate representation if:

- The application for the order is contested by the child's parents; or
- The child opposes the application.[178]

However, the Court may also appoint a separate representative in other circumstances where it is deemed in the child's best interests.

A separate representative may represent more than one child in the same proceeding, but if the Court considers there is a conflict or possible conflict of interest, the Court may order that another separate representative be appointed for another child or other children.[179]

It is important to understand the nature of the Court's order. The Court is not appointing a legal advocate to put the child's instructions before the Court. The separate representative must act in the child's best interests regardless of any instructions from the child. Often the child's wishes and interests will be similar, however, this will not always be the case. For example, a child may wish to

[176] s 72(1) *CPA*.
[177] s 110(1) *CPA*.
[178] s 110(2) *CPA*.
[179] s 111 *CPA*.

remain home with the parent, however it may be in the child's best interests to remove the child from that environment.

5.13.1 **Comment**

Section 110 does not compel the Court to order a separate representative for every child. The order should only be made after careful consideration of the evidence available at the time. It is not possible to set out the precise circumstances that would lead to a separate representative being appointed. Matters which the court might consider relevant when considering the appointment were considered the in the Family Court matter of *Re K* (1994) 17 Fam LR 537.

In *Re K* it was held that the broad general rule is that the Court will make such appointments when it considers that the child's interests require independent representation.[180] In determining whether it is in the child's interests, the following list of guidelines was suggested:[181]

- Cases involving allegations of child abuse, whether physical, sexual or psychological;
- Cases where there is an apparently intractable conflict between the parties;
- Cases where the child is apparently alienated from one or both parties;
- Where there are real issues of cultural or religious difference affecting the child;
- Where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;
- Where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it serious impinges on the child's welfare;
- Where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children;
- Any case in which, on the material filed by the parents, neither seems a suitable custodian;
- Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
- Where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child;
- Cases where it is proposed to separate siblings;
- Custody cases where none of the parties are legally represented.

The order for a separate representative may be made at any time the application is before the Court. Once the order is made, the Registrar must serve a copy of the order and all material on Legal Aid Queensland as soon as practicable, so a separate representative can be allocated.[182]

[180] *Re K* (1994) 17 Fam LR 537 at 555.
[181] *Re K* (1994) 17 Fam LR 537 at 555 to 558.
[182] r 40 *CCR*.

Sample Order and Direction:

- On adjournment of the proceeding/s, I order that the child/ren …….be separately represented by a lawyer appointed to act in the child/ren's best interests and request that Legal Aid Queensland facilitate such representation
- I direct the Registrar of this Court to promptly advise Legal Aid Queensland as to the making of this order and, as soon as practicable, send a copy of the order and all material filed in the proceeding.

Section 110(4) of the Act states the separate representative **must**, to the extent that is appropriate, taking into account the child's age and ability to understand:

- Meet with the child;
- Explain the separate representative's role;
- Help the child take part in the proceedings; and
- As far as possible, present the child's views and wishes to the Court.

The separate representative is not a party to a proceeding on an application, but must do anything required to be done by a party and may do anything required to be done by a party.[183] The parties to the proceeding must act in relation to the proceeding as if the separate representative were a party.[184] The Childrens Court Rules apply to a separate representative to the same extent they would apply to a party.[185]

5.14 *Direct representation for a child*

A child has a right of appearance in person or to be represented by a lawyer.[186] Direct representatives act on the instructions of a child or young person, as opposed to a separate representatives who acts in a child's best interests. The court has no explicit power to order that a child be directly represented.

A child can be represented by a separate representative and/or a direct representative. A direct representative acts on the instructions of the child/young person, in the same way that a parent's lawyer acts on the parent's instructions.

If a child or young person wishes to be directly represented, they can apply to Legal Aid for a lawyer to be appointed (with the assistance and support of a trusted adult if needed). Young people under the age of 18 years are not subject to a means test and, in many cases, young people will be able to obtain a grant of aid for initial advice and consideration of their matter (currently if the young person is the subject of an out of home order they satisfy the merit test). It is important to know that part of Legal Aid's assessment of a young person's application for Legal Aid can include a lawyer talking with

[183] s 110(6) *CPA*.
[184] s 110(7) *CPA*.
[185] r 37 *CCR.*
[186] s 108 *CPA*.

the young person to ensure they have a sufficient understanding of the legal process and its consequences to instruct a lawyer. Also, that Legal Aid funding is assessed at each stage of a matter (as it is for parents).

If a young person wants to discuss their situation and obtain legal advice over the phone, prior to/instead of making an application for Legal Aid, they can contact Legal Aid Queensland directly.

5.15 *Child Advocate (Office of the Public Guardian)*

Young people are also able to apply for a Child Advocate from the Office of the Public Guardian, who can also provide legal advice to young people under Child Safety intervention (see Appendix 6 for more information on Child Advocates). A Child Advocate can also help a young person to apply for a direct representative through Legal Aid, if the young person decides to do so.

Once a direct representative is appointed, the Child Advocate will generally take no further part in the proceedings.

5.16 *Continuation of orders*

According to section 99 of the Act, if an order has been made under Chapter 2 in relation to a child, and before the order ends an application is made by the chief executive or ligitation director for an extension, variation, revocation or substitution of the order, the earlier order continues until the application is decided unless a magistrate or the Childrens Court otherwise orders.

Sample direction:

I note that pursuant to section 99 of the Act the **previous child protection order in respect of the child/ren** _____ will continue to have effect until the application is decided unless the Childrens Court orders an earlier end to the order.

5.17 *Expert Assistance*

For Child Protection proceedings, the Childrens Court may appoint a person having special knowledge or skill to help the court, either on the Court's own initiative or on the application of a party to a proceeding.[187]

The report may be on any subject including psychiatric assessments, parenting capacity assessments, paediatric reviews and medical opinions. The cost of this report is borne by the Registry.

[187] s 107 *CPA*.

5.18 *Transcripts*

Transcripts of child protection proceedings constitute child protection records that contain confidential information protected by the Act. The inspection and copying of child protection court records is only permitted in accordance with applicable legislation.[188]

A party to a child protection proceeding does not have an automatic right to access a record relating to that proceeding by virtue of their party status. Consequently, there is no automatic right of access to court records by the child who is the subject of child protection proceedings, nor by their respondent parents or the Public Guardian. A magistrate can grant access in accordance with the legislation and provide court records to a party who is categorised as an applicable person under section 187 of the Act.[189]

Under section 192 of the Act, if a person is granted access, they must not publish information given in evidence in a proceeding or information that identifies, or is likely to identify a person or party to a proceeding without the courts approval.[190]

Sample direction:

I ORDER the transcript of the proceedings which occurred on _____ be released to the parties.

5.19 *Other orders on adjournment*

In addition to the orders that can be made under Section 67, the Childrens Court has other powers on the adjournment of proceedings.

On the adjournment of a proceeding for a child protection order, the Childrens Court may also make one or more of the orders set out in section 68, which include:

- an order requiring a written social assessment report about the child and the child's family be prepared and filed in the court and the particular issues the report must address;
- an order authorising a medical examination or treatment of the child and requiring a report of the examination or treatment be filed in the court and the particular issues the report must address;
- an order about the child's contact with the child's family during the adjournment;
- an order requiring the chief executive to convene a family group meeting to develop or
- revise a case plan and file the plan in the court; or to convene a family group meeting to consider, make recommendations about, or otherwise deal with, another matter relating to the child's wellbeing and protection and care needs;

[188] ss 187 & 192 *CPA*.
[189] s 187 *CPA*.
[190] s 192 *CPA*.

- an order that a conference between the parties be held before the proceeding continues to decide the matters in dispute or to try to resolve the matters;
- an order under section 110 that the child be separately legally represented.

5.19.1 **Comment**

When stating the particular issues to be addressed in a report, it is important to keep in mind that this does not limit the issues that may be addressed in the report.[191]

If an order is made in relation to contact between the child and the child's family, the order may limit the contact and/or provide for how the contact is to happen.[192] However, the court must not make an order for contact that requires the chief executive to supervise family contact with the child unless the chief executive agrees to supervise the contact.[193] To remove any doubt, it is declared that the chief executive may be the subject of an order for a social assessment report, medical examination or treatment of the child and contact even though the chief executive is not a party to the proceeding.[194]

See **Appendix 5** for proposed standard directions.

5.20 *Listing for final hearing*

Section 59 sets out the requirements the Childrens Court must be satisfied with before a child protection order can be made. For a matter to be listed for a final hearing it will be important for the Magistrate to ensure they are satisfied that these requirements have been met or will be met, such as:

- Is there a case plan for the child and is it appropriate for meeting the child's assessed protection and care needs
- has the case plan or the review report been filed with the court
- has a court ordered conference been held
- have the child's wishes or views, if able to be ascertained, been made known to the court

Directions could include the following:

I make the following Directions for the conduct of the hearing:

- That the evidence in chief of all witnesses shall be by way of affidavit
- That the applicant file with the Registry and serve upon the parties all affidavit material intended to be relied upon on or before 4.00pm on ……/……/……

[191] s 68(3) *CPA*.
[192] s 68(4) *CPA*.
[193] s 68(5) *CPA*.
[194] s 68(6) *CPA*.

- That the Separate Representative file with the Registry and serve upon the parties all affidavit material intended to be relied upon on or before 4.00pm on ……/……/…….
- That the respondent(s) file with the Registry and serve upon the parties all affidavit material intended to be relied upon on or before 4.00pm on ……/……/…….
- That the applicant and the separate representative file with the Registry and serve upon the parties any material in reply on or before 4.00pm on ……/……/……

This application is further adjourned to ……/……/…….for Review Mention in Court ……. at am/pm. (Appearances may be required on this date – if the parties fail to appear, I now inform the parties that I may proceed to determine the application based upon the filed material.

5.21 *DCPL Outline of Arguments*

Some Magistrates prefer DCPL to lodge an outline of arguments prior to the hearing, so they can have a brief overview of the issues in contention and the likely course of the hearing. When listing for a hearing or alternatively at the review mention, Magistrates may order the Applicant (DCPL) to provide the Court with a summary by a certain date. The four items to be included in the summary are:

1. The child protection issues in dispute (maximum of one page)
2. A list of material relied upon
3. A list of witnesses to be cross-examined and what each witness's role is
4. The date of the latest case plan

It is an expectation that all parties are to have seen the case plan prior to the hearing commencing. If Magistrates would like this to occur, a sample direction may look like this:

I ORDER the Applicant to file with the Registry and serve on the parties a child protection summary on or before 4.00pm on ……/……/…….. containing:

1. The child protection issues in dispute (maximum of one page)
2. A list of material relied upon
3. A list of witnesses to be cross-examined and what each witness's role is
4. The date of the latest case plan

5.22 *Review Mention*

The review mention is generally listed for four weeks prior to the first day of the hearing. The purpose of the review mention is to ensure that all parties are ready for the hearing.

In deciding whether the parties are ready for the hearing, there are a number of matters that should be considered. These include:

- have all affidavits intended to be relied upon at the hearing been filed and served;
- if the affidavits have not been filed by the due dates, what is outstanding, and when will outstanding material become available;
- have all statements, reports, exhibits been perused/viewed and/or exchanged;
- are there any preliminary applications to be dealt with prior to the hearing, and if so, what are they (e.g. phone evidence, special witnesses, any special equipment, interpreter);
- number of witnesses being called, and whether all the witnesses are available, and if not why and when will they become available;
- how many days will be required for the hearing;
- has Counsel been briefed and has their availability been confirmed;
- are there any matter/s which may delay the commencement of the hearing and/or which may result in an application for an adjournment.

6 WITHDRAWAL OF APPLICATION

Section 57A of the Act states the application for a child protection order may **only** be withdrawn with the Court's leave. When seeking the Court's leave, DCPL must give reasons as to why the child protection order is no longer required.

6.1.1 **Comment**

See *Lewis v DCPL & Ors* [2018] QChC 22 for a discussion on when a Court may grant leave for DCPL to withdraw a child protection order application. In that matter, DCPL had filed applications for child protection orders, and the Department had interim custody of the children. The children had been placed with the paternal grandparents by the Department. In July 2017, the Federal Circuit Court of Australia ('FCC') made interim custody orders pursuant to section 69ZK of the *Family Law Act 1975* (Cth), for the children to reside with the paternal grandparents. Those orders were to take effect only if and when the children cease to be under a child welfare order. At the time, the only child welfare order the children were under was the interim custody order granted by the Children's Court. In August 2017, DCPL made application to the Children's Court Magistrate pursuant to section 57A of the Act for leave to withdraw the child protection order, so the FCC orders can come into effect. It was submitted by DCPL that if the children were in the care of their paternal grandparents under the FCC order, then they would no longer be in need of protection, and therefore there would be no need for a child protection order. Leave was granted by the Magistrate and applications were withdrawn, thereby allowing the FCC orders to come into effect.

This decision was appealed by the Separate Representative on the grounds that the Magistrate should have considered whether the children were in need of protection, before granting leave to withdraw the child protection order.

His Honour Dearden DCJ found at paragraphs [70]-[72]:

> *The submissions by the appellant and the second respondent, in effect, seek to constrain the exercise of the learned Childrens Court magistrate's discretion pursuant to CPA s. 57A, to*

require the issue of whether each of the three children were "in need of protection" before the learned Childrens Court magistrate could grant the DCPL application. With respect, that proposition is unworkable and is a gloss on the language of CPA s. 57A, which is not supportable either in the terms of the section itself, or in the light of the explanatory notes to the Child Protection Reform Amendment Bill 2016.

The purpose of requiring the DCPL to provide the Childrens Court with reasons for discontinuing a child protection application is clearly to ensure that the application is not made capriciously, or without reasons sufficient to enable the court to exercise its discretion to grant leave for the application to be withdrawn.

Where, as here, the DCPL was satisfied that the children were no longer in need of protection, because the Federal Circuit Court order would come into effect immediately upon withdrawal of the application in the Childrens Court, and that the children would then be residing with the paternal grandparents (about whom there was no evidence of child protection concerns), then the learned Childrens Court magistrate did not err, in my view, in exercising his discretion to grant the application for leave to withdraw.

Furthermore, at paragraphs [76]-[78]:

The Childrens Court magistrate was not only entitled, but was obliged to consider the effect of the Federal Circuit Court parenting orders on the child protection issues in respect of each of the children (as of course was the DCPL prior to making the application to withdraw the proceedings).

As the Chief Executive no longer had child protection concerns in respect of the children, the DCPL was entitled to make the application under CPA s. 57A. The relevant parenting issues in respect of each of the three children remain open to be litigated before the Federal Circuit Court pursuant to the Family Law Act with the participation of the appellant, and second, third and fourth respondents, if they chose.

I consider the learned Childrens Court magistrate, while exercising the judicial discretion pursuant to CPA s. 57A, should approach the task with caution, and exercise the discretion to refuse an application to withdraw child protection proceedings after careful and anxious consideration of the competing factors placed before the court. It is clear that the discretion was appropriately exercised by the learned Childrens Court magistrate.

7 MAKING A CHILD PROTECTION ORDER

The Childrens Court **may only make a child protection order if** it is satisfied: [195]

- The child is **in need of protection** and the order is appropriate and desirable for the child's protection (see Chapter 2 for guidance on this);

[195] s 59 *CPA*.

- There is **a case plan** for the child developed or revised under part 3A and the case plan is appropriate for meeting the child's assessed care and protection needs. (In deciding if it is appropriate, it is not relevant that not all people who participated in the development or revision of the plan agreed with it).[196]
- If the making of the order is contested, that the parties have attended a **conference** or reasonable attempts have been made to hold a conference (See para 5.12 re court ordered conferences)
- The **child's wishes** or views if able to be ascertained have been made known to the court and
- The protection sought to be achieved by the order is unlikely to be achieved by **any less intrusive order**.

A copy of the child's case plan and, if it is a revised case plan, a copy of the report about the last revision under section 51X must also have been filed in the court prior to the making of a child protection order.[197]

Section 59(2) – (9) of the Act sets out the remaining requirements that must be complied with prior to the making of a child protection order, including additional factors that must be considered before making particular types of long-term orders.

Section 5E of the Act sets out the principles for the participation of children where a person exercises a power or makes a decision under the *Child Protection Act 1999* that affects, or may affect, a child.[198] The section sets out how this is to occur, including ensuring that the child is given meaningful and ongoing opportunities to participate, is given information that is reasonably necessary and that communication with the child is carried out in a way that is appropriate for the child.[199] Examples are also provided in relation to how a child may decide to participate.[200]
(see Chapter **10**.4 for further discussion of this).

Pursuant to section 61 of the Act, the Childrens Court may make any 1 or more of the following child protection orders that the court considers appropriate in the circumstances:

- Directive order;
- Supervision order;
- Transition order (see Chapter 8);
- Custody order;
- Short-term guardianship order;
- Long-term guardianship order; or
- Permanent care order.

For information about how the Department make their decisions as to the most appropriate order, see Chapter 3.2 of the Child Safety Practice Manual, which is available on the Child Safety website.

[196] s 59(3) *CPA*.
[197] s 59(4) *CPA*.
[198] s 5E(1) *CPA*. Note: this section does not apply to a court or tribunal s5E(5) *CPA*.
[199] s 5E(2) *CPA*.
[200] s 5E(3) *CPA*.

7.1 *A directive order*

There are two types of directive orders under section 61(a) and 61(b) of the Act. The first one directs a parent of the child to do or not do something directly related to the child's protection. For example, the court might direct a parent not to leave the child in the care of a particular person convicted of seriously harming a child.

The second type places restriction on parental contact with the child, either by directing that no contact occur or that only supervised contact occur. For example, the court may direct a parent who has harmed the child not to have contact with the child, or allow the parent contact only when a stated category of person is present such as "one of the mother's family" or "a worker from 'xyz' agency".

7.1.1 **Comment**

In *MDS v DCPL & Ors* [2017] QChC 6, His Honour Morzone QC DCJ considered at paragraph [131] when a directive order may be appropriate. His Honour considered indicia for a directive order includes:

- the child can safely remain at home, as long as the parent takes certain actions (e.g. if the other parent who may be at risk of harming the child was subject to restricted or no contact);
- the action is able to be clearly defined, and what is required of parent can be easily understood by them;
- the parent will not do the act on a voluntary basis;
- a specific order is able to be made by the court;
- failure by a parent to comply with the order will place the child at unacceptable risk of harm; and
- the parent is likely to comply with the order.

The following are some examples from the Child Safety Practice Manual about when they may seek an order under section 61(b) of the Act for a directive order:

- the child could remain at home with a protective parent if the parent to whom the child protection concerns apply was prevented, or restricted, from contact;
- a protective parent consents to the child being cared for by another person (for example, a relative), and the parent to whom the child protection concerns apply was subject to restricted or no contact;
- there is a Family Court of Australia parenting order that needs to be overridden for child protection reasons, allowing the protective parent to apply for variation of the Family Court of Australia order;
- there is a need to prevent a parent from harassing the child in a significantly harmful way (for example, by making telephone threats), and prosecution may be required to enforce the contact order – in this case, the order may be made in conjunction with any other child protection order; or

- the child's safety could be secured through the supervision of the parent to whom the child protection concerns apply, and there is a person assessed as able and willing to provide the supervision.

A directive order may be made in conjunction with a supervision order or other child protection order and can be in place during an intervention with parental agreement.

The order must state the time when it ends, and the duration of the order must not be more than 1 year after the day it is made.[201]

7.2 *A supervision order*

Under section 61(c) of the Act, a supervision order requires the chief executive to supervise the child's protection in relation to the matters stated in the order. For example, the order may require the chief executive to supervise the parent's care of the child in relation to necessary medical care.

7.2.1 **Comment**

In *MDS v DCPL & Ors* [2017] QChC 6, His Honour Morzone QC DCJ considered at paragraph [133] that the following circumstances may be conducive to a supervision order:

- The child is in need or protection, but it is appropriate for the parents to retain their custody and guardianship rights and responsibilities;
- Areas relating to the child's care can be identified and capable of being supervised by Child Safety;
- Supervision and direction by Child Safety will enable the child to safely remain at home under the supervision of Child Safety to ensure that the parents address matters specified in the order;
- Failure by a parent to comply with Child Safety requirements will not place the child at immediate risk of harm; and
- The intervention needed, with the child residing in the home, will not be accepted by the parents on a voluntary basis.

However, in circumstances where failure by a parent to comply with the directions would result in significant harm to the child, a supervision order is not appropriate. See *DCPL v ADB & Ors* [2018] QChC 30 where the Magistrate made a supervision order so the children could be placed with the mother, with directions to the mother not to allow any contact with the father and also being directed to notify Child Safety immediately if the father does have unauthorised contact. However the mother did not accept the risk posed by the father and had previously breached orders of the Court that the father is not to have contact with the children. The mother had also shown no indication that she would now be willing to follow the directions of the Order and not allow contact between the children and their father. This order was found by His Honour Judge Shanahan to not achieve the protection required and was set aside in favour of a short-term custody order.

[201] s 62 *CPA*.

The order must state the time when it ends, and the duration of the order must not be more than 1 year after the day it is made.[202]

7.3 *A custody order*

A custody order grants custody of the child to a suitable family member other than a parent of the child,[203] or to the chief executive[204] and cannot be made for a period of more than two years.[205]

Before making this order in favour of someone other than the chief executive, the court must have regard to any report or recommendation to the court by the chief executive about the person's criminal history, domestic violence history and traffic history.[206] (See **Chapter 12** for further discussion about domestic violence and child protection).

7.3.1 **Comment**

The Child Safety Practice Manual outlines strict conditions relating to an application for a custody order. Preference is given to the granting of a custody order to a member of the child's family. This is granted where:

- the child cannot remain at home under a less intrusive order;
- Child Safety is working towards the reunification of the child and family;
- there is an appropriate relative able and willing to assume short-term custody for the purpose of protecting the child and is also willing to work with Child Safety in planning for the child to return to the care of the parents;
- there is no significant conflict between the parents and the relative, and the relative will facilitate appropriate family contact between the child and the parents;
- it is not necessary to impose a 'no contact' decision on a parent;
- the member of the child's family is able and willing to assume full financial responsibility for the care of the child.

If there is uncertainty about one of the above factors, it may be appropriate to seek an order granting custody to the chief executive while still placing the child with the relative.

If it is necessary to restrict a parent from all contact with the child, or to actively remove guardianship from a parent due to the very serious nature of the harm, an order granting short-term guardianship to the chief executive will be sought.

Duration and consecutive short-term orders

[202] s 62 *CPA*.
[203] s 61(d)(i) *CPA*.
[204] s 61(d)(ii) *CPA*.
[205] s 62 *CPA*.
[206] s 59(5) *CPA*.

Note the amendments to the Act which came into force in October 2018, which state **a child is not to be subject to consecutive short-term custody or guardianship orders which result in them being in care under short-term care arrangements for more than 2 years**. The reason for this is to provide children with a sense of permanency and stability, which cannot be afforded under consecutive short-term orders, as it is unknown whether the children will be successfully reunified to their parents or not. If a respondent parent has not demonstrated they are able to adequately protect their child from harm despite the child being in Child Safety's care for over 2 years, then long-term orders should be considered. The Act provides the following relevant examples:

> *Example - The court makes an order granting custody of a child to the chief executive. A previous child protection order granting custody of the child to the chief executive was in effect for 1 year. Since the making of the previous order, the child has been in care, including under interim orders, for a continuous period of 18 months. The stated time for the new order must not be more than 2 years after the previous child protection order was made. As a result, the maximum duration of the new order is 6 months.*
>
> *Example - The court makes an order granting custody of a child to the chief executive and there have been previous orders granting custody of the child to the chief executive. The first order was in effect for 1 year, after which the child was returned to the care of the child's parents for 1 year. Then another order was made granting custody of the child to the chief executive for 12 months. Since the making of the second order, the child has been in care, including under interim orders, for a continuous period of 18 months. The stated time for the new order must not be more than 2 years after the second order was made. As a result, the maximum duration of the new order is 6 months.*

However, the Court may make a further order that results in the child being in short-term care for a consecutive period of more than 2 years if:

- it is in the best interests of the child to have longer than 2 years under short-term orders, and
- the Court considers that reunification of the child with the child's family is reasonably achievable within the longer stated time.[207]

Before extending or making a further child protection order granting custody or short-term guardianship of the child, the court must have regard to the child's need for emotional security and stability.[208]

When deciding if a further short-term order is in child's best interests, consider *DCPL v PMK & Ors (No. 2)* [2018] QChC 4 where a Magistrate's decision to grant a short-term order instead of long-term was overturned on appeal by DCPL. Whilst this decision was made before the legislative amendments came into effect in October 2018, there is still an emphasis on long-term stability for the child being a primary consideration. His Honour Dearden DCJ stated at paragraph [68]:

[207] s 62 *CPA*.
[208] s 59(8) *CPA*.

"With respect (…) *it is my view that the learned magistrate put too much weight on the bare possibility that the first respondent would, at some uncertain time in the future, become able (or capable) of caring for the children (and remain willing to do so – also an unlikely possibility given her past conduct), and too little weight on the long term emotional security of the children."*

Can the court attach conditions to a custody order?

As to whether the Childrens Court has the power to attach conditions to custody orders made under section 61(d)(ii) of the Act see *Department of Communities v LE and Ors* [2011] QChC 4. In that case, Harrison DCJ heard an appeal by the Director General of Communities against a decision of the Childrens Court at Pormpuraaw to make a child protection order under section 61(d)(ii) of the Act for a period of 12 months in which the Magistrate imposed two conditions:[209]

1. that the child reside in the safe house at Pormpuraaw until;
2. a suitable kinship carer, as approved by the Department of Communities (Child Safety), is located in Pormpuraaw and the child resides with the that kinship carer in Pormpuraaw until the child protection order expires.

The basis of the appeal is that the learned Magistrate did not have the power to impose those conditions or, for that matter, any conditions.

The appellant argued that the Childrens Court is an inferior court which has no inherent jurisdiction but has implied powers only as may be necessary to carry out its functions.[210] It was argued that there is no specific power in the Act to attach conditions to a Child Protection Order and the appellant relied on the following passage from the High Court in *Grassby v R* [1989] HCA 45; (1989) 87 ALR 618 at 628 where the Court said:[211]

> *"…It would be unprofitable to attempt to generalise in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'. There is in my view no reason why, where appropriate, they may not extend to ordering a stay of proceedings; cf R v Hush; ex parte Devanny (1932) 48 CLR 487 at 515*."

The respondents conceded that there is no specific power to attach conditions referred to in the Act but argued that the power is implied. They referred to the principles set out in sections 5,5A, 5C and 104 of the Act. His Honour said that it certainly appears as though the conditions related to the principles set out in section 5C of the Act, this being a case involving an aboriginal baby born and residing in an outlying aboriginal community.[212] However, His Honour went on to conclude:[213]

[209] *Department of Communities v LE and Ors* [2011] QChC 4 at [2].
[210] *Department of Communities v LE and Ors* [2011] QChC 4 at [18].
[211] *Department of Communities v LE and Ors* [2011] QChC 4 at [18].
[212] *Department of Communities v LE and Ors* [2011] QChC 4 at [23].
[213] *Department of Communities v LE and Ors* [2011] QChC 4 at [31]-[36].

*"…**I believe that before the Court has a power it has to be specifically spelt out in the legislation itself and cannot be implied by reference to the various statements of principle that appear in the legislation.***

Statements of principle in statutes are not provisions which confer particular jurisdiction.

Section 61 of the Act is the section which confers jurisdiction to make the custody order and it clearly makes no reference to the imposition of conditions.
Applying the principles of Grassby (supra) I do not believe that the power to impose such conditions can be implied from the Act.

…In the circumstances… the appeal should be allowed."

7.4 *A short-term guardianship order*

A short-term guardianship order can only be made to the chief executive[214] for a period of up to two years.

7.4.1 **Comment**

The Child Safety Practice Manual instructs staff that it is preferable to allow parents to retain guardianship unless there are reasons why this is not in the child's best interests. The manual states that an application for a short-term guardianship order to the chief executive should be made when:

- the child cannot be safely left at home using a lesser order;
- Child Safety is working towards the reunification of the child with the family, and one of the following circumstances apply:
    - there is no available parent to exercise guardianship and be involved in case planning
    - it is necessary to actively remove guardianship from the parents, due to the very serious nature of the harm, or because they are incapable of exercising guardianship; or
    - it is assessed that the parent will fail to make appropriate guardianship decisions, such as schooling and health care, and therefore it is in the child's best interests for guardianship to be vested in the chief executive.

Duration and consecutive short-term orders

Note the amendments to the Act which came into force in October 2018, which state **a child is not to be subject to consecutive short-term custody or guardianship orders which result in them being in care under short-term care arrangements for more than 2 years**. See further information under 6.3.1 above.

[214] s 61(e) *CPA*.

Before extending or making a further child protection order granting custody or short-term guardianship of the child, the court must have regard to the child's need for emotional security and stability.[215]

7.5 *A long-term guardianship order*

A long-term guardianship order can be granted to the chief executive or to someone else until the child turns 18 years. In addition to the factors that the court must be satisfied of under section 59(1) of the Act (see above), the court **must** also be satisfied either:[216]

- there is no parent able and willing to protect the child in the foreseeable future **or**
- the child's emotional security will be best met in the long term by making the order.

A long-term guardianship order may be made granting guardianship to:

- A suitable family member, other than a parent of the child;[217]
- A suitable person, other than a family member, nominated by the chief executive.[218] The court **must not** make this order unless the child is already in custody or guardianship under a child protection order;[219] or
- The chief executive.[220] The court **must not** make this order if the court can properly grant guardianship to another suitable person.[221]

7.5.1 **Comment**

DCPL v PMK & Ors (No. 2) [2018] QChC 4 is an example of where the child's long term emotional security should take precedence over whether the parents may eventually be capable of protecting the children from harm. The Magistrate made a short-term custody order and this was appealed by DCPL on the basis the Magistrate had erred by failing to consider whether each child's need for emotional security will best be met by a long-term guardianship order, as required in section 59(8) of the Act. His Honour Dearden DCJ discussed the definition of emotional security and considered at paragraph [27]:

> *"In short, the child's need for "emotional security" as defined in CPA s59(6)(b), in the context of the Explanatory Notes and dictionary definitions, is in my view, a need for the child's mental feelings to be protected from or not exposed to danger."*

Similarly, in *Director of Child Protection Litigation v MCE & Anor* [2020] QChC 15 the DCPL appealed the decision to order short-term guardianship of the child to the Chief Executive on a number of grounds[222], namely there was insufficient evidence before the court to draw a conclusion that

[215] s 59(8) *CPA*.
[216] s 59(6) *CPA*.
[217] s 61(f)(i) *CPA*.
[218] s 61(f)(ii) *CPA*.
[219] s 59(7)(a) *CPA*.
[220] s 61(f)(iii) *CPA*.
[221] s 59(7)(b) *CPA*.
[222] outlined at [1]

reunification could be achieved with either parent by the time the short-term guardianship order expired in March 2021. Her Honour Richards DCJ noted at paragraph [60]:

> "*having regard to the provisions of s 62 of the Child Protection Act 1999, the requirement to promote stability is paramount in this case. This is a young child who needs to know where his home will be and who his carers will be. He has carers who have looked after him continuously since he was very young and who are willing to continue in that role. The child has been in limbo for in excess of five years now and it is beginning to affect his well-being*."

In allowing the appeal and making a long-term guardianship order, Richards concluded at paragraph [62] that, "*the best interests of the child dictate that there should be finality in this matter. The safety, well-being and best interests of the child are best achieved by his remaining with his current carers*.".

The Child Safety Practice Manual outlines that a long-term guardianship order is sought only after a period of case planning has been undertaken, and family reunification has been attempted but has failed:

> "*Once a decision is made to pursue an alternative long-term stable living arrangement, it is not appropriate for a child to remain on a short-term custody or short-term guardianship order*".

There are a myriad of factors which must be considered by Child Safety and DCPL before they proceed with a long-term guardianship application. Some of those factors are detailed in this Child Safety practice resource.

7.6 *Permanent Care Order*

A Permanent Care Order (PCO) is an order that grants permanent guardianship of the child to a suitable person, other than a parent of the child or the chief executive, nominated by the Chief Executive.[223] A PCO is less intrusive than adoption (which severs the child's relationship with the parents entirely), but more intrusive than a long-term guardianship order to other (which still has ongoing Departmental involvement and parents can apply to Court to revoke this order).

Section 59(7A) of the Act requires the Court to be satisfied of the following before making a PCO:

(a) the person to whom guardianship of the child is to be granted under the order (the proposed guardian) is—
    (i) a suitable person for having guardianship of the child on a permanent basis; and
    (ii) willing and able to meet the child's ongoing protection and care needs on a permanent basis; and
    (iii) committed to preserving—
        (A) the child's identity; and
        (B) the child's connection to the child's culture of origin; and

[223] s 61(g) *CPA*.

(C) the child's relationships with members of the child's family in accordance with the case plan for the child; and

(b) the child has been in the care of the proposed guardian, under a child protection order granting custody or guardianship of the child to the chief executive or the proposed guardian, for a period of at least 12 months immediately before the making of the application.

However section 59(7B) confirms the Court may still make a PCO even if the requirement of section 59(7A)(b) has not been met, if it would be in the child's best interests to do so. For example, when the guardian is caring for one or more siblings of the child.

In deciding whether to make a PCO for an Aboriginal or Torres Strait Islander children the Childrens Court **must** have proper regard to the additional matters[224] set out in section 59A(2) of the Act, being:

(a) Aboriginal tradition and Island custom relating to the child; and
(b) the Aboriginal and Torres Strait Islander child placement principle in relation to the child.[225]

Under section 59A(3) the Childrens Court may only make the PCO if it is satisfied:

(a) the case plan for the child includes appropriate details about how the child's connection with his or her culture, and community or language group, will be developed or maintained; and
(b) the decision to apply for the order has been made in consultation with the child, if the court considers consultation is appropriate.

To inform itself about the matters mentioned in section 59(A)(2)(a), the court may have regard to the views of:

(a) an independent Aboriginal or Torres Strait Islander entity for the child; or
(b) the child; or
(c) a member of the child's family.[226]

For a table comparing the child protection orders granting long-term guardianship to the Chief Executive, long-term guardianship to suitable other person and Permanent Care Order, see the table in Appendix 4.

[224] s 59A *CPA.*
[225] s 59A(2) *CPA.*
[226] s 59A(4) *CPA.*

7.7 *Section 59 checklist for making a child protection order*

Checklist for making a child protection order

1. At the date of the application, was the child a child in need of protection:
    - Had the child suffered harm, was the child then suffering harm or was the child at unacceptable risk of suffering harm?
    - Did the child have a parent who was willing and able to protect the child from harm?

2. Is the order sought by the applicant appropriate and desirable for the protection of the child?

3. Has a case plan been developed or revised for X that is appropriate for meeting X's assessed protection and care needs and has it been filed in the court?

4. If the matter is contested, has a conference been held between the parties or have reasonable attempts been made to hold such a conference?

5. Have the child's wishes been ascertained and made known to the court?

6. Is it likely that the protection of the child can be achieved by an order on less intrusive terms than that which is the subject of the application?

See Chapter 7.1 for discussion of Transition orders where a Court declines to make a child protection order.

7.8 *Is the case plan "appropriate"?*

Section 59(1)(b) of the Act requires there to be a case plan that is appropriate for meeting the child's assessed protection and care needs and for an order granting long-term guardianship of the child, that includes living and contact arrangements for the child. When deciding if a case plan is appropriate it must include the following matters:[227]

(a) the goal for best achieving permanency for the child and the actions to be taken to achieve the goal;
(b) if returning the child to the care of a parent of the child is the goal for best achieving permanency for the child—an alternative goal in the event that the timely return of the child to the care of the parent is not possible;

[227] s 51B(2) *CPA*.

(c) for an Aboriginal or Torres Strait Islander child—details about how the case plan is consistent with the connection principle stated in section 5C(2)(e).

Section 5F(5) of the Act sets out the requirements about how the chief executive or an authorised officer must perform functions under this Act involving an Aboriginal or Torres Strait Islander person.

The Act is clear that when making a significant decision about an Aboriginal or Torres Strait Islander child, a relevant authority,[228] **must** have regard to the child placement principles in relation to the child, and in consultation with the child and the child's family, arrange for an independent Aboriginal or Torres Strait Islander entity for the child to facilitate the participation of the child and the child's family in the decision-making process. This, as far as reasonably practicable, must be done in a way that allows the full participation of the person and the person's family group, and in a place with is appropriate to Aboriginal tradition or island custom.
Section 5H applies to an Aboriginal or Torres Strait Islander independent entity's attendance and participation in case planning meetings or in the review and preparation of a revised case plan for the child.[229]

In addition to the matters that must be included, the following matters may also be included:[230]

(a) any other goals to be achieved by implementing the plan;
(b) arrangements about where or with whom the child will live, including interim arrangements;
(c) services to be provided to meet the child's protection and care needs and promote the child's future wellbeing;
(d) matters for which the chief executive will be responsible, including particular support or services;
(e) the child's contact with the child's family group or other persons with whom the child is connected;
(f) arrangements for maintaining the child's ethnic and cultural identity;
(g) matters for which a parent or carer will be responsible;
(h) a proposed review day for the plan.

Section 51V provides that a child, who does not have a long term guardian, may, at any time, ask the chief executive to review the child's case plan.[231]

7.8.1 **Family Led Decision Making**

To support Aboriginal and Torres Strait Islander children and families to meaningfully participate and exercise self-determination in regards to significant decisions, Child Safety may refer a family for family-led decision-making processes, when it is practicable and in the best interests of the child:

[228] s 5F(1) *CPA.*
[229] s 51L(5)(b) *CPA*. See also s 51W(6)(b) *CPA*.
[230] s 51B(4) *CPA.*
[231] s 51V(5) *CPA*.

- when deciding the outcome of an investigation and assessment, where an outcome of 'child in need of protection' is likely, and, if appropriate, the type of ongoing intervention required to provide for the child or young person's protection and care
- when developing a case plan.

Family-led decision-making during the investigation and assessment phase is aimed at providing a culturally inclusive decision-making process where a child's family group collaboratively identify and address safety concerns, with the intent of forming alternative plans to ongoing intervention.

Where it is determined the child is in need of protection, family-led decision-making is focused on identifying strategies to minimise the degree and length of necessary ongoing intervention, including keeping the child connected with family, community and culture where the child cannot remain safely at home.

The Act provides for family group meetings to facilitate family-based responses to children's protection and care needs. It allows for a family group meeting to be convened by a delegated officer (usually the family group meeting convenor) or by a private convenor.[232] Family group meetings for an Aboriginal or Torres Strait Islander child should be family-led processes as far as possible, facilitated by the Family Participation Program or family group meeting convenor.

7.8.2 **Family Participation Program**

The Family Participation Program comprises services delivered by Aboriginal and Torres Strait Islander community-controlled organisations to support a child's family group to participate in child protection processes. Families are assisted to develop family-based solutions, with the aim of ensuring the safety of Aboriginal and Torres Strait Islander children within family, community and culture. The Family Participation Program recognises that children and families have the best knowledge about the strengths and risks that exist in their own families and communities.

7.8.3 **Family Group Meeting Convenor**

At times a child and family may choose to participate in a family-led decision-making process facilitated by the family group meeting convenor.

As it is not facilitated independently of Child Safety, it differs to the model of 'Aboriginal and Torres Strait Islander family-led decision-making', which is undertaken exclusively by the Family Participation Program or other Aboriginal or Torres Strait Islander service.[233]

7.9 ***Consent orders***

Generally, the fact that the parties do not oppose the making of an order will be a matter of great weight for the Court. However, this is not a consent jurisdiction and consent is not binding on the

[232] s 51H *CPA*.
[233] Child Safety Practice Manual, Decision-making about Aboriginal and Torres Strait Islander Children, Chapter 10.1.

Court as there is a duty on the Court to exercise its independent judgment to make an order which it considers is in the best interests of the child. When parties come to an agreement prior to the final hearing the final order can be made during the callover of child protection applications or at the end of a hearing the court may make the order or dismiss the application. Furthermore, parties coming to an agreement does not waive DCPL's obligation to file a notice stating their disclosure duty has been complied with, pursuant to rule 61 of the Childrens Court Rules.

In the Family Court case of *T v N* [2003] FAM CA 1129 Moore J highlighted the independent role of a judicial officer dealing with cases involving the welfare and rights of children. The case involved the issue of contact by a father with his children in circumstances where there was considerable evidence before the court about the father's history of violence and drug use. The mother and the father were legally represented and the children were separately represented. Following discussions among Counsel, proposed consent orders were submitted to the Court. Moore J refused to make the orders on the basis that she had a statutory responsibility to make orders consistent with the best interest of the children, irrespective of any agreement reached by the parties. Her Honour held that the untested affidavits established on first appearance a risk to the children if the proposed orders were made and that the magnitude of that risk was unacceptable.[234]

7.10 *Parental capacity to understand proceedings*

As to the efficacy of the Appellant's consent in view of her mild intellectual disability and absence of legal representation see *KD v Department of Child Safety and Others* [2011] QChC 8:

This was an appeal against a decision of a Childrens Court magistrate to make, by consent, an order granting long-term guardianship of the child to the Chief Executive on 12 November 2009. The appellant had been assessed in early 2007 as "functioning at the mildly disabled range of general intellectual functioning; borderline average verbal intellectual abilities and extremely low average range of performance intellectual abilities."[235] She had been legally represented up until the 12th November but following the last mention on 8 October 2009 she had been refused legal aid. Ms Hurse a departmental officer wrote to the Childrens Court Magistrate advising that the matter was set down for final review mention on 19 November and that the mother's legal representative had withdrawn due to the refusal of the legal aid application and seeking to have the matter listed for early mention on 12 November 2009. The 12 November was the last day the appellant could appeal against her refusal of aid.

At the mention on 12 November the appellant attended with a support person. The departmental officers had a brief conversation with her about what the process of a child protection hearing entailed and indicated that the Department would be seeking a long-term order. The appellant consented to the order at the time.

[234] *T v N* [2003] FAM CA 1129 at [12]-[13].
[235] *KD v Department of Child Safety and Others* [2011] QChC 8 at p 3.

The appellant subsequently appealed on the grounds that her consent was obtained in circumstances of duress and in circumstances that were not fair to her, that she was not legally represented and that she felt pressured and without any choice but to consent to the application.

Hi Honour Judge Wall QC noted that:[236]

> "*The Magistrate had before him the application for the child protection order which included the background information about the appellant's intellectual capacity and he would therefore have been aware that she was a person with a mild intellectual disability which affected her verbal comprehension and complex reasoning*."

After examining the transcript His Honour came to the view that:[237]

> "*The Magistrate seemed to be more concerned with the absence of funding for legal representation than with the efficacy of any consent forthcoming from the appellant.*"

His Honour further commented that the Magistrate did not appear to have directed his mind to the provisions of section 106, subsection (2) of the Act which provides that the Childrens Court must not hear a proceeding involving a parent who has a disability without a person to effectively assist the parent suffering from the disability:[238]

> "*When he asked the appellant: "Do you want to consent to an order?" he should, in my view, have taken some steps to ensure that the appellant understood precisely what was going on and what had been said to her in the period leading up to the indication by her that she was consenting. A new aspect of the hearing had been raised about which she had not had an opportunity to seek any advice about, namely, the fact that other parties to the application had requested the Magistrate hear the matter on the papers in circumstances where she would not be able to ask questions of any of the witnesses. I think it was incumbent upon the Magistrate to further explain to the appellant the position in relation to that aspect.*
>
> *The impression given by all the material before me is that the appellant may have felt she had no option but to consent to the court pursued by the Department, supported as it was by Ms Fox [the separate representative]. I accept thought that at all times the Department and Ms Fox considered they were acting in the best interests of the child but the impression given by the appellant is that, absent legal aid, it was all over and she didn't have any option but to consent to the Department's application. This impression was, I think, reinforced by the relatively perfunctory way in which the matter was disposed of in court…*

[236] *KD v Department of Child Safety and Others* [2011] QChC 8 at p 14-15.
[237] *KD v Department of Child Safety and Others* [2011] QChC 8 at p 15.
[238] *KD v Department of Child Safety and Others* [2011] QChC 8 at p 15-17.

> *…In all of the circumstances I have some reservations about the efficacy of the consent obtained and given by the applicant and the circumstances by which she came to give her consent.*
>
> *…In the circumstances I think there is a sufficient doubt surrounding the consent given by the appellant to justify setting aside the order and allowing the appeal*".

Where there is an unrepresented parent who appears to lack capacity and the magistrate considers this a concern, consideration should be given to having the Department or a representative contact the Office of the Public Guardian (OPG) if appointed for legal matters for the person, or otherwise consider making an application to QCAT for a guardian to be appointed (**see** Appendix 5**).**
Section 106(2) of the Act states if the child, parent or other party has difficulty communicating in English or a disability that prevents him or her from understanding or taking part in the proceedings, the Childrens court must not hear the proceeding without an interpreter to translate or a person to facilitate their taking part in the proceeding.

If all parties come to an agreement about the most appropriate child protection order, and the court makes this order, the Magistrate still has an obligation to provide reasons for their decision under section 104 of the Act, and to be satisfied of the matters in section 59 of the Act. See *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16 for discussion.

7.11 *Duration of orders*

A child protection order must state the time when it ends:

- Not more than one year after the day on which it is made for an order other than a custody or guardianship order;
- Not more than 2 years after the day on which it is made for a custody or short-term guardianship order; or
- When a child turns 18 for a long-term guardianship order.[239]

The order ends at the stated time unless it is extended or earlier revoked.

All child protection orders end when a child turns 18.

7.11.1 **Comment**

In *Director-General v G-H & Ors* [2007] QChC 6 the Court considered an appeal by the Director-General of Child Safety from the decision of the Childrens Court at Redcliffe refusing an application for further orders in respect of three children. The three children were the subject of protection orders made on 24 May 2004 to continue in force for two years. On 24 May 2006 the Department filed in the court applications to revoke those orders and make further orders with respect to the children. On 8 January when the matter came on for hearing, the learned Magistrate decided the

[239] s 62 *CPA*.

protection orders had expired on midnight 23 May 2006 and therefore he had no jurisdiction to entertain the applications. Further he found that the applications filed on 24 May 2006 did not enliven his jurisdiction.

After examining section 62 of the Act and section 38 of the *Acts Interpretation Act 1954* (Qld) His Honour Judge Samios stated:[240]

"*In the present matter the orders were made on 24 may 2004 and are stated to continue in force for a period of two years. In my opinion having regard to the provisions of s62 of the Act that must be taken to mean not more than two years after the day it is made. The order was made on 24 May 2004. Two years after the order was made would mean the order expired at midnight on 24 May 2006.*

In my opinion the time began to run on the day the order was made but the time it ends by the terms of the order must not be more than two years after the day the order is made. The day the order is made is part of the duration of order as is the two years after the day it is made. The stated time when the order is to end must not be more than two years after the day it is made.

In my opinion that is the proper construction of s 62 of the Act and the orders that have been made in this instance.

If recourse were had to s 38 of the Acts Interpretation Act 1954 subsection 1 of that section provides that the two years is calculated by excluding the day the order is made. In this matter that day is 24 May 2004.

Therefore, in my opinion the learned magistrates had jurisdiction to entertain the applications. Further it was not a bar to hearing the applications that the applications had been filed on 24 May 2006 and the hearing was taking place on 8 January 2007."

See *Director of Child Protection Litigation v KC & PC* [2021] QChCM 1 concerning the meaning of "reasonably achievable" in section 62(5) in terms of whether reunification is achievable within the period of a further short term order.

7.12 *Extension of orders*

The DCPL may apply to the Childrens Court to extend a child protection order (other than a long-term guardianship order)[241]. The application must be made before the order ends.[242] If the application is to extend a child protection order granting custody or short-term guardianship of a child, the court must not extend the order for a period of time that would result in the child being in continuous care for a period of 2 years or more, unless the court is satisfied:[243]
It is in the best interests of the child for the order to be extended for a longer time, and

[240] *Director-General v G-H & Ors* [2007] QChC 6 at [8]-[12].
[241] s 64(1) *CPA*, s 10 *Director of Child Protection Litigation Act* 2016.
[242] s 64(2) *CPA*.
[243] s 64(3)-(4) *CPA*.

Reunification of the child with the child's family is reasonably achievable within the longer time.

Before the Court makes an order to extend or make a further custody order or short-term guardianship order, the court must have regard to the child's need for emotional security and stability.[244]

If the Court refuses to extend an order, the Court may consider making a Transition Order (refer to Transition orders at Chapter 8).

7.13 *Variation or revocation of child protection orders*

DCPL, a child's parent or the child may apply to the Childrens Court for an order to vary or revoke a child protection order or to revoke an order and make another child protection order in its place.[245]

Under section 65(2) of the Act, a child's parents cannot:

Apply for an order to revoke a child protection order for the child and make another child protection order in its place that grants guardianship of the child;
Without the leave of the Court, apply for an order to vary or revoke a child protection order for the child if the Court has already decided on an earlier application by the parent to vary or revoke the child protection order;
Apply to vary a long-term guardianship order granting long-term guardianship to the Chief Executive to grant long-term guardianship to a suitable person mentioned in s61 (f)(i) or (ii).

For the Court to grant leave under s65(2)(b), the Court must be satisfied the child's parent has new evidence to give to the Court.[246]

The Court may revoke a child protection order for a child only if it is satisfied the order is no longer appropriate and desirable for the child's protection.[247]

Note section 65(8), 'child protection order' in section 65(1) does not include an interim order under section 67.[248]

However, the above section 65 principles do not apply to permanent care orders, only DCPL can apply to the Court to have those varied or revoked. DCPL may do this if they are satisfied:[249]

> The child has suffered significant harm, is suffering significant harm, or is it at an unacceptable risk of suffering significant harm and the child's permanent guardian is not able and willing to protect the child from harm; or

[244] s 59(8) *CPA*.
[245] s 65(1) *CPA*.
[246] s 65(3) *CPA*.
[247] s 65(6) *CPA*.
[248] NB s67(5) *CPA* interim order has effect for the period of the adjournment.
[249] s 65AA *CPA*.

The child's permanent guardian is not complying, in a significant way, with the guardian's obligations under section 79A(1).

Where a court revokes a child protection order, see Transition Orders (below).

8 DECLINING TO MAKE A CHILD PROTECTION ORDER

8.1 *Transition Orders*

Transition orders provide the Court with the discretionary power to set a future end date for an existing child protection order, when it declines to make certain further orders. The future end date is not to be more than 28 days from the day of the Court's decision. The purpose of the order is to ensure that the Department has time to prepare and assist the child to return to their parents' care in a planned way that minimises the disruption and trauma to the child.[250]

A transition order may be made on the application of a party or on the Court's own initiative following a decision by the Court to:[251]

- Revoke, or refuse to extend or grant a further order granting custody to a suitable person who is a relative of the child
- Revoke, or refuse to extend or grant a further order granting short-term guardianship to the chief executive
- Decide an appeal in relation to an order granting custody to a suitable person who is a relative of the child or the chief executive, or granting short-term guardianship to the chief executive, in favour of a person other than DCPL
- Revoke an order granting long-term guardianship to a suitable person or the chief executive
- Decide an appeal against the making of an order granting long-term guardianship to a suitable person or the chief executive in favour of a person other than DCPL.

A Court may make a transition order if satisfied the order is necessary to allow for the gradual transition of the child into the care of the child's parents in a way that supports the child, may reduce any disruption or distress experienced by the child and is otherwise in the best interests of the child.[252]

When deciding whether to make a transition order, the court must have regard to the child's wishes and views (if able to be ascertained) and the parents' readiness to care of the child. The Court may have regard to any other relevant matter.[253]

---

[250] Second reading speech, Hon PG Reeves, Minister for Child Safety and Minister for Sport, *Child Protection and Other Acts Amendment Bill*, Handsard 10 June 2010, p 2033.
[251] s 65A *CPA*.
[252] s 65B(1) *CPA*.
[253] s 65B(2) *CPA*.

If the court makes a transition order, the chief executive must prepare a plan for the period of the transition order that states how the chief executive intends to provide for the support and gradual transition of the child into the care of their parents.[254]

9 APPLICATION IN A PROCEEDING

Section 73 of the Childrens Court Rules states that, subject to rule 74 and the making of an oral application, or unless an Act or another rule states otherwise, if a person makes an application in a proceeding, the application must:

a) be in the approved form; and
b) be filed in the court; and
c) be served on each party to the proceeding; and
d) state the decision the applicant is seeking from the court; and
e) identify the proceeding, including by reference to the name of the parties and the file number for the proceeding.

The court may also issue directions about how an application is to be heard and decided, including directing the parties to the application to file material by a particular day; and directing that the application be decided with or without a hearing.[255] However, if the court directs that the application is to be decided with a hearing, the registrar must notify the applicant of the day and time of the hearing.

If the application is in a child protection proceeding and is made by a person who is not a party to the proceeding, the person is not required to serve the application on each party to the proceeding. In these circumstances the Registrar must give written notice to the DCPL who must serve the document on the other parties to the application.[256]

Under Rule 74 of the Childrens Court Rules a party to a proceeding may make an oral application for any order or relief the court may make or grant on a written application. On application the Court may permit the application to proceed orally, in a way and on the conditions the court considers appropriate or direct the party to make the application in writing in accordance with rule 73.

In deciding whether to permit the application to proceed orally the Court must consider:

- as paramount for a decision in a CAO proceeding or child protection proceeding—the child protection principles; or
- any unreasonable prejudice or detriment that may be caused to a party or potential party to the proceeding; and the requirement to provide procedural fairness to another person.

[254] s 65D *CPA*.
[255] r 73(3) and 73(4) *CPR.*
[256] r 73(2) *CPR.*

See *GGD v Director of Child Protection Litigation & Ors* [2021] QDC 309 where Porter QC DCJ found Rule 16 did not restrict the filing of documents by lodgement in the registry. The Magistrate had the power to permit the filing of documents in court. Further Rules 73 and 74 permitted the party to make his application for contact orally and the Magistrate erred by not allowing the party to do so.[257]

10 GENERAL PROVISIONS TO NOTE RE: PROCEEDINGS

10.1 *Court to give reasons*

When making a decision under the Act, the Childrens Court must have regard to the principles stated in sections 5A to 5C, to the extent they are relevant, and state the reasons for its decision.[258]

The Court has an obligation to ensure, as far as practicable, that the child's parents and other parties (including the child, if present) understand the nature, purpose and legal implications of the proceedings and any order or ruling of the court.[259]

10.1.1 **Comment**

See *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16 where it was found a Magistrate's decision to make a child protection order was appealable on the basis of inadequate reasons and the Magistrate not meeting their obligation under section 104 of the Act.

A Magistrate's obligation to provide adequate reasons also extends to interim decisions, as held in *DCPL v FGE & FPA (No. 2)* [2018] QChC 17. In this decision, His Honour Lynham DCJ adopted the principles of Victorian Court of Appeal case, *Lam v Lam* [2017] VSCA 17 at paragraphs 106-113 as to what principles should be applied in determining whether the reasons for a decision are adequate:

> *Reasons are a necessary incident of the judicial process and are important not simply as a means of enabling appeals to be properly conducted and determined, but also so as to enable parties to perceive that justice has been done in their case, to enable the public generally to perceive that justice is being done in cases before the Courts, as a means of providing for judicial accountability, and because judgments perform an important educative function.*
>
> *The extent and detail of the reasons required in a particular case will vary depending upon the nature of the case, the complexity of the issues, and the evidence and the submissions made (…)*
> *Where factual matters are concerned, the reasons ought not leave the reader to wonder which of a number of possible routes have been taken to the conclusion expressed.*
>
> *In Soulemezis, McHugh JA (as he then was) observed:*

[257] At paragraph [14].
[258] s 104 *CPA*.
[259] s 106 *CPA*.

> *Where the resolution of the case depends entirely on credibility, it is probably enough that the judge has said that he believed one witness in preference to another; it is not necessary 'for him to go further and say, for example, that the reason was based on demeanour': Connell v Ackland City Council [1977] 1 NZLR 630 at 632-633 per Chilwell J.*

> *If there is evidence which is uncontradicted, reasonable and inherently probable, and which goes to the core of the case, a failure to refer to the evidence has been held to constitute appellable error on the basis that the evidence had either been rejected without any reason being given, or had not been considered as it should have been.*

> *(…) A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge's failure to mention such facts and arguments would be evidence that he or she had not properly considered the losing party's case.*

10.2 *Court not bound by rules of evidence*

In a child protection proceeding, the Childrens Court is not bound by the rules of evidence but may inform itself in any way that it thinks appropriate.[260]

10.2.1 **Comment**

MDS v DCPL & Ors [2017] QChC 6 discussed section 105 in further detail. His Honour Morzone QC DCJ stated at paragraph [22]:

> *The premise behind the provision is clear and long held in child protection matters. The court ought to have all pertinent information to fulfil the paramount purpose of the proceedings to protect children ensuring that the safety, wellbeing and best interests of a child are paramount. In doing so the rules of evidence and procedure should serve and not thwart that purpose.*

However, the Court's use of evidence is not completely fettered to avoid an injustice. His Honour goes on to state at [26]:

> *It is well settled that, as a matter of law, although not bound by the rules of evidence, the Court's decision must derive from relevant, reliable, and rationally probative evidence that tends logically to show the existence or non-existence of facts in issue. It is not enough to suspect or speculate that something might have occurred.*

For example, in *DCPL v MAP & CJS* [2018] QChC 20, it was found the Department's evidence of neglect was based on the concerns about the children having behavioural, communication and developmental deficits. However there were no medical reports tendered to demonstrate the delays

[260] s 105 *CPA*.

were as a result of parental neglect. The causative link to the harm was subject of opinion evidence by the Department and tended to conflate historical and contemporary information so as to demonstrate or purport to demonstrate a risk of harm to the children. The weight of the opinion evidence was undermined by the quality of various sources so as to be conjecture, speculation and, in some respects, guess work (per [74]). This did not meet the evidentiary burden and the decision of the Magistrate not to grant temporary custody to the Department was upheld.

This provision was the subject of commentary by Tamara Walsh and Heather Douglas in *"Lawyers' Views of Decision-Making in Child Protection Matters: The Tension Between Adversarialism and Collaborative Approaches*".[261]

> *"Child protection matters are dealt with in a less formal manner in court than traditional civil proceedings. In Children's Courts around Australia, the rules of evidence do not bind the court, proceedings are to be conducted with as little formality and technicality as possible, and courts are permitted to inform themselves in such a manner as they see fit. The premise behind this is clear – in order for the court to make the best decisions possible to bring about protective outcomes for children, all pertinent information should be made available to the court. Yet it must be borne in mind that while procedural rules may be relaxed, they can never be completely discarded. This has been noted by the High Court in other contexts, for example, in R v War Pensions Entitlement Tribunal; Ex parte Bott, Evatt J remarked:*
>
> *Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence.' Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.[262]*
>
> *It is well established that regardless of any applicable rules of evidence, a tribunal must, as a matter of law, base any decisions it makes on 'rationally probative evidence'. That is, decisions should not be made based merely on matters of 'suspicion or speculation' where certain conduct may or may not have occurred.[263] Evidence must always be relevant,[264] and reliable,[265] and there is no reason in law to suggest that this is less the case in child protection matters that any other. Indeed, this seems particularly important in a child protection context because of the degree of discretion granted to child protection officers, and the gravity of the implications of decisions made for children and families."*

---

[261] Tamara Walsh and Heather Douglas, 'Lawyers' Views of Decision-Making in Child Protection Matters: The Tension Between Adversarialism and Collaborative Approaches' [2012] Monash University Law Review 19.
[262] (1933) 50 CLR 228 at 256. See also *Local Government Board v Arlidge* [1915] AC 120 at 132, 137 and 147.
[263] *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139 at156.
[264] *Casey v Repatriation Commission* (1995) 60 FCR 510. See also *Goldsmith v Sandilands* [2002] HCA 21; (2002) 190 ALR 370 at 377; *Nicholls v The Queen* [2005] HCA 1; (2005) 219 CLR 196.
[265] *R v Board of Visitors of Hull Prison; Ex parte St Germain [No 2]* [1979] 1 WLR 1401 at 1411; *Grey v The Queen* [2001] HCA 65; (2001) 184 ALR 593; *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* [2000] HCA 50; (2000) 175 ALR 209.

See *Department of Communities, Child Safety and Disability Services v S & Anor* [2013] QChC 33 where His Honour Judge Samios said that while section 105 provides that the court may inform itself in any way it thinks fit and is not bound by the rules of evidence, it does not authorise the Magistrate to meet with the parents in the absence of the Department.[266]

Also note that whilst the Court may inform itself in any way it thinks fit, the boundaries of legal professional privilege should still be respected and maintained. For example, as considered in *DCPL v LGC & DJC* [2019] QCHM 1, if a legal representative commissioned a psychological report for a respondent parent for the purposes of ascertaining whether said parent has capacity to instruct, then that report can be subject to legal professional privilege and the other parties cannot subpoena it.

The Act also provides guidance about what is not admissible. For example, communications at the court ordered conference are not admissible without the consent of all the parties.[267] Furthermore if a party attends a family group meeting or otherwise participated in the making of a case plan, it does not mean that party has admitted to anything alleged about them merely because they participated.[268] However this does not affect the admissibility of anything the party says or does at the family group meeting.[269] See rule 65, 66 and Part 8 of the *Childrens Court Rules 2016* (Qld) for further guidance around evidence in child protection proceedings.

See also Loury QC DCJ in *PJR v Director of Child Protection Litigation & Ors* [2022] QChC 3 in relation to an appeal against an application under section 99 CPA, at page 7:

> *"…the Court, in considering this application under section 99, could inform itself in any way it considered appropriate, was not bound by the rules of evidence and needed only be satisfied of the matters on the balance of probabilities[270]. However, the Court's decision must derive from relevant, reliable and rationally probative evidence that tends to logically show the existence or non-existence of the facts in issue.[271]*

10.3 *Proof on the balance of probabilities*

The standard of proof in Childrens Court proceedings is the civil standard – on the balance of probabilities.[272]

Take note that previous Children's Court of Queensland decisions, on appeal from the Children's Court constituted by a Magistrate, have confirmed the adoption of the *Briginshaw* principles as to whether an issue has been proved on the balance of probabilities. In *Briginshaw v Briginshaw*,[273] Dixon J stated:

---

[266] Department of Communities, Child Safety and Disability Services v S & Anor [2013] QChC 33 at [19].
[267] s 71 *CPA*.
[268] ss 51YA-YB *CPA*.
[269] s 51YA(3) *CPA*.
[270] s 105 *CPA*
[271] *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 per Meagher JA; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 226.
[272] s 105(2) *CPA*.
[273] (1938) 60 CLR 336, at 362.

> *"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved."*

This approach has been confirmed in *MDS v DCPL & Ors* [2017] QChC 6, where His Honour Morzone QC DCJ found at paragraph [32]:

> *"However, this principle in Briginshaw does not create another standard of proof. That is, it does not displace the requirement that the court "need only" be satisfied on the balance of probabilities; instead it permits the court to require a higher degree of satisfaction to discharge that standard where the seriousness of the allegations and consequences of sustaining them warrant that approach. So much was affirmed by the High Court in Refjek v McElroy and Neat Holdings Pty Ltd v Karajan & Holdings Pty Ltd."*

His Honour continues at paragraph [37]:

> *The grave consequences of sustaining the case here included the removal of a child from a parent's care and destroying or impairing the relationship between a child and a parent. In my view, the seriousness of the allegations in this case, and the gravity of their consequences, warranted a higher degree of certainty to be satisfied on the balance of probabilities.*

For other cases utilising the *Briginshaw* principles when determining whether a child is in need of protection, see *AG & TG v DCPL & Anors* [2017] QChC 14 and *DCPL v ADB & Ors* [2018] QChC 30.

10.4 *Hearing the views of children*

Before making a child protection order, the Court must be satisfied that the child's wishes or views, if appropriate, have been made known to the Court.[274] The court may be informed of the child's views through one of the following avenues:

- Through the appointment by the court of a separate representative;
- Through the appointment of a direct representative for the child;
- Through the preparation of a social assessment report;
- Through the affidavit material filed by the departmental officers during the proceedings;
- Through a Child Advocate from the Office of the Public Guardian; or
- In person themselves where age appropriate.

A child's views and wishes are just one factor the Magistrate must consider before making a decision, and it is a matter for the Court how much weight is placed on these views. The subject child has the right to participate to the extent that they choose. They are a party to the proceedings (schedule 3, *'party'*), and have the right to appear pursuant to section 108 of the Act. There is no obligation on the child to provide their and wishes directly, they cannot be compelled to give evidence (section

[274] s 59(1)(d) *CPA*.

112), and they do not have to participate in child protection proceedings if they do not seek this participation.

In *Director of Child Protection Litigation v SYA & Anor* [2021] QChC 5 an appeal from an order dismissing an application seeking long term guardianship to the Chief Executive was dismissed given the strong wishes expressed by child. The child, JYG, had been subject to an interim order grading temporary custody to the Chief Executive and had been placed with his paternal grandmother and his siblings. He expressed a wish that a "*[long term] order not be made in relation to him and he does not wish to avail himself of any assistance package from the Department designed to assist his transition to adulthood*." He turned 18 on 18 March 2021 and intends to remain living with his grandmother.

At paragraphs [5] – [6] the appellant appealed on the following grounds:

1. The Children's Court Magistrate was misdirected with respect to the relevant statutory test contained in the s 59(1)(a) of the *Child Protection Act 1999* (Qld).
2. The Children's Court Magistrate failed to have regard to all relevant considerations in determining whether an order was appropriate and desirable.
3. The Children's Court Magistrate placed too much weight on the view and wishes of JYG to the extent that the Court did not have the paramount consideration as being the safety, wellbeing and best interests of JYG, both through childhood and for the rest of his life.

The Separate Representative did not support the appeal [14]. At paragraph [25] Her Honour Richards P noted:

> "*… However, s 59(1)(a) provides that the Court can only make the order if the Court is satisfied that the child is a child in need of protection and the order is appropriate and desirable for the child's protection. Furthermore, the Act mandates that the Court has to take into account the child's wishes or views, that the protection sought to be achieved by the order is unlikely to be achieved by an order under less intrusive terms and that the Court must be satisfied that the child's need for emotional security will be best met in the long term by making the order*."

In dismissing the application, at paragraphs [26-27] Richards P concluded that, this is an unusual case. The child has expressed very strong views that he does not wish to engage with the Department or to be subject to an order of guardianship by the Department. While there are services the Department could provide to JYG that would assist him, "*… The fact that he is nearly 18 means in my view that his attitude should be given significant weight. He is on the cusp of adulthood*."

Rule 43 of the *Childrens Court Rules 2016* (Qld) confirms the Court may hear from a child in the way the Court considers appropriate, including:

- Hearing from the child orally in court or another place or with the use of technology, including an audio visual link or audio link;
- Hearing from the child without the other participants present;
- Receiving a document from the child;
- Receiving submissions by, or on behalf of, the child;

- Receiving submissions by a direct representative of the child or their Child Advocate from the Office of the Public Guardian;
- Receiving submissions by the separate representative of the child; or
- If the child is Aboriginal or Torres Strait Islander, receiving submissions from a person who may appropriately speak for the child in accordance with Aboriginal tradition or Island custom.

Rule 42 of the Childrens Court Rules provides that if a child wishes to participate in the proceedings, the court may make an order or issue a direction to assist the child to participate. This includes for example:

- The child may have a person nearby during all or part of an appearance,
- The child may appear at an appearance in a particular way,
- Service of the child under rule 31 is to occur in a particular way
- A requirement that something be done to assist the child to understand and participate.

10.5 *Children giving evidence*

Section 112 of the Act provides that a child cannot be called to give evidence in child protection proceedings without the leave of the court. The Court may only grant such leave if the child:

- Is at least 12 years of age;
- Is represented by a lawyer; and
- Agrees to give evidence.

If leave is granted and the child gives evidence, he or she may only be cross-examined with the leave of the court.

These provisions are consistent with article 12 of the UN Convention, which requires that a child or young person who is capable of forming their own views has the right to express those views freely in all matters affecting them, and that they must be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or indirectly.

10.5.1 **Comment**

For background information and advice in relation to the evidence of children, refer to "Child Development, Children's Evidence and Communicating with Children," Chapter 2, *Benchbook for Children Giving Evidence*.

There is growing evidence that facilitating a child's right to participate (where they seek this participation) is not only consistent with their legal rights but also in their best interests.[275] If a child is not able to participate in the way that they seek, this could send the message to them that their views are not valued and what they want is not of importance to the decision-maker, thereby potentially causing emotional harm to the child. The importance of children being afforded the

[275] QCPCI pg. 472.

opportunity to participate is also reflected in other child protection jurisdictions in Australia (see **Chapter 1.5** for links to Childrens Court benchbooks in interstate jurisdictions).

For resources on the benefits on child participation in proceedings, please review:

- Child Safety framework for the participation of children and young people in decision making, 2018
- G Force Children and Young People's Participation Strategy: G Force is a state-wide work group chaired by the Create Foundation and comprised of the OPG, Child Safety, Foster Care Queensland, PeakCare Queensland and other non-government organisations to support those working with young people in care.

10.6 *Parties to the proceeding and representation*

The parties to child protection proceedings are:

- The applicant
- The respondent parents;[276] and
- The child.[277]

The Court has an obligation to ensure, as far as practicable, that the child's parents and other parties (including the child, if present) understand the nature, purpose and legal implications of the proceedings and any order or ruling of the court.[278]

If the child, parent or other party has a difficulty communicating in English or a disability that prevents him or her from understanding or taking part in the proceedings, the Childrens Court must not hear the proceedings without an interpreter or other person to facilitate his or her participation.[279] The Court must consider issuing directions about things to be done to help decide whether a party to the proceeding understands the nature, purpose and legal implications of the proceeding; or ensure the party understands the proceeding.[280]

The child, the child's parents and other parties have a right to appear, and they may be represented by a lawyer.[281] Where a parent appears in an application for a child protection order and is not represented, the Court may continue with the proceeding **only** if it is satisfied the parent has had reasonable opportunity to obtain legal representation. This does not prevent the court from adjourning the proceedings.[282]

Where the parties are represented by a lawyer, the Court can enlist the assistance of the lawyers to assist the Court to ensure the parties understand the proceedings.

[276] s 57 *CPA*.
[277] Schedule 3 *CPA*.
[278] s 106(1) *CPA*.
[279] s 106(2) *CPA*.
[280] r 67(2)(c) *CCR*.
[281] s 108 (1)(b) *CPA*.
[282] s 109 *CPA*.

See *GGD v Director of Child Protection Litigation & Ors* [2021] QDC 309 where Porter QC DCJ found the Magistrate erred by failing to listen to the (unrepresented) applicant and failing to provide any assistance to the applicant as a litigant in person by explaining the processes of the Court and how they might facilitate matters he sought to agitate (at [22]). Note also His Honour's comment regarding the duty of counsel for the DCPL to assist where a litigant in person appears. At [23]:

> *"It is counsel's duty to assist a Court and to help the Court to avoid error. This includes assisting the Court to navigate the shoals and reefs of the 'duty to assist' where a litigant in person appears. Given the pressure of work presumably confronting her Honour, it was the Director's duty to assist her Honour to avoid the errors which occurred in this matter. That is all the more so given that the Director's counsel had greater knowledge of the background circumstances generally, and GGD's position in particular, and presumably had particular expertise in Child Protection law and practice. One might think that the Director ought to have intervened to assist her Honour to avoid falling into error."*

10.7 *Separate representatives*

Where a separate representative has been appointed for a child, the lawyer is not a party to the proceeding, but must do anything required to be done by a party, may do anything permitted to be done by a party, and the parties to the proceeding must act as if the separate representative were a party to the proceedings.[283]

10.8 *Non-parties*

The Court may hear submissions from some non-parties to a proceeding including a member of the child's family, and anyone else the court considers is able to inform it on any matter relevant to the proceeding. A submission may be made by a non-party's lawyer.[284] The Court may allow the non-party to view a document or other information before the court on an application for an order for a child, if satisfied of the criteria set out in section 113(3) of the Act, particularly:

- The extent to which the person may be able to inform the court abut a matter relevant to the proceeding; and
- The person's relationship with the child.

Section 113, by its terms, states that it applies in relation to "a proceeding on an application for an order for a child". An order is defined to mean "an assessment order, temporary custody order or child protection order".[285]

When making an order under section 113 allowing the person to take part in the proceeding, the Magistrate **must** state:

[283] s 110 *CPA*; r 37 *CCR*.
[284] s 113 *CPA*.
[285] CPA Schedule 3

- how the person may take part; and
- whether the participation is allowed until the proceeding ends or only for a stated part of the proceeding.[286]

In addition to the above, the Magistrate **may** also make an order:

- be subject to conditions; and
- requiring the person to do a thing that a party is or may be required to do; and
- providing that a stated provision of the Act, or all provisions, apply in relation to the person as if the person were a party.[287]

10.8.1 **Comment**

The non-party does not need to fall within the definition of 'family member'

In *DCPL v EM* [2021] QDC 298 concerned the right of appeal against a decision to refuse an application under section 113. The applicant for the section 113 order was named as the registered father on the chid's birth certificate however DNA testing showed he was not the child's biological father. On 4 January 2021 the applicant filed an application and supporting affidavit seeking to take part in the proceeding pursuant to section 113 of the Act. On 4 February 2021 that application was refused by the Childrens Court (magistrate) on the basis that the non-party did not fall withing the definition of 'family member'. The DCPL appealed that interim decision on the basis that the Childrens Court (magistrate) erred in her interpretation of section 113 of the Act.

In addition to the legal issue of the step-father's right of appeal (see Chapter 12 – Appeals for further discussion on this issue), Her Honour Loury QC DCJ discussed section 113 and the matters to be considered before determining a section 113 application.

Her Honour Loury stated at paragraph [25]:

> *[25] Section 113 of the Act provided that the learned Magistrate need consider two matters before determining the application. The first was the extent to which [the step-parent] may be able to inform the court about a matter relevant to the proceeding and secondly his relationship to the child.*[288] ***There was no requirement for the learned Magistrate to find that [the step-parent] fell within the definition of "family member" before he could be considered a proper person to participate in the proceedings****.*

10.9 *The role of the Public Guardian in child protection proceedings*

The OPG has a right of appearance in child protection proceedings in the Childrens Court, pursuant to section 108B of the Act. The statutory right of intervention allows the Public Guardian to

[286] s 113(4)(a)(i) and 113(4)(a)(ii) *CPA*.
[287] s 113(4)(b) to (d) *CPA*.
[288] s 5B *CPA*.

communicate the child's wishes, appear, make submissions, and lead and test evidence in the proceedings as required to advocate for and provide support to a child.[289] This is in addition to a child's right to engage a direct legal representative and the court's ability to order a separate representative for the child (see Appendix 6 - for information on referring a child to a Child Advocate).

The OPG also has a separate legislative function as decision makers for adults with impaired capacity. This is separate to the role of the Child Advocate, and a Child Advocate cannot act as a decision maker for an adult with impaired capacity. See Appendix 5 for further information about what to do if it is suspected an adult in the proceedings may have impaired capacity.

If the Public Guardian intends to appear in child protection proceedings, they must file a written notice of intention to the Court. However, a failure to comply with the requirement to provide written notice does not prevent the Public Guardian from appearing.[290]

The Public Guardian is not a party to a proceeding. Pursuant to rule 39 of the Childrens Court Rules, a reference to a party in the proceeding is taken to include the Public Guardian, unless the contrary intention appears or the context requires otherwise, to the extent necessary for the public guardian to perform its role and functions under section 108C of the Act.

10.10 *Restrictions on persons' presence at child protection proceedings*

Because of the nature of these proceedings involving a child and his or her family, restrictions are imposed on who may be present at the proceeding and the Court must take an active role in enforcing these restrictions. Section 20 of the Act obliges the court in a proceeding relating to a child to exclude from the room in which the court is sitting a person who is not:

- The child; or
- A parent or other adult member of the child's family; or
- A witness giving evidence; or
- A party or person representing a party to the proceeding; or
- The Chief Executive of the Department; or
- If the child is an Aboriginal or Torres Strait Islander person, a person representing an Aboriginal and Torres Strait Islander child and family welfare service; or
- A person whom the court permits to be present. This includes a person who is engaged in study relevant to the operation of the court, research approved by the chief executive or a person who, in the court's opinion will assist the court.

Note especially the Court's discretion under section 20(3)(b) of the Childrens Court Act 1992 (Qld) (Childrens Court Act) to allow a person who it considers will be of assistance to the court to be present for the proceedings.

[289] s 108C *CPA*.
[290] s 108B (2)-(3) *CPA*.

10.11 *Independent Aboriginal or Torres Strait Islander entity*

When the Court is exercising a power under the Act in relation to Aboriginal and Torres Strait Islander children, section 5G of the Act states that the Court **must** have regard to Aboriginal tradition and Torres Strait Island custom and the Aboriginal and Torres Strait Islander child placement principle. To inform itself about these matters, the Court may have regard to the views of an independent Aboriginal or Torres Strait Islander entity for the child, or the child or a member of the child's family.

Section 6 of the Act outlines who may be considered an independent entity. The independent entity or independent person will be an individual who is an Aboriginal or Torres Strait Islander person or another entity whose members include individuals who are Aboriginal or Torres Strait Islander. Furthermore, Child Safety must be satisfied the entity:

1. Provides services to Aboriginal or Torres Strait Islander persons; or
2. Is a representative of the child's community or language group; or
3. Satisfies the requirements mentioned in section 6(2), namely:
    a. Is a person of significance to the child or child's family; and
    b. Is a suitable person for associating on a daily basis with the child; and
    c. Is a person with appropriate authority to speak about Aboriginal or Torres Strait Islander culture in relation to the child or the child's family; and
    d. Is not an officer or employee of the Department.

Therefore, it is possible an independent entity may seek to be heard by the Court on matters of cultural importance to the subject child. Rule 72 of the Childrens Court Rules requires that the Court **must** consider how the Court is to be informed of, and whether to issue directions to ensure the Court is informed of, matters relevant to how the additional principles mentioned in the Act, section 5C(1) (**self-determination** and **long-term effects of decision**), section 5C(2) (Aboriginal and Torres Strait Islander **child placement principles**), and section 83 (**provisions for placing Aboriginal and Torres Strait Islander children in care**) apply to the child, and the views of the consulted entity about Aboriginal tradition or Island custom relating to the child.

Section 5H provides that where an independent Aboriginal or Torres Strait Islander entity intends to carry out a relevant activity for the child and either the child or child's family does not consent[291], the independent Aboriginal or Torres Strait Islander entity must not carry out the relevant activity for the child.[292]

A relevant activity is defined to mean any of the following:[293]

a) facilitating the participation of the child, and the child's family, in a decision-making process;
b) attending, and participating in, a case planning meeting for the child;
c) participating in the review and preparation of a revised case plan for the child;
d) otherwise participating in a family group meeting for the child;
e) attending a court ordered conference, under chapter 2, part 5, division 2, related to the child.

[291] s 5H(1) *CPA*.
[292] s 5H(2) *CPA*.
[293] s 5H(3) *CPA*.

10.12 *Restriction on publication of certain information for proceedings*

Section 189 of the Act states it is prohibited, without the written permission of the chief executive, to publish information that identifies, or is likely to lead to the identification of:

- a child who is or has been subject of an investigation under the Act of an allegation of harm or risk of harm; or
- a child in the chief executive's custody or guardianship under the Act; or
- a child for whom an order is in force.

The prohibition also extends to the publication of information that identifies, or is likely to lead to the identification of:

- a child living in Queensland who has been harmed or allegedly harmed by a parent or step-parent of the child or another member of the child's family; or
- a child living in Queensland who is, or allegedly is, at risk of harm being caused by a parent or step-parent of the child or another member of the child's family.

The prohibition on publication of identifying information extends to the Magistrate when publishing a decision in relation to the matter.

10.13 *Contempt*

A Childrens Court Magistrate (or a Magistrate or justices) performing duties in relation to the Childrens Court has the same power to punish for contempt as a Magistrate has or justices have to punish for contempt of a Magistrates Court. Section 40 of the *Justices Act 1886* (Qld) (Penalty for insulting or interrupting justices) applies in relation to the court when constituted by a Childrens Court Magistrate, Magistrate or justices in the same way it applies to a Magistrates Court.[294]

10.14 *Costs*

There is currently no power under the Act for the Childrens Court to make an order for costs. Section 116 of the Act specifically states that the parties to a proceeding in the Childrens Court for an order must pay their own costs of the proceeding.

However, if a party issues a subpoena to a non-participant in the proceedings requiring them to attend Court to give evidence, the Court may order the party seeking the subpoena to pay the non-participant a travelling allowance, an accommodation allowance, an attendance allowance and the losses and expenses, including legal costs, incurred by the non-participant in complying with the subpoena. Please refer to rule 100 of the Childrens Court Rules for further information about when the Court may make such an order.

10.14.1 **Comment**

[294] s 26 *CCA*.

In *FY & Anor v Dept of Child Safety* [2009] QCA 67 Keane JA, with whom Muir and Daubney JJA agreed, stated at [18] that where the order sought by the party on appeal was an order for costs of proceedings, this could be ignored given that there is no provision for the award of costs under the Act.

10.15 *Interface with QCAT*

Section 99M of the Act provides that if there is a review application before QCAT (the Tribunal) and some or all of the matters to which the reviewable decision relates are also before the court, a legally qualified member must suspend the tribunal's review if the member considers:

- The court's decisions about the matters would effectively decide the same issues to be decided by the tribunal; and
- The matters will be dealt with quickly by the court.

Section 99MA of the Act states if Child Safety makes a reviewable decision under section 87(2) about contact with the child, and a review application for the reviewable decision is made, a proceeding for the review application is before the Tribunal, and the applicant is also a party to child protection proceedings on foot – then Child Safety must notify the Tribunal Registrar. After the Tribunal Registrar has been notified, a legally qualified member of the Tribunal must suspend the review proceedings. The Tribunal Registrar must then notify the parties to the review proceedings and the Childrens Court Registrar of the suspension, and Child Safety must notify the parties to the child protection proceedings of the suspension.

While the review proceedings are suspended in the Tribunal, the Childrens Court may make an order that the subject matter of the reviewable decision may be dealt with by QCAT in the review proceeding. The Childrens Court Registrar must then notify the Tribunal if such an order is made.[295]

Similarly, if the Court decides to adjourn the child protection proceeding and make an interim contact order, or otherwise finalises the child protection proceedings without deciding the subject matter of the reviewable decision, then the Childrens Court Registrar must also notify the Tribunal Registrar of that action, so the review proceedings can either be re-commenced or dismissed.[296]

11 EXTRATERRITORIALITY

The Childrens Court may make a child protection order even if the events causing the child to be a child in need of protection happened outside Queensland, or partly in Queensland and partly outside Queensland.[297]

11.1.1 **Comment**

[295] s 99MA(4) *CPA*.
[296] s 99MA(5) *CPA*.
[297] s 60 *CPA*.

As to whether the Childrens Court had jurisdiction to entertain an application for a child protection order where the parent and child were outside Queensland when the application was made, see the observations of Keane JA (as his Honour then was) with whom Muir JA and Lyons J agreed in *SBD v Chief Executive, Department of Child Safety* [2007] QCA 318 or [2008] 1 Qd R 474 at [29] and [32]:

> "*[29] Insofar as it is necessary to read down the general words of the Act to ensure a sufficient connection to Queensland to preserve its constitutional validity, sufficient connection exists where a child has suffered harm while he has been resident in Queensland or is at risk of suffering harm in Queensland having regard to his usual residence in Queensland. The provisions of the Act show that the purview of the Act and the associated jurisdiction of the Childrens Court are at least this broad.*
>
> *…*
>
> *[32] [Referring to ss 27 and 29 of the Child Protection Act in respect of temporary assessment orders] These provisions afford, in my respectful opinion, a clear indication that the purposes of the Act, and the related jurisdiction of the Childrens Court, cannot be defeated by the mere assertion that a child, who has habitually resided in the State has been removed permanently from the State. A child who is within the purview of the Act as a child in need of protection because of harm which has occurred, or may occur, in Queensland, cannot be denied that protection merely by the removal of the child from the State. I do not presume to prejudge the merits of the application for a child protection order in this case; but it must be understood that the Act cannot responsibly be read down so as to allow exposure of a child to harm to continue in cases where a child is taken out of the State by the very person who is responsible for the harm suffered by the child. Whether a child is within the purview of the Act depends on whether the child has been harmed in Queensland or is at risk of harm in Queensland*."

SBD v Chef Executive, Department of Child Safety was applied in *Billington v Secretary, Department of families, Housing, Community Services and Indigenous Affairs* [2013] FCA 480 at [37] onwards where Logan J considered whether the *Child Protection Act* could apply to a child born outside Queensland who had never entered Queensland but was at risk of harm in Queensland. Logan J considered that because the child's mother was usually resident in Queensland and her place of domicile was Queensland, the child's domicile and putative place of residence were in Queensland and this provided a sufficient relevant connection to support the extraterritorial operation of the Act. On the question of the operation of the equivalent New South Wales legislation to the child in question, his Honour said at [56]:

> "*…Only if there had existed at the time conflicting orders under the NSW Act would the Queensland temporary assessment orders be invalid. They would be invalid because they would be inconsistent with orders authorised by an enactment of a legislature with a stronger territorial connection during the period in question, which had expressly and permissibly provided that a child's presence in that state was enough to ground an order which had in fact been made*."

Re whether the Court had jurisdiction to make a child protection order where the child and parent were within jurisdiction when the application was made but out of jurisdiction at the time of hearing:

See *S v Chief Executive of the Department of Child Safety* [2007] QChC 2 (referred to at 4.1.3 above) in which Wall DCJ considered an application for a child protection order made to the Court on 23 December 2006 and expressed to be returnable on 2nd January 2007. By the 2nd January, the appellant contended that the child was no longer in Queensland but was living with his mother, the appellant, in New South Wales and therefore the Court had no jurisdiction to make any order in respect to him.

In her affidavit, the appellant deposed that she was not a permanent resident of Queensland and had not been so since 23 December 2006. She deposed that she was permanent resident of New South Wales since 23 December, having been a temporary resident of Queensland for about seven months from May 2006 to December 2006.

His Honour noted that the application for the Child Protection Order was filed on 23 December 2006 and that the affidavit of service affirmed on 27 December 2006 showed that the appellant was served at her Southport address on 27 December 2006. For the purposes of the appeal, His Honour proceeded on the basis that the appellant and the child were within the jurisdiction (Queensland) when served with the application but were in New South Wales on 2nd January 2007 and the appellant was legally represented before the Magistrate on that date.

His Honour reviewed the relevant provisions of the legislation and concluded at pg. 17:

> "*…whilst orders made are in respect to the child, they are primarily directed to the parent or parents of the child upon whom, understandably, certain rights are conferred.*
>
> *The appellant submitted that the Childrens Court Magistrate erred in making the orders he did on 2nd January 2007 primarily because the child was not within the jurisdiction. Any argument to the same effect involving the appellant must, of necessity, fail because she was served and effectively appeared on the 2nd January, 2007 albeit objecting to the jurisdiction of the Court to make any orders; her objection to the jurisdiction of the Court was expressed to be on the basis of the absence from the jurisdiction of the child.*
>
> *In my view the Court was not, by the absence from the jurisdiction of the child, prevented from making the orders it did on the 2md January 2007. The appellant had been served with the application when she and the child were both within the jurisdiction and, in my view, she is not able to frustrate the proceedings by removing herself from the jurisdiction before the date of the hearing. The removal of the child from the jurisdiction did not deprive the Court from making orders in respect to him*".

12 APPEALS

Temporary assessment order or temporary custody order

The applicant, the child and the child's parents can appeal against a decision on an application for a temporary assessment order or a temporary custody order.[298] The appeal lies to a Childrens Court constituted by a Judge[299] (see definition of 'appellate court' in Schedule 3 Dictionary).

Court assessment order or child protection order

In the case of an application for a court assessment order or a child protection order, a party to the proceeding may appeal against the decision.[300] Note that a separate representative also has the right to appeal a child protection order, as per *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16. The appeal lies to the Childrens Court constituted by a Judge if the decision was made by the Childrens Court constituted by a Childrens Court Magistrate, Magistrate or justices.[301] If the decision at first instance was made by a Childrens Court constituted by a Judge, the appeal lies to the Court of Appeal.[302] Sections 118 to 121 of the Act and rules 120 to 127 of the *Childrens Court Rules 2016* (Qld) set out procedures and other information relevant to the hearing of appeals.

Interstate transfer decisions

A party may also appeal against a decision of the Childrens Court (the original decision) on an application for an order transferring a child protection order or child protection proceeding to a participating State (refer to Chapter 11).[303]

12.1.1 Comment

In *FY & Anor v Dept of Child Safety* [2009] QCA 67 the Queensland Court of Appeal considered whether there was a right of appeal to the Court of Appeal from a decision of Childrens Court constituted by a Judge hearing an appeal to that court. The Court of Appeal confirmed the decisions in *SBD v Chief Executive , Department of Child Safety* [2008] 1 Qd r R 474; [2007] QCA 318 and *KAA v Schemionech & Anor (No 2)* [2007] QCA 449 that no appeal from the Childrens Court constituted by a Judge which is itself sitting as the appellate court lies to the Court of Appeal as of right.

In *The Department of Communities, Child Safety v M and S* [2013] QChC 27, Samios DCJ considered the utility of the Court considering an appeal against interim orders when final orders had been made by the time the appeal was heard. His Honour said:

> "*[4] ….It has been recognised, in a number of cases, including People with a Disability Australia Incorporated v Minister for Disability Services and another (2011) NSWCOA 253*[sic], *that the court does not have an advisory jurisdiction. Where an appeal is moot and of no utility, as a general rule, the Court, in such circumstances, will not entertain the appeal. However, as Justice of Appeal Beazley said at paragraph 13 in that case, "that is a general rule only and the Court retains the discretion to hear and determine an appeal which has been regularly commenced, but where a change of circumstances means that any decision will be moot as far as the particular controversy between the parties is concerned." Her Honour went on to say in paragraph 14 that one of the factors which would cause the Court to exercise its*

[298] s 117(1) *CPA*.
[299] s 102(1) *CPA*.
[300] s 117(2) *CPA*.
[301] s 102(1) *CPA*.
[302] See definition of "appellate court" in Schedule 3 dictionary *CPA*.
[303] s 239 *CPA*.

discretion and determine the matters is where the decision subject of the appeal is likely to affect other cases.

[5] I am satisfied in this matter that the determination of this appeal could affect other cases or, I should say, likely to affect other cases, as the circumstances in this matter are likely to be duplicated from time to time and will therefore require magistrates to determine these issues and make orders accordingly of the kind that have been made in this matter and which are now the subject of appeal…..

[10]….. I have elected to decide the appeal although in the end I have dismissed it."

(See also 5.10 for further discussion of this case).

12.1.2 **Comment**

Decision on the Application

In *DCPL v EM* [2021] QDC 298 it was argued that the words "make interim orders on applications for … child protection orders" should inform the interpretation of the phrase "decision on the application" in section 117(2).

In this case, the applicant (registered father on the child's birth certificate) had made an application under section 113, which confers a power to allow a person who is not a parent as defined in section 52 of the Act to participate in the proceeding for a child protection order. On the basis of DNA test results showing he was not the father, the decision made by the Childrens Court (magistrate) was to remove the applicant as a respondent under section 52 and not to allow him to take part in proceedings under section 113.

The appellant, respondent and separate representative each submitted that whilst there has been no determination by any appellate court as to the right to appeal against a decision made under section 113, other decisions of this court which have allowed appeals against interim orders assist and that by parity of the reasoning set out in the decision of Fraser JA in *Cousins v HAL & Anor* [2008] QCA 49[304] with respect to appeals against interim orders made pursuant to section 67, the appellate court had jurisdiction to hear the appeal.

Section 117(2) and the interpretation of 'decision on the application' was discussed in further detail. Her Honour Loury QC DCJ stated at paragraph [14] through to [18]:

[14] Cousins involved an application to the Court of Appeal pursuant to section 119 of the Child Protection Act 1999 for a stay of an order made by a judge of the Childrens Court of Queensland pending a proposed appeal to the Court of Appeal. In Cousins it was determined that the Court of Appeal had no jurisdiction to entertain the application or an appeal to that court.

[304] [2008] QCA 49

[15] The reasoning of Fraser JA considered the jurisdiction of this court, the Childrens Court of Queensland, in an appeal against an interim custody order made pursuant to section 67 of the Child Protection Act 1999. The right of appeal was conferred by section 117(2) of the Child Protection Act 1999. The magistrate's decision was made pursuant to section 67 (1) of the Act. It provided that:

> *"(1) On the adjournment of a proceeding for a court assessment order or child protection order, the Childrens Court may make all or any of the following orders –*
>
> *(a) An interim order granting temporary custody of a child –*
>
> *(i) …*
>
> *(ii) for a child protection order – to the chief executive or a suitable person who is a member of the child's family.*
>
> *…"*

[16] Section 67(2) provides that the order has effect for the period of the adjournment.

[17] Fraser JA reasoned that section 67 conferred a power to make an interim custody order, "on the adjournment of a proceeding for" a child protection order and it described such an order as being "for a child protection order". Accordingly, he found, the provisions treated an interim custody order under section 67(1) as one which was made on the application for a child protection order. Therefore, he reasoned, the Magistrates decision was an order "on the application" for a child protection order within the meaning of section 117(2). Fraser JA referred to the decision of Keane JA (as he then was) in the decision of SBD v Chief Executive, Department of Child Safety[305] in which he concluded at [18] that the reference in section 117(2) of the Act to an "appeal to the appellate court against a decision on the application" was to a decision upon the original application for a child protection order. SBD was concerned with the jurisdiction of the Court of Appeal when a decision for a court assessment order or a child protection order was made by the Childrens Court constituted by a Magistrate.

[18]Consistently with the plain words of the Act, section 113 confers a power on the magistrate to order a person to take part in the proceeding on an application for an order for a child. It does not state that it is a "decision on the application". It could not be seen to be a "decision on the application".

Her Honour went on to say that the decisions of judges of the Childrens Court of Queensland referred to by counsel have each involved appeals against decisions made either pursuant to section 67 of the Act or section 68 of the Act, which also provides for powers on the adjournment of proceedings for a child protection order. Her Honour stated that none of the decisions referred to have considered the jurisdictional issue, and that none of the decisions referred to relate to an application made pursuant to section 113 of the Act.[306]

[305] [2007] QCA 318.

[306] *DCPL v EM* [2021] QDC 298 at [19].

Her Honour went on to conclude that there was no jurisdiction for the Court to entertain the appeal and that the determination of an application pursuant to section 113 of the Act does not involve a "decision on the application" for a child protection order.

The appeal was determined to be incompetent and was dismissed.

12.2 *Commencing an Appeal*

Note: The following information is only applicable to the Childrens Court of Queensland (CCQ) constituted by a Judge, rather than the Childrens Court constituted by a Magistrate.

The appeal provisions of the Act are set out in Chapter 3, Part 4 (ss117-121).

An appeal is commenced by the appellant complying with the following:[307]

1. Filing a written notice of appeal with the registrar of the appellate court (CCQ);
2. Serving a copy of the notice on the other persons also entitled to appeal against the decisions;
3. Filing within 28 days of the decision being made, unless the Court extends the period for filing the notice of appeal; and
4. Stating fully in the notice of appeal the grounds of the appeal and the facts relied upon.

Section 118A was inserted in October 2022 and provides that, despite section 118(2), the appellant may ask the clerk of the appellate court to arrange for the appeal to be heard by the court before a person is served under that subsection.

According to the explanatory notes, this is intended to allow decisions to be appealed immediately in circumstances where any delay may place a child at risk of harm, for example where the original application was decided on an ex parte basis due to immediate safety concerns.[308]

Where the appeal is heard in the absence of the respondent, the new section 121A applies.

12.2.1 **Stay Application**

A stay application is where the appellant seeks to have the appealable decision prevented from taking effect, in order to secure the effectiveness of the appeal. A stay will usually be sought as a matter of urgency, before the Magistrate decision can take effect. For example, if a Magistrate declined to extend a custody order and a party was appealing this decision in the CCQ, the applicant may seek a stay of the decision to prevent the subject children being returned to their parent's care, which is what would happen if the Magistrate's decision were to take effect.

If a stay is not granted by a CCQ Judge, then the Magistrate's decision will take effect and the appeal on foot will have no effect on the decision until said appeal is decided by the Judge in due course.[309]

---

[307] s 118 *CPA*.
[308] Explanatory notes, *Child Protection Reform and Other Legislation Amendment Bill 2022* (Qld), page 35
[309] s 119(4) *CPA*.

The onus is on the appellant to apply for the stay, and merely filing an appeal is not sufficient grounds to grant a stay.

When deciding whether to grant a stay, previous CCQ decisions[310] have relied upon the principles in *Aldridge v Keaton* [2009] FamCAFC 106, namely:

> *[18] The principles to be applied in determining an application for a stay of orders both in the general law and in respect of parenting proceedings are also well known* (see The Commissioner of Taxation of the Commonwealth of Australia v Myer Emporium Limited [No.1] *(1986) 160 CLR 220 at 222;* Alexander v Cambridge Credit Corporation *(1985) 2 NSW LR 685;* Jennings Construction Limited v Burgundy Royale Investments Pty Limited *(1986) 161 CLR 681;* Clemett & Clemett *(1981) FLC 91-013;* JRN & KEN v IEG & BLG *(1998) 72 [2009] FamCAFC 106 Reasons Page 6 ALJR 1329 at 1332).*
>
> *The authorities stress the discretionary nature of the application which should be determined on its merits. Principles relevant to this matter include the following:*
>
> - *the onus to establish a proper basis for the stay is on the applicant for the stay. However it is not necessary for the applicant to demonstrate any "special" or "exceptional" circumstances;*
> - *a person who has obtained a judgment is entitled to the benefit of that judgment;*
> - *a person who has obtained a judgment is entitled to presume the judgment is correct;*
> - *the mere filing of an appeal is insufficient to grant a stay;*
> - *the bona fides of the applicant;*
> - *a stay may be granted on terms that are fair to all parties - this may involve a court weighing the balance of convenience and the competing rights of the parties;*
> - *a weighing of the risk that an appeal may be rendered nugatory if a stay is not granted – this will be a substantial factor in determining whether it will be appropriate to grant a stay;*
> - *some preliminary assessment of the strength of the proposed appeal –whether the appellant has an arguable case;*
> - *the desirability of limiting the frequency of any change in a child's living arrangements;*
> - *the period of time in which the appeal can be heard and whether existing satisfactory arrangements may support the granting of the stay for a short period of time; and*
> - *the best interests of the child the subject of the proceedings are a significant consideration.*

Ultimately the granting of a stay is a discretionary matter for the Presiding Judge, and is not an indication of the final outcome of the substantive appeal.

12.2.2 **Leave to appeal out of time**

[310] *DCPL v D & Anor* [2016] QChC 20 and *DCPL v FGE & FPA* [2018] QChC 16

Leave to appeal out of time may be granted in circumstances where there would be no unfair prejudice against the other parties. Merely failing to file the appeal in time will not be sufficient grounds, there must be a reason for why this did not occur e.g. another party had already filed an appeal.[311]

12.3 *Process for Deciding Appeals*

Pursuant to section 120 of the Act, an appeal of a temporary assessment order or a temporary custody order is not restricted to the material before the Magistrate.

An appeal against another decision (e.g. a child protection order application) must be decided on the evidence and proceedings before the Childrens Court (a re-hearing). However, the appellate court *may* order that the appeal be heard afresh, in whole or part (otherwise known as a hearing de novo, where the Court exercises original jurisdiction) which would allow the parties to file further evidence.

Samios DCJ succinctly set out the obligations of a CCQ Judge when deciding an appeal in *SB v Department of Communities & Ors* [2014] QChC 7, and this approach has been adopted in subsequent CCQ decisions.[312] His Honour states at paragraph [6]:

> *The appellant in the Notice of Appeal seeks a hearing de novo. Section 120(3) of the Act provides that an appellate court may order that the appeal be heard afresh, in whole or part. However, on the hearing of the appeal the appellant did not advance a basis for the appeal to be heard de novo. Section 120(2) of the Act does provide an appeal against the learned Magistrate's decision must be decided on the evidence and proceedings before the learned Magistrate. I take the view this requires me to deal with the appeal as a re-hearing.* ***In that respect my powers are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before me, the order that is the subject of the appeal is a result of some legal, factual or discretionary error*** *(Allesch v Maunz (2000) 203 CLR 172 at para 23). In addition, I am obliged to conduct a real review of the hearing and of the learned Magistrate's reasons. Further I am not excused from the task of "weighing conflicting evidence and drawing my own inferences and conclusions, though I should always bear in mind that I have neither seen nor heard the witnesses and should make due allowance in this respect (Fox v Percy (2003) 214 CLR 118 at para 25). Further I should afford respect to the decision of the learned Magistrate and bear in mind any advantage the learned Magistrate had in seeing and hearing the witnesses give evidence, but I am required to review the evidence, to weigh the conflicting evidence, and to draw my own conclusions (Mbuzi v Torcetti [2008] QCA 231 para 17).*

When dealing with appeals relating to child protection orders or another decision under s120(2) CPA, Shanahan DCJ (former President of the Childrens Court) has previously stated there is clear legislative intention for the matter to be heard on the record, unless there is good reason shown for the Judge to order that it may be heard afresh.[313] An example of a reason for the matter to be heard afresh is

[311] *DCPL v PMK & Others (No. 1)* [2018] QChC 3.
[312] *JP v Department of Communities, Child Safety and Disability Services* [2015] QChC 4 at [7] and *DCPL v PMK & Ors (No. 2)* [2018] QChC 4 at [6].
[313] Referred to in *KAA & Anor v Schemioneck & Anor (No 2)* [2007] QCA 449 at [29].

there being a significant change in circumstances for the subject child since the appealable decision was made, which the appellate court must consider when making their decision.[314]

Section 104 of the Act requires the Childrens Court, in exercising its jurisdiction or powers, must have regard to the principles stated in sections 5A to 5C of the Act, to the extent the principles are relevant. When making decisions under this Act, the Childrens Court must also state its reasons for the decision.

12.3.1 **Legal, factual or discretionary error**

Legal errors are made when a judicial decision maker has incorrectly interpreted or incorrectly applied legislative provisions in their decision making. In this case, the appellate may argue the Magistrate failed to apply certain principles or provisions of the Act when making their decision.

Factual errors are made when a judicial decision maker has ultimately come to a factual conclusion that is incorrect, such as if they found an event did take place. In the child protection jurisdiction, it is not necessary for judicial decision makers to find an event occurred, but rather whether there is a risk of harm to the child, based on the evidence before the Court.[315]

Where the decision appealed from involves the exercise of discretion by the Magistrate, the principles of *House v R*[316] have been adopted by other CCQ cases.[317] That is, the appellate court will not interfere unless the following errors occurred:

1. The Magistrate acts upon a wrong principle;
2. The Magistrate allows extraneous or irrelevant matters to guide or affect the discretion;
3. The Magistrate mistakes the facts; or
4. The Magistrate does not take into account some material consideration.

The principles set out in *House v R* therefore limit any appeal where an exercise of discretion is sought to be challenged. The basis upon which an appellate court may intervene in the exercise of discretion is therefore a limited one.[318] However, if it is not possible to ascertain how the Magistrate reached the result embodied in the order, and if upon the facts it is unreasonable or plainly unjust, the appellate court will interfere upon the basis of an inference that in some way there has been a failure to exercise the discretion.[319] See **Chapter 9.1** for further discussion of the importance to provide reasons when making decisions under the Act.

12.4 ***Appeal Outcomes***

[314] *DCPL v PMK & Others (No. 1)* [2018] QChC 3 and *ASD v Chief Executive, Department of Communities, Disabilities and Child Safety Services & Anor* [2013] QDC 168 at [7].
[315] *AG & TG v DCPL & Anors* [2017] QChC 14.
[316] (1936) 55 CLR 499 at 504–5.
[317] *DCPL v ADB & Ors* [2018] QChC 30 at [7].
[318] *Bremer Landesbank Kreditanstalt Oldenburg v Ship Turakina* (1999) 161 ALR 587.
[319] *Sudan v Minister for Immigration and Border Protection* [2015] FCA 90.

If the appellate Judge determines the grounds for appeal have been met, they may make the following orders where the respondent appears:[320]

1. Confirm the decision appealed against;
2. Vary the decision appealed against;
3. Set aside the decision and substitute another decision; or
4. Set aside the decision appealed against and either substitute another decision or remit the matter to the Magistrate or Childrens Court that made the decision.

Where the respondent does not appear, and the court is either satisfied that respondent has been served under section 118(2) or dispenses with the requirement for service under section 118(2), the court may:[321]

1. Confirm the decision appealed against; or
2. Vary the decision appealed against;
3. Set aside the decision appealed against and either substitute another decision or remit the matter to the magistrate or Childrens Court that made the decision; or
4. Stay the decision appealed against under section 119; or
5. Make a temporary order that either temporarily varies the decision appealed against or temporarily sets aside the decision appealed against and substitutes another decision; or
6. Adjourn the appeal, whether or not the court stays the decision appealed against or makes a temporary order.

If remitting to the lower Childrens Court, the appellate Judge may also order the matter be presided over by a Magistrate other than the one who made the original decision or remitted to a Childrens Court in a different location.[322]

13 INTERSTATE TRANSFER OF CHILD PROTECTION ORDERS AND PROCEEDINGS

Chapter 7 of the Act provides for the transfer of orders and proceedings between Queensland and other States and between Queensland and New Zealand. The purpose is to provide for transfers so that:[323]

- Children in need of protection may be protected if they move from one jurisdiction to another; and
- Proceedings relating to the protection of a child may be decided in a timely and expeditious way in a court in the most appropriate jurisdiction.

[320] s 121 *CPA*.
[321] s 121A *CPA*.
[322] *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16 at [90]-[98].
[323] s 198 CPA.

For information on the relevant interstate and international legislation, as well as who the appropriate interstate officer is, please see Schedule 2 of the *Child Protection Regulation 2023* (Qld).

13.1 *Judicial transfer of child protection order to another state*

A child protection order in force under the Act can be transferred to a participating State unless the order is: an interim order under section 67 of the Act; an order granting long-term guardianship to a person other than the chief executive; or a permanent care order.[324] Interim orders are excluded because they are made during proceedings for a child protection order and if the child has moved interstate or such a move is planned, then the proceeding itself should be transferred to that State. Long-term guardianship orders to a person other than the Chief Executive and permanent care orders are excluded because the State does not have responsibility for the child.[325]

The Act provides for administrative transfers and judicial transfers. Administrative transfers may be processed by the chief executive per sections 207 to 211 of the Act.

Judicial transfers are applied for by DCPL under section 212 of the Act. The procedure to be followed is set out in section 213 of the Act and reflects the same procedures followed for an application for a child protection order – ss 54(2), 55 to 58, Chapter 2 Part 5 and Chapter 3 parts 1 to 3 of the Act.

The Childrens Court may order the transfer of an order if:[326]

- The home order[327] is not subject to an appeal, and if no appeal has been started, the time for starting an appeal has expired; and
- The interstate officer for the participating state has given written consent to the transfer and the provisions of the proposed interstate order;[328] and
- An appropriate case plan has been prepared; and
- A family group meeting has been held or reasonable attempts have been made to hold one; and
- If the application is contested, a conference between the parties has been held or reasonable attempts have been made to hold one; and
- The child's wishes or views, if able to be ascertained, have been made known to the court.

If the Court decides to order the transfer, it must decide the provisions of the proposed interstate order.

The Court must be satisfied:[329]

- The proposed interstate order is one that could be made under the law of that State;

[324] s 206 *CPA*.
[325] Explanatory Notes to the *Child Protection Amendment Bill 2000* (Qld) p 18.
[326] s 214 *CPA*.
[327] Defined in s 200 *CPA*.
[328] Defined in s 200 *CPA*.
[329] s 215 *CPA*.

- The protection sought by the proposed interstate order is unlikely to be achieved by an order on less intrusive terms; and
- The proposed interstate order is of the same or similar effect as the home order or is otherwise in the child's best interests.

The Court must decide the time for which the order should have effect in the participating State and state that in the order. The time must not be more that the maximum time for which an order of that type could be made under the child welfare law of that State.[330]

See *STC v DCPL* [2016] QChC 19 where Magistrate made a decision to transfer the long-term guardianship order of a child to NSW, but failed to comply with the requirements set out in sections 214 & 215 of the Act. These procedural errors led to the matter being heard afresh on appeal. The failure to comply with ss214-215 were subsequently addressed during the appeal proceedings, and His Honour Dearden DCJ confirmed the decision of the Magistrate to transfer the order interstate. In that matter, the subject child had lived with his carers since he was 9 days old, and was currently 11 years old. The carers moved interstate and it was found to be in his best interests to be able to move with them, as his primary attachment was to his carers.

13.2 *Transfer of order from another State*

An interstate order may be transferred to Queensland only if the chief executive gives written consent to the transfer and to the provisions of the order.

Where the chief executive consents to the transfer of an order from another State, the order may be filed in the Childrens Court and registered.[331] The order is taken to be a child protection order of the Childrens Court in Queensland made on the day of its registration, except for the purposes of an appeal against the order.[332]

The chief executive, the child, the child's parents or a party to a proceeding in which the interstate transfer decision was made can apply to the Childrens Court to revoke the registration of the order.[333] The court may grant the application and revoke the registration only if it is satisfied that, when the order was registered:[334]

- The period for appealing, or applying for review of, the interstate transfer decision had not expired; or
- The decision was the subject of an appeal or application for review; or
- The decision was stayed.

13.3 *Judicial transfer of proceedings to another State*

[330] ss 215(3) and (4) *CPA*.
[331] s 222 *CPA*.
[332] s 223 *CPA*.
[333] See s 224 *CPA* for the details of the revocation application.
[334] s 224(3) *CPA*.

DCPL can apply to the Childrens Court for an order to transfer to another State a proceeding for a child protection order pending in the Childrens Court.[335] The application must be filed in the court and state the grounds on which it is made and the nature of the order sought and must comply with applicable rules of court.[336]

The Registrar is to fix the time and place for hearing[337] and the applicant is to serve a copy on the parents and notify the child.[338]

The Court may order the transfer of the proceeding to a participating State if the interstate officer has given written consent to the transfer.[339] In deciding whether to order the transfer, the Court must have regard to the following:[340]

- Whether there are any child protection orders in force in the other State;
- Whether any other proceedings relating to the child are pending or have been heard and decided under a child welfare law in the other State;
- Where the matters giving rise to the proceedings happened; and
- The place of residence and likely future place of residence of the child, the child's parents and other persons significant to the child.

If the Childrens Court orders the transfer, it may make an interim order granting custody of the child to any person, or giving responsibility for the child's supervision to the interstate officer or another person in that state to whom responsibility may be given under a child welfare law of that State.[341] The interim order must state the time for which it has effect, which may not exceed 30 days.[342]

If the Court's order transferring the proceedings is registered in the other State's Childrens Court (under its interstate law) the proceeding is discontinued in the Childrens Court in Queensland and any interim order made by the Childrens Court in Queensland on ordering the transfer ceases to have effect under the Act.[343]

13.4 *Transfer of proceedings from another State*

Chapter 7 Part 5 of the Act relates to the transfer to Queensland of a proceeding from another State. The proceeding cannot be transferred without the written consent of the chief executive who must give the consent when asked by the interstate officer unless it would not be in the child's best interests.[344]

[335] s 225 *CPA*.
[336] s 225 *CPA*.
[337] s 226 *CPA*.
[338] s 227 *CPA*.
[339] s 228 *CPA*.
[340] s 229 *CPA*.
[341] s 230(1) *CPA*.
[342] s 230(2) *CPA*.
[343] s 232 *CPA*.
[344] s 234 *CPA*.

Once the interstate transfer decision is filed and registered in accordance with s 235 of the Act, the transferred proceeding is taken to be a proceeding started in the Childrens Court in Queensland on the day of registration and may be continued in the court.[345]

Importantly, the court is not bound by any finding of fact made by the Childrens Court in the other State and may inform itself on a matter using a transcript of the proceeding in that court or evidence tendered in the proceeding.[346]

An associated interim order filed and registered in accordance with s 235 of the Act, is taken to be an order of the Childrens Court made on the day of registration except for the purposes of an appeal against the order.[347] The order may be enforced as if it were an interim order under s 67 of the Act even if it includes provisions that could not otherwise be included in an order under that section.[348] However, the court may not extend or vary the order[349] and the court can revoke the order and make another order under s 67 of the Act.[350]

Section 238 of the Act sets out who can apply to revoke the registration and the process for same.

13.5 *Appeals against transfer decisions*

An appeal lies to the appellate court[351] against the decision of a Childrens Court on any application for an order to transfer a child protection order or a child protection proceeding to another State. Section 239 of the Act sets out the appeal process.

14 DOMESTIC AND FAMILY VIOLENCE AND CHILD PROTECTION INTERFACE

There is a separate Benchbook for Magistrates presiding over Domestic Violence matters. Further information can be found at Domestic and Family Violence Protection Act 2012 Benchbook.

Domestic and family violence and child protection issues are inherently interconnected. It is reported that 13 per cent of women and 10 per cent of men witness physical violence towards their mothers, and 4 per cent of women and 4.7 per cent of men witness physical violence towards their fathers, before the age of 15.[352] The impacts to children of repeated abuse and exposure to domestic and family violence are profound and traumatic.[353] Exposure to childhood trauma, including exposure to domestic and family violence, has been shown to impact on long term educational and health outcomes.[354]

---

[345] s 236 *CPA*.
[346] s 236(3) *CPA*.
[347] s 236(1) *CPA*.
[348] s 237(2) *CPA*.
[349] s 237(3) *CPA*.
[350] s 237 *CPA*.
[351] See Schedule 3 Dictionary *CPA* for the definition of "appellate court".
[352] Australian Bureau of Statistics, in the 2016 Personal Safety Survey.
[353] Department of Child Safety, Youth and Women, *Domestic and family violence and its relationship to child protection*, Practice Paper (April 2018)
[354] Australian Institute of Family Studies, *Children's exposure to domestic and family violence – Key issues and responses*, December 2015

In Queensland, the Child Death Case Review Committee report for 2013 - 14 identified domestic and family violence as an issue for 71 per cent of cases involving a death of a child with recent involvement in the child protection system. Similarly, the 2017-18 Annual Report of the Queensland Domestic and Family Violence Death Review and Advisory Board reports that in 65 per cent of cases reviewed by the Board, children were exposed to domestic and family violence, including being direct victims of this abuse.

Under the *Domestic and Family Violence Protection Act 2012* (Qld) (DFVPA), a child[355] can be named in a domestic violence order if the court is satisfied that naming the child in the order is necessary or desirable to protect the child from associated domestic violence[356] or being exposed to domestic violence[357] committed by the respondent.[358] The Court must consider naming the child if the court is hearing an application for, or a variation of, a domestic violence order, or deciding whether to make a domestic violence order in criminal or child protection proceedings under sections 42 and 43 of the DFVPA, and the application discloses the existence of a child of the aggrieved or a child who usually lives with the aggrieved.[359] See Chapter 9, *Domestic and Family Violence Protection Act 2012* Benchbook.

A protection order under the DFVPA can also be made in the Childrens Court. Under section 43 DFVPA, the Childrens Court when hearing a child protection proceeding may make or vary a protection order against a parent of a child for whom an order is sought in the child protection proceeding.

14.1 *Making a protection order under the DFVPA in child protection proceedings*

Section 43 of the DFVPA gives the Childrens Court, when hearing a child protection proceeding, the power to make or vary a protection order under the DFVPA against a parent of a child for whom an order is sought in the child protection proceeding if:

- The Court is satisfied that a protection order could be made against the parent under section 37 of the DVFPA;[360] and
- The person named as the aggrieved in the protection order is also a parent of the child for whom an order is sought in the child protection proceeding.

If there is already a protection order in force against a parent, the Court must consider the order and whether in the circumstances it needs to be varied, including whether the end date needs to be changed or whether terms of the order need to be changed to be consistent with a proposed child protection order.[361] [362]

---

[355] A child of the aggrieved or a child who usually lives with the aggrieved, s 53 *DFVPA*.
[356] See s 9 *DFVPA* for meaning of "associated domestic violence".
[357] See s 10 *DFVPA* for meaning of "exposed to domestic violence".
[358] s 53 *DFVPA*.
[359] S 54 *DFVPA*.
[360] Under s 37 *DFVPA*, the court can make a protection order if (a) a relevant relationship exists between the aggrieved and the respondent; (b) the respondent has committed domestic violence against the aggrieved; and (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
[361] s 43(3) *DVFPA*.
[362] See *Jones v DBA [2019] QDC 149* where it was found that the power to vary in s 42 *DFVPA* does not give the court the power to vary a temporary protection order into a five year final order.

The protection order or variation to a protection order can be made on the Court's own initiative or on the application of a party to the child protection proceedings.[363] However, the Court cannot make the order unless each party to the proceedings has been given a reasonable opportunity to be heard on the matter.[364] A party includes a child for whom an order is sought in the proceeding; or a separate legal representative, if any, for the child; or an applicant or respondent in the proceeding.[365]

The Court may make the protection order or variation during the hearing of the child protection proceeding or it may adjourn the matter to a later date and make a temporary protection order under DFVPA Division 2 in the interim.[366]

If the Court adjourns the matter, the Court:

- is obliged to inform the parent that if they do not appear at the later date an order may be made in their absence and the court may issue a warrant for the parent to be taken into custody by a police officer if the Court believes that it is necessary for the parent to be heard; and
- may issue any direction that it considers necessary.[367]

If the parent fails to appear on the later date, the Court can make an order in their absence or adjourn the matter further and make a temporary protection order or order the issue of a warrant for the parent to be taken into custody.[368]

Section 43 DFVPA does not limit the power of the court to make any order under the Act.

The Act requires the Court, before making a child protection order granting custody or guardianship of a child to a person other than the chief executive, to have regard to any report given, or recommendation made, to the court by the chief executive about the person, including a report about the person's criminal history, domestic violence history and traffic history.[369]

14.1.1 **Comment**

For a discussion of the research and issues surrounding children affected by domestic and family violence, see:

- Australian Institute of Criminology, *Children's exposure to domestic violence in Australia*, Trends & Issues in Crime and Criminal Justice no. 419 (June 2011).

- Australian Institute of Family Studies, *Children's exposure to domestic and family violence – Key issues and responses*, December 2015.

[363] s 43(4) *DVFPA*.
[364] s 43(5) *DVFPA*.
[365] s 43(10) *DVFPA*.
[366] s 43(6) *DVFPA*.
[367] s 43(7) *DVFPA*.
[368] s 43(8) *DVFPA*.
[369] s 59(5) *CPA*.

- Department of Child Safety, Youth and Women, *Domestic and family violence and its relationship to child protection*, Practice Paper (April 2018).

- Australian Institute of Criminology, *Targeting repeat domestic violence: Assessing short term risk of reoffending*, Trends & Issues in Crime & Criminal Justice no. 552 (June 2018).

- Australian National Research Organisation for Womens Safety *The impacts of domestic and family violence no children, Research Summary* (16 August 2018).

- Queensland Centre for Domestic and Family Violence Research, *Impact of the experience of domestic and family violence on children – what does the literature have to say?*, January 2019.

See also Appendix 1 for discussion of the intersect between domestic violence and child protection.

15 YOUTH JUSTICE INTERFACE

There is a separate Benchbook for Magistrates presiding over Youth Justice matters. Further information can be found here at Youth Justice *Benchbook*.

The Australian Institute of Health and Welfare (AIHW) reported that close to 50 percent of Australian children aged 10 to 16 years under youth justice supervision across Australia had also received child protection services.[370] In Queensland, the QCPCI reported that 76% of children in the youth justice system are known to Child Safety Services.[371]

With Aboriginal and Torres Strait Islander children overrepresented in the youth justice and child protection system, there is a need for culturally responsive services that promote connection to family, community and culture as an integral part of their identity, as well as their social, emotional, educational and psychological development.

If a child is involved in the youth justice system whilst in the care of the state, it may be appropriate to ask questions about the quality of supervision / accommodation provided to the child.[372]

Research has shown that when a child is engaged in formal education and extra-curricular activities that are consistent with the child's interests and talents, this can play a significant role in reducing

[370] Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2015/16*, 2017 at 8; Tamara Walsh, 'From child protection to youth justice: Legal responses to the plight of 'Crossover Kids'', (2019) 46(1) *University of Western Australia Law Review*, 90-110.
[371] The Hon Tim Carmody, *Taking Responsibility: A Roadmap for Queensland Child Protection: Report of the Queensland Child Protection Commission of Inquiry*, 2013, 36; Tamara Walsh, 'From child protection to youth justice: Legal responses to the plight of 'Crossover Kids'', (2019) 46(1) *University of Western Australia Law Review*, 90-110.
[372] Julie Shaw, 'Policy, practice and perceptions: Exploring the criminalisation of children's home residents in England' (2016) 16(2) *Youth Justice* 147, 148; Tamara Walsh, 'From child protection to youth justice: Legal responses to the plight of 'Crossover Kids'', (2019) 46(1) *University of Western Australia Law Review*, 90-110.

the risk of criminalisation.[373] Schedule 1 of the Act and the HRA includes a right to education appropriate to the child's age and development and this should be addressed by the Department in material provided to the Court for children in their care or under an order.

15.1 *The voice of the child*

Participation in decision-making is a right of all children and young people, not a privilege.

Article 12 of the United Nations Convention on the Rights of the Child[374] holds that young people have the right to have a say in all matters that affect them. In Queensland, the HRA also guarantees the right of every person to take part in public life without discrimination.[375]

To give full expression to young people's right to participate the court should offer meaningful avenues to have young people's voices heard. For further information on how this can be done see Chapter 8.4.

16 HUMAN RIGHTS ACT 2019 (QLD)

The *Human Rights Act 2019* (HRA) was passed by the Legislative Assembly on 27 February 2019 and commenced in full on 1 January 2020. The principle aim of the HRA is to ensure that respect for human rights is embedded in the culture of the public sector. The HRA requires public entities to undertake public functions in a principled way that places individuals at the centre of decision-making and service delivery.

The HRA protects **23 fundamental human rights** that are recognised in international covenants.

The HRA achieves a consolidated statutory protection of the following human rights, which are **not absolute** (they must be balanced against the rights of others and public policy issues of significant importance):

- recognition and equality before the law
- right to life
- protection from torture and cruel inhuman or degrading treatment
- freedom from forced work
- freedom of movement
- freedom of thought, conscience, religion and belief
- freedom of expression
- peaceful assembly and freedom of association

[373] Taylor, above n22, 177-8. See also Cashmore, above n17, 38; Schofield et al, above n20, 63. Also, Northern Territory Royal Commission notes the high levels of educational disengagement, often as a result of exclusion from school: above n2, 18; Tamara Walsh, 'From child protection to youth justice: Legal responses to the plight of 'Crossover Kids'', (2019) 46(1) *University of Western Australia Law Review*, 90-110.
[374] *UN Convention on the Rights of the Child,* adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.
[375] Queensland Family and Child Commission, Model of Participation.

- taking part in public life
- property rights
- privacy and reputation
- protection of families and children
- cultural rights – generally
- cultural rights – Aboriginal peoples and Torres Strait Islanders peoples
- right to liberty and security of person
- humane treatment when deprived of liberty
- fair hearing
- rights in criminal proceedings
- children in the criminal process
- right not to be tried or punished more than once
- retrospective criminal laws
- right to education
- right to health services

The HRA requires **Courts and Tribunals** to interpret legislation that, to the extent possible, is consistent with its purpose in a way that is compatible with human rights. This obligation does not authorise Courts to depart from Parliament's intention in enacting a particular law. The interpretation by a Court must be consistent with the legislative purpose of the statutory provision. The HRA does not allow a Court to invalidate any laws.

Part 3 Division 3 HRA provides that so far as is possible to do so, **Courts must interpret legislation in a way that is compatible with human rights.** Section 49 provides:

> *(1) This section applies if, in a proceeding before a court or tribunal -*
> *(a) a question of law arises that relates to the application of this Act; or*
> *(b) a question arises in relation to the interpretation of a statutory provision in accordance with this Act.*
> *(2) The question may be referred to the Supreme Court if -*
> *(a) a party to the proceeding has made an application for referral; and*
> *(b) the court or tribunal considers the question is appropriate to be decided by the Supreme Court.*
> *(3) If a question is referred under subsection (2), the court or tribunal referring the question must not –*
> *(a) make a decision about the matter to which the question is relevant while the referral is pending; or*
> *(b) proceed in a way or make a decision that is inconsistent with the Supreme Court's decision on the question.*

Section 53 provides that the Supreme Court or a Court of Appeal may, in a proceeding, make a declaration of incompatibility to the effect that the court is of the opinion that a statutory provision

cannot be interpreted in a way compatible with human rights. The term *compatible with human rights* is defined in section 8 of the HRA to mean:

> An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision—
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

This makes it clear that the proportionality analysis in section 13 is relevant to the exercise of the Court's power to make a declaration. This effectively narrows the scope of the Court's power to issue a declaration since the Court may only issue a declaration after the Court has first considered whether a limit on a human right is reasonable and demonstrably justifiable in accordance with section 13 and concluded that it is not.

A declaration does not affect the validity of the law, is not binding on the parties, nor does it create legal rights or a civil cause of action, but it does trigger a procedure whereby the incompatibility is brought to the attention of the Attorney-General and the Parliament.

16.1 *Remedies*

There is no stand-alone legal remedy for contravention of the HRA. There is, however, a limited enforcement mechanism. The HRA provides that it is unlawful for a public entity to: act or make a decision in a way that is not compatible with human rights; or in making a decision, to fail to give proper consideration to a human right relevant to the decision (section 58(1)). However, a person may only seek relief or remedy for this unlawfulness under section 59(1) of the HRA if the person may seek relief or remedy in relation to an act or decision of the public entity on a ground of unlawfulness other than under section 58(1). In practice this will mean where individuals have an independent cause of action against a public entity (for example, the right to seek judicial review of a decision of a public entity), a claim of unlawfulness under the HRA can be added to that existing claim. This is what is colloquially known as a 'piggy-back' cause of action.

Monetary damages will not be available for a contravention of the HRA itself, but a person will be entitled to any other relief or remedy they could have obtained in relation to an independent cause of action (for example, in the case of judicial review, quashing or setting the decision aside, or referring the decision back to the original decision maker for further consideration and redetermination). There is an entitlement to this remedy (except if it is damages) even if the person is not successful in their independent cause of action.

Relevantly, section 9(4)(b) of the HRA states that a public entity does <u>not</u> include a court or tribunal, except when acting in an administrative capacity.

A Court or Tribunal will only be a public entity for the purposes of the HRA when it is **acting in administrative capacity**. That expression is not defined in the HRA but can be interpreted in reference

to the exercise of administrative power based on Australian public law principles – that is, a Court or Tribunal, will be acting in an administrative capacity for the purposes of the HRA when exercising power of an administrative nature, as distinct from judicial or legislative power.

When ascertaining the distinction between administrative and judicial power, principles relating to the distinction at federal level may be applied, but will not necessarily provide a universal test.

The following are examples of when courts have been deemed acting in an administrative capacity in the *Victorian Charter of Rights and Responsibilities 2006* (Vic), which has a similar provision to that of section 9(4)(b):

- a magistrate's decision to commit a person for trial;
- the issuing of a warrant;
- the Victorian Civil and Administrative Tribunal when acting in its original jurisdiction with regards to decisions around exemptions under the *Equal Opportunity Act 2010* (Vic); in determining an application for an order for the creation of tenancy; and guardianship orders.

Other tribunals, including medial practitioner's boards and mental health review boards, have also been taken to be public entities when acting in an administrative capacity.

A Court or Tribunal, when acting in an administrative capacity, will be a public entity and will therefore need to meet the obligations in section 58 of the HRA, that is to act or make a decision in a way that is not compatible with human rights; or in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Further information can be found on the Magistrates Intranet including links to the Judicial College of Victoria Charter of Human Rights Benchbook

16.2 *Jurisprudence*

Domestic violence has long been recognised as a human rights issue by the United Nations. Whilst the Queensland jurisprudence is developing, reference can be made to case law concerning domestic violence and human rights in other jurisdictions with a more developed human rights jurisprudence including:

- **Victoria**
  Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) on 25 July 2006 and has developed a body of jurisprudence accordingly. See the Judicial College of Victoria Charter of Human Rights Benchbook (Victorian HR Benchbook) and the Victorian Human Rights Charter Case Collection.

Note Chapter 2 of the Victorian HR Benchbook sets out the Charter's effects on courts including the direct application of Charter rights to courts.

- **New Zealand**

  The *Human Rights Act 1993* aims to protect human rights in New Zealand in general accordance with United Nations Human Rights treaties. Disputes under the New Zealand Act are determined by the Human Rights Review Tribunal, the High Court, Court of Appeal and Supreme Court. Decisions can be searched here.

- **United Kingdom**

  The *Human Rights Act 1998* received Royal Assent on 9 November 1998, commencing in full in October 2000. The Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to and incorporates the European Convention on Human Rights into British law. UK Decisions can be searched here.

- **European Union**

  The European Court of Human Rights has developed a body of jurisprudence. Decisions can be searched here.

- **United Nations**

  A number of UN bodies have provided guidance in relation to the intersection between international human rights law and domestic violence, including the Committee on the Elimination of Discrimination against Women in its General Comment 19 – Violence against Women.

16.3 *Further Information*

- *Human Rights Act 2019*
- Explanatory Notes
- Queensland Government Human Rights Portal
- Queensland Human Rights Commission
- Australian Human Rights Commission (see link to AHRC and domestic and family violence page)
- University of Melbourne – Human Rights Law Research Guide: New Zealand
- New Zealand Human Rights Commission
- University of Melbourne – Human Rights Law Research Guide: United Kingdom
- Commonwealth Forum of National Human Rights Institutions

17 Appendix 1 - Links between Social Disadvantage, Child Abuse and Neglect

Domestic violence, homelessness, substance abuse, and mental health are co-occurring, but these issues don't generally happen independently of each other.

The Queensland Child Protection Commission of Inquiry (QCPCI) reported that many studies have shown strong links between social disadvantage and child abuse and neglect. It cited an article by Melissa O'Donnell et al, 'Child abuse and neglect – is it time for a public health approach?' (2008) 32(4) *Australian and New Zealand Journal of Public Health* 327:

> We already know from the literature about many of the risk factors for child abuse and neglect in communities, families and children. US research has found communities that are more vulnerable have greater poverty and unemployment, higher residential mobility and a low adult to child ratio. A low adult to child ratio is true of many Aboriginal communities and is associated with an increased burden for caregivers. Family characteristics that increase risk include parents with mental health problems, substance abuse issues, domestic violence, poor family functioning, young mothers, single parents and mothers who have little social support or contact.

While the underlying social problems should not be interpreted as being predictive of child abuse and neglect, these problems will place additional stress on families, reduce parenting capacity, and potentially increase the risk of child abuse or neglect.

Homelessness

Homelessness is often caused by interrelated factors. The population experiencing homelessness and the populations experiencing substance misuse, mental illness and domestic violence frequently overlap. Links between homelessness and involvement with child protection services have been shown, but it is under-researched in Australia.[376]

From the 2016 census, it was found:

- There were 116,427 people enumerated in the Census who are classified as being homeless on Census night (up from 102,439 persons in 2011);
- The homeless rate was 50 persons for every 10,000 persons enumerated in the 2016 Census, up 5% from the 48 persons in 2011 and up on the 45 persons in 2006;
- Most of the increase in homelessness between 2011 and 2016 was reflected in persons living in 'severely' crowded dwellings, up from 41,370 in 2011 to 51,088 in 2016;
- The number of people spending Census night in supported accommodation for the homeless in 2016 was 21,235;
- There were 17,503 homeless persons living in boarding houses on Census night in 2016;

- The number of homeless persons living in improvised dwellings, tents or sleeping out in 2016 was 8,200, up from 6,810 in 2011;
- People who were born overseas and arrived in Australia in the last 5 years accounted for 15% (17,749 persons) of all persons who were homeless on Census night in 2016;
- The rate of Aboriginal and Torres Strait Islander peoples who were homeless was 361 persons for every 10,000 of the Aboriginal and Torres Strait Islander population;
- Homeless youth (aged 12 to 24 years) made up 32% of total homeless persons living in 'severely' crowded dwellings, 23% of persons in supported accommodation for the homeless and 16% of persons staying temporarily in other households in 2016;
- Nearly 60% of homeless people in 2016 were aged under 35 years, and 42% of the increase in homelessness was in the 25 to 34 years age group (up 32% to 24,224 persons in 2016);

Aboriginal and Torres Strait Islander peoples made up 3% of the Australian population in 2016. However, Aboriginal and Torres Strait Islander peoples accounted for 20% (23,437 persons) (down from 26% in 2011) of all persons who were homeless on Census night in 2016. Of those who were classified as homeless, 70% (down from 75% in 2011) were living in 'severely' crowded dwellings, 12% were in supported accommodation for the homeless and 9% were in improvised dwellings, tents or sleeping out. For non-Indigenous homeless persons, 42% were living in 'severely' crowded dwellings, 15% were in supported accommodation, and 6% were in improvised dwellings, tents or sleeping out.

The Australian Institute of Health and Welfare also releases an annual report on specialist homelessness services, and the 2017-2018 annual report showed that in Queensland:

- 41,118 people were assisted by homeless services in Queensland, representing 14% of the national population accessing homeless services;
- 53% were homeless on first presentation to these services, which is higher than the national rate of 43%;
- The client characteristics of the majority of people accessing these services were either one parent with child/ren (40%) or a couple with child/ren (13%).

The top 3 reasons for clients seeking assistance were:

- Financial difficulties (47%, compared with 39% nationally)
- Housing crisis (44%, compared with 39% nationally)
- Housing affordability stress (36%, compared with 26% nationally).

On average, 13 requests for assistance went unmet each day.

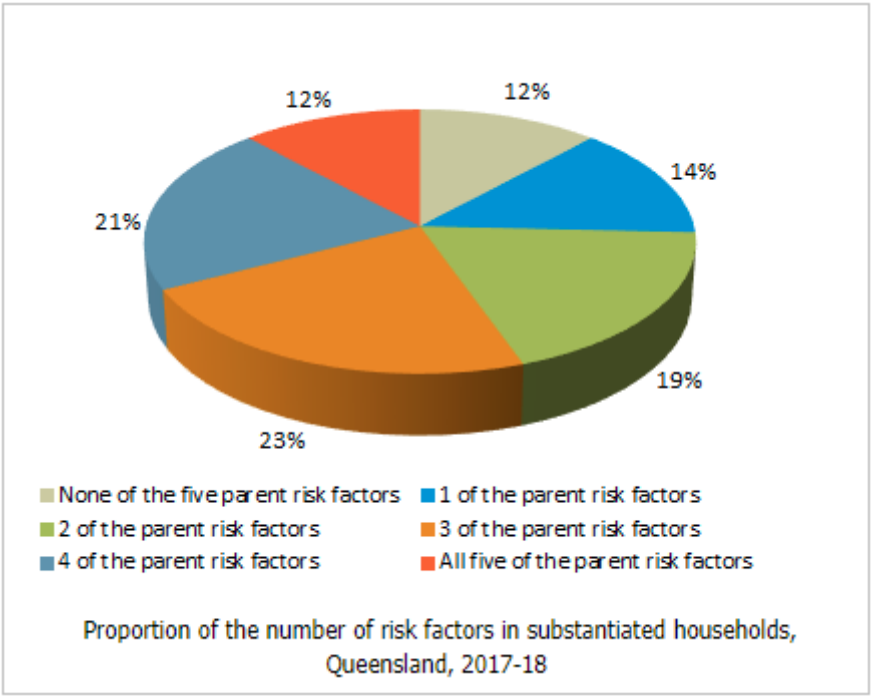
Risk factors for child abuse and neglect

Child Safety has analysed the characteristics of parents with children in the child protection system.[377] Demographic characteristics identified for parents in substantiated households for the 12 month period ending 31 March 2019 included:

[377] Department of Child Safety, Youth and Women, 2019 Family and household characteristics.

1. Domestic and family violence (50%);
2. Substance misuse (66%);
3. Intergenerational experience of abuse or neglect (42%);
4. Mental illness (42%); and
5. Criminal history (52%).

The analysis identified parental risk factors associated with child abuse and neglect, and 88% of households had at least one of these factors. The analysis also showed that 74% of substantiated households had more than one of the five risk factors:



Source: https://www.csyw.qld.gov.au/child-family/our-performance/family-household-characteristics

Drug use

The above Child Safety analysis also identified the following trends in the child protection system:

- More than 1 in 3 children (36 per cent or 810 children) who came into care of the Department during the year ending 31 March 2019 had a parent with current or previous methamphetamine use recorded, up from 30 per cent a year ago and 34 per cent last quarter.
- In most cases (68 per cent) the type of methamphetamine was ICE.
- In the majority of cases (70 per cent) where parental ICE use was recorded, it was reported to have occurred in the last 12 months, but not prior to that. This indicates most of these parents had recently begun using ICE.

Domestic violence and family violence

The following is from a Child Safety practice paper published in April 2018, "DFV and Child Protection":

> *Recent research suggests that as many as one in three women have experienced physical violence, whilst one in four women have experienced violence by an intimate partner. These numbers are even higher for women who identify as Aboriginal or Torres Strait Islander. It is estimated that half of the Aboriginal and Torres Strait Islander women in Australia experience domestic and family violence. Child witnesses of violence are most likely to be in families where the perpetrator is their father and the protective parent is their mother.*
>
> *The perception that women are also commonly perpetrators is not generated from statistics or supported by practitioners working in the field. This is not to say that some men, sometimes, experience violence from their female partner, however, the reality is that relatively few men in heterosexual relationships are solely victims of intimate partner violence. Men are much more likely than their female partner to be using a number of repeated forms of violence to dominate and control. Men's violence is more likely to inflict severe injury and to result from attempts to control, coerce, intimidate and dominate women partners. Where violence is used by both partners in a relationship, the woman's acts are more likely to be in self-defence.*
> *(…)*
>
> *Researchers studying perpetrators of domestic and family violence have highlighted the diversity of men who commit violence against women. Contrary to some beliefs, perpetrators are found in all social classes and engage in a variety of lifestyles, social roles and cultural practices. Perpetrators may appear to be presentable and responsible people, exhibiting strength, dependability and self-control. At the same time, within the family home, they may control family members through superior physical strength, threats and fear.*
>
> *There are many societal myths associated with perpetrators. For example, perpetrators may be described as 'mentally ill', 'unable to control their anger', or are 'abusive only when drunk'. Perpetrating violence is a choice, although typically it is not seen as such in the mind of the perpetrator.*
> *(…)*
>
> *Perpetrators may further harm children physically, sexually, emotionally, and through neglect. Harm may occur because:*
> - *they may focus their attention on controlling their partner rather than engaging as a parent, or prevent their partner from caring for their children resulting in neglect of the children.*
> - *they may prevent their partner from seeking medical treatment for the children, particularly when they have physically abused them, heightening the risk of serious injury and even death in the case of babies and infants*

- *they may hurt children emotionally by verbally abusing them, or damaging their relationships through using them as a tool by coercing them into abusing the other parent*
- *they may hurt children emotionally by creating an environment in which children live with fear, even if they never see or hear violence or abuse occurring, and which may undermine the ability of practitioners and service providers to intervene and protect them*

The Duluth Power and Control Wheel (below) demonstrates the types of coercive behaviours that are considered to be domestic violence. Note that many of the behaviours are not necessarily physical, but are still intended to exert control and dominance over an intimate partner and are still classified as domestic violence.

Source: https://www.theduluthmodel.org/wheels/

Safe and Together Model – Court guidance to assess the allegations of domestic violence
(*click below image to open in new window*)

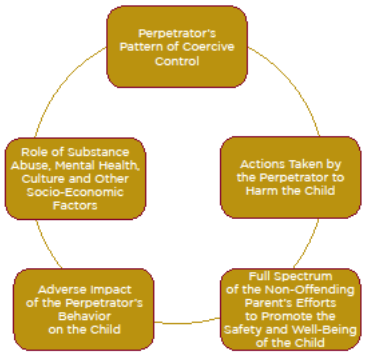
THE SUPREME COURT *of* OHIO

ASSESSING ALLEGATIONS OF DOMESTIC VIOLENCE IN CHILD ABUSE CASES

Juvenile courts and their justice partners are tasked with safeguarding the well-being and welfare of children.

Experts agree that experiences with domestic violence pose short- and long-term risks for children, including their becoming targets of abuse themselves. To examine how domestic violence affects children and determine whether the parents, regardless of their own experience with domestic violence, may provide a nurturing, protective environment for their children to flourish, judicial officers should expect meaningful information from child protective services agencies (CPS). Many Ohio CPS agencies have incorporated the Safe and Together™ model into their practices (*See right*). This model assesses the capacity of parents to act as parents when allegations of intimate partner violence are made. Additionally, its emphasis on patterns of coercive control may be useful as an assessment lens in other family violence cases.

Safe and Together™ Critical Components



Other Resources

National Council on Juvenile and Family Court Judges (NCJFCJ)

- Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence (2008)
- Preliminary Protective Hearing Bench Card (2010)
- Checklist to Promote Perpetrator Accountability in Dependency Cases Involving Domestic Violence (2011)

Supreme Court of Ohio

- Planning for Parenting Time: Ohio's Guide for Parents Living Apart (2012)
- Domestic Violence & Allocation of Parental Rights and Responsibilities Court Guide (2016)

Practice Guides for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters, Battered Women's Justice Project (2015)

The Impact of Batterers on Children: An Ohio Model Community Response Protocol, The Ohio IPV Collaborative (2015)

Safe & Together™, David Mandel & Associates, LLC (2015)

November 2016

Mental Illness

The 2017–18 National Health Survey found there had been an increase in the proportion of people reporting they had a mental or behavioural condition.[378] The Survey found:

- In 2017-18, one in five (20.1%) or 4.8 million Australians had a mental or behavioural condition, an increase from 4.0 million Australians (17.5%) in 2014-15
- In 2017-18, around one in eight (13.0% or 2.4 million) Australians aged 18 years and over experienced high or very high levels of psychological distress, an increase from 2014-15 (11.7%)
- In 2017-18, adults living in areas of most disadvantage across Australia were more than twice as likely to experience high or very high levels of psychological distress than adults living in areas of least disadvantage (18.3% compared with 9.0% respectively), continuing the pattern from 2014-15 (17.7% compared with 7.3% respectively)

These results indicate that not only are rates of psychological distress becoming more common, they are also more likely to affect those already living in an area of most disadvantage.

As can be summarised from the above data relating to homelessness, drug abuse, domestic violence and mental illness, those that are at a significant disadvantage in society are much more likely to be found unable or unwilling to protect their children from harm. Therefore, when addressing child protection issues, a multi-disciplinary approach may be of most benefit to families, as it is rarely just one issue that has caused the concerns, but rather a combination of multiple factors which has had a significant impact on the family and their ability to keep their children safe.

[378] Includes organic mental problems, alcohol and drug problems, mood (affective) problems and other mental and behavioural problems. Australian Bureau of Statistics 2019, National Health Survey: First Results, 2017-18, cat. no. 4364.0.55.001, Commonwealth of Australia, Canberra.

18 Appendix 2 – Legal Aid referral for Social Assessment Report

(Provided by Legal Aid Queensland)

Independent Social Assessment Report Referral

CHILDRENS COURT OF QUEENSLAND

REGISTRY:
NUMBER:

Children:

Applicant:

AND

Respondent:

I confirm that you have been briefed to complete a social assessment report in relation to the child, and parents, Insert parents' full names .

The child is currently in the care of the Department of Communities (Child Safety and Disability Services) – "Child Safety". Child Safety Officer Name of CSO of the Location Child Safety Service Centre has applied to the Childrens Court for child protection orders as follows:

Child	Current application

The social assessment report is sought and funded by the separate representative for the child, [*insert name*] of [*insert practice details*]. The instructions to you have been settled by the separate representative, with opportunity for input provided to Child Safety and the respondent parents. Legal Aid Queensland has approved $ funding for this report. The grant of aid is approved as code SW5.

Your assessment will be used to assist the separate representative to perform the role set out in section 110(3) of the *Child Protection Act 1999* ("the Act"), to:

- act in the child's best interests, regardless of any instructions from the child; and
- as far as possible to present the child's views and wishes to the Childrens Court.

Your report will be provided to the Childrens Court and to the parties, including the parents and the Child Safety. Depending on the child's maturity and level of understanding, they may be entitled to access a copy of the report, now or in the future.

Briefing documents

A list of the documents provided with this letter of instruction is included below. The separate representative has sought to summarise key information from the majority of the documents within these instructions. However, the source documents are provided to ensure the report writer has access to the original material and context, should that be required in conducting the assessment and preparing the report.

Under section 188 of the Act, these documents are provided to you on a confidential basis and you must not disclose the information or give access to the document to anyone else. A breach of this provision is a criminal offence and carries a maximum penalty of 100 penalty units ($7,500) or 2 years imprisonment.

Part 1 – Instructions to social assessment report writer

Please address the following matters. Should you be unable to comment on a particular matter, please outline the reasons why you are unable to do so.

Harm and parent willing and able to protect from harm

1. Has the child suffered harm, is suffering harm, and/or is there an unacceptable risk that the child may suffer harm in the future?

   For your consideration, harm, to a child, is defined in section 9 of the Act as follows:

   - any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'; and
   - can be caused by physical, psychological or emotional abuse or neglect, or sexual abuse or exploitation.

   Harm can be caused by a single act, omission or circumstance, or a series or combination of acts, omissions or circumstances. It is also immaterial how the harm is caused.

2. If so, what harm do you assess that the child has suffered, is suffering or is at unacceptable risk of suffering? Please comment specifically on the following:

   a. Is the nature of any harm identified physical, psychological or emotional and what is the cause of the harm identified?

b. Why do you consider the harm has or will have a detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing?

c. In relation to any unacceptable risk of suffering harm in the future that has been identified, why do you consider the risk to be unacceptable?

3. What is your assessment of the care and protective needs of the child?

4. What arrangements will best meet those care and protective needs?

5. Does the child have a parent who is able and willing to protect from the harm and, or the unacceptable risk of harm?

Should a child protection order be made and if so what type of order is appropriate?

6. If you assess that the child is in need of protection, is the order sought (as detailed above), appropriate and desirable for the protection of the subject child?

   For your consideration, section 61 of the Act, which details the types of children protection orders, which the Childrens Court may make any 1 or more of has been attached. Please note that the Childrens Court may make 1 or more of the orders as the court considers appropriate.

7. Is the protection of the child achievable by a less intrusive or different order?

8. If you consider a protective supervision order and/or a directive order, with the child remaining in parents' care, to be the most appropriate, please outline the areas that should be supervised and/or directives you would support.

9. If you assess that the most appropriate order would see the child in out of home care, please comment on which type of order would be the most appropriate.

10. If you consider a short-term custody order to be the most appropriate:

    a. Is there a member of the family who is suitable to be granted short term custody of the child?

    b. Please comment on who the child should be reunified with, how such reunification should be achieved and what length of order is appropriate for the parent/s to develop and demonstrate both willingness and ability to protect their child from harm.

    c. If you consider reunification cannot occur please comment on why neither parent is likely to become able and willing in the foreseeable future and what length of order is appropriate for Child Safety to address and resolve the permanency planning needs of the child and their family prior to seeking long-term guardianship of the child?

    d. In relation to each parent please comment on why in your view they have the capacity to make guardianship decisions for their child?

11. If you consider a short-term guardianship order to be the most appropriate:

    a. Please comment on who the child should be reunified with, how such reunification should be achieved and what length of order is appropriate for the parents to develop and demonstrate both willingness and ability to protect their child from harm.

b. If you consider reunification cannot occur please comment on why neither parent is likely to become able and willing in the foreseeable future and what length of order is appropriate for Child Safety to address and resolve the permanency planning needs of the child and their family prior to seeking long-term guardianship of the child?

c. In relation to each parent please comment on why in your view they do not have the capacity to make guardianship decisions for their child.

12. If the child has been the subject of previous child protection orders granting either short-term custody or guardianship and you believe further orders are required, please comment on the type of order you recommend and its likely impact on the child's need for emotional security and stability?

13. If you consider a long-term guardianship order to be the most appropriate:

    a. Please comment on why neither parent is likely to become able and willing to protect the child within the foreseeable future; or why the child's need for emotional security will be best met in the long term by making the long-term order.

    b. Please consider whether Child Safety has adequately considered and addressed the factors set out in Child Safety's *Practice resource: Long-term guardianship – assessment factors* (attached to this material). If not adequately addressed please outline what matters remain to be addressed.

    c. Is there a member of the family, or another person who is suitable to be granted guardianship of the child?

Principles for Aboriginal or Torres Strait Islander children and Culturally and Linguistically Diverse children

14. Do the orders sought and the case plans developed for the child, support to develop and maintain a connection with ethnicity, religion, family, culture, traditions, language and community?

15. What likely long-term effects on the child's identity and connection with family and community should be taken into account before decisions are made regarding Child Safety's application and proposed case planning?

16. What are the views of the child's parents, extended family and the Recognised Entity in relation to these matters?

17. If you consider that additional information is required to make an assessment of these issues, or that the views of other people and agencies need to be sought, please outline the basis of your view.

Child's wishes and assessment

18. What is your assessment of the child's age, level of maturity and ability to understand the child protection concerns and resulting proceedings?

19. Has the child expressed any views and wishes about:
    a. living with parents;
    b. being in care and where would like to live;
    c. the court proceedings and the making of any orders;
    d. what level of contact would like to have with parents, siblings or other family members;
    e. participation in decision-making by Child Safety; or
    f. about any other case planning matter (for example – placement, schooling, health, access to counseling, etc)?

    If so, what are those views and wishes?

20. If the child has expressed views and wishes, what is your assessment of the child's reaction to the possibility that the court may make orders that do not reflect views or wishes? What supports, if any, should be provided to the child in this regard?

21. If the child has not expressed any views and wishes, what is your assessment of circumstances?

Relationship between the child and parents/caregivers

22. Please comment on any observations you made about the relationship, attachment and bonding of the child with Insert parents' full names .

23. Please comment on any observations you made about the relationship, attachment and bonding of the child with carer, whose details appear below in Part 2.

Circumstances during an order - contact

24. If it is appropriate and desirable for child protection orders to be made granting either custody or guardianship of the child:
    a. What contact arrangements between the child and parents/extended family are appropriate?
    b. What conditions should be placed, if any, on contact?

25. The current contact arrangements are that Insert parents' full names may have unsupervised/supervised contact at the Location Child Safety Service Centre with the child as follows: Detail contact arrangements.

    In your view, are the contact arrangements outlined appropriate in the circumstances?

26. Specifically, please comment on the following if appropriate:
    a. Should contact be more frequent or less frequent than is currently in place?

b. If you believe it would be in the best interests of the child to consider increasing the frequency of the contact in the future, please comment on what milestones, if any, should be achieved prior to increasing contact?

c. If you believe it would be in the best interests of the child to consider unsupervised contact in the future, please comment on what milestones, if any, should be achieved prior to this taking place?

d. Any specific questions

27. In relation to contact with extended family members for the child:

    a. To what extent does the child have established relationships with paternal and maternal extended family?

    b. What, if any, positive steps and interventions are required to support and promote contact, and a positive ongoing relationship, between the child and paternal and maternal extended family?

Circumstances during an order – case planning

28. Please comment on the adequacy and appropriateness of the interventions and supports outlined in the child's case plan in relation to Insert parents' full names. Specifically, please make any recommendations you consider appropriate that may be likely to assist Insert parents' full names in enhancing their ability to protect the child from harm and therefore achieving reunification, such as:

    a. Are any clinical/forensic/other assessments of the parents required to guide casework and intervention by Child Safety?

    b. Do you recommend that the parents be referred to any specific interventions/programs/services?

    c. Do you have any recommendations or comments regarding interventions/programs/services the parents are already engaged with?

    d. Please also comment on any other matters relevant to the case planning and case management of this matter in the best interests of the child.

29. Please comment on the adequacy and appropriateness of the interventions and supports outlined in the child's case plan. Specifically, please make any recommendations you consider appropriate that may be likely to assist in meeting the child's needs, such as:

    a. Are any clinical/forensic/other assessments of the child required to identify needs or to guide casework and intervention by Child Safety?

    b. Do you recommend that the child be referred to any specific supports/programs/services?

    c. Do you make any recommendations regarding referrals or case work aimed at enhancing the child's ability to have a safe and meaningful relationship with parents?

d. Do you have any recommendations or comments regarding interventions/programs/services the child is already engaged with?

e. Please also comment on any other matters relevant to the case planning and case management of this matter in the best interests of the child.

Circumstances during an order – placement

30. Please comment on the appropriateness of the current placement for the child. Specifically, please make any recommendations you consider appropriate regarding supports and interventions to assist the child's carer in meeting individual needs.

31. The report writer is referred in particular to section 83 of the Act, attached to this material, which sets out particular matters which must be considered when making decisions about the placement of Aboriginal or Torres Strait Islander children. The details of the carers with whom the child is currently placed are set out below in Part 2. Detail any additional information re the carers and their relationship to children/community. Please comment on:

    a. Is the current placement appropriate for the child, with reference to the requirements set out in section 83 and to the paramount considerations of the child's safety, well-being and best interests.

    b. Is the placement appropriate for meeting the child's needs for connection with both parents, and with maternal and paternal extended family members?

    c. What impact, if any, does the current placement arrangement have on sibling relationships between the subject child, and with siblings in the care of extended family?

    d. Is the current placement appropriate for meeting the child's need to maintain a connection with and sense of community, language, culture and identity?

32. The report writer is referred in particular to section 5B(k)(i) and s5B(m) of the Act , attached to this material, which sets out particular matters which must be considered when making decisions about the placement of children. The child is currently placed with Names of carers and relationship to children/community. Please comment on:

    a. Is the current placement appropriate for the child, with reference to the requirements set out in section 5B and to the paramount considerations of the child's safety, well-being and best interests.

    b. Is the placement appropriate for meeting the child's needs for connection with both parents, and with maternal and paternal extended family members?

    c. What impact, if any, does the current placement arrangement have on sibling relationships between the subject child, and with siblings in the care of extended family?

    d. Is the current placement appropriate for meeting the child's need to maintain a connection with and sense of ethnicity, religion, community, language, culture and identity?

Other

33. Would you please explore the issue of

34. Please explore any other matters you consider to be:

    a. significant in the context of the current child protection concerns and child protection history; or

    b. relevant to the case management of this matter in the best interests of the child?

Part 2 – Information about the subject child

CHILD:

Date of Birth: Sex: Male ☐ Female ☐

Who does the child live with?

Ph:
Mobile:

Part 3 – Information about the parties

Information about the applicant

Child Safety Officer:

Team leader:

Service Centre: CSSC

Address:

Contact no: (CSO)

Facsimile no.:

Information about the first respondent –

Name:

DOB:

Address:

Contact no:

Solicitor: N/A

Address: N/A

Contact no: N/A

Information about the second respondent –

Name:

DOB:

Address:

Contact no:

Solicitor: N/A

Address: N/A

Contact no: N/A

Part 4 – History of the current application

Date application filed for [name of child]:

Childrens Court:

Type of order sought:

Child	**Order sought**

Date of order appointing separate representative:

Next court date:

Court event report is required for: {Mention/Family group meeting/Court ordered conference/Hearing}

Part 5 – Summary of significant allegations leading to the current application

Alleged harm and parental willingness and ability to protect the child:

The affidavit of Name dated Date outlines the harms allegedly experienced by the child in family of origin, and parents' willingness and ability to protect the child.

The concerns which led to the current application for a child protection order, are set out in sheets and can be summarised as follows:

-

Child Safety's assessment of the alleged harm and required intervention

Child Safety's assessment of the alleged harms to the child and the family's child protection history can be found in the affidavit of Name dated Date and can be summarised as follows:

-

Part 6 – History of Child Safety's involvement and significant events

Date	Event	Source

Part 7 – Child's views and wishes

The child's views and wishes are yet to be documented by Child Safety in material before the Childrens Court.

-

Part 8 – Requirements of report writer

Has there been any prior involvement in this matter by another independent social assessment report writer? **Yes** ☐ **No** ☐

Purpose of the social assessment report, including matters to be assessed by report writer:
The instructions in relation to the report to be prepared by the report writer are outlined at the beginning of this document.

Does the separate representative intend meeting the children with the report writer? **Yes** ☐ **No** ☐

The separate representative would like to meet with the child on the date of the parent-child observations, when these are scheduled.

Do you want the report writer to liaise with the childrens school, medical personnel, SCAN Team etc? **Yes** ☐ **No** ☐

If the report writer considers it appropriate in the context of the requested assessment, and it is within the quoted fee for the reports, please liaise with appropriate agencies. If the report writer requires assistance with this matter, please contact the separate representative or Child Safety Officer

Are there other reports being prepared? **Yes** ☐ **No** ☐

Part 9 – List of documents provided to report writer

	Applicant's Documents	**Dated**	**Filed**	
1.				
2.				

	Respondent's Documents	**Dated**	**Filed**	
3.				
4.				

	Child Safety's Material –	**Dated**	
5.			

Part 10 – Next court date

This matter is in the

Next court date:

Type of event:

NB: This report is required for the mention in this matter on

Will the report writer be required to attend court on the next court date?

Yes ☐ **No** ☐

If the matter proceeds to hearing the report writer must attend court. I will advise you closer to the date of the times you will be required.

Part 11 – Date report required

Please provide us with your report by close of business on

……

Date: 2015

Separate Representative

CHILD PROTECTION ACT 1999

5B Other General Principles

(k) a child should have stable living arrangements, including arrangements that provide—

(i) for a stable connection with the child's family and community, to the extent that is in the child's best interests; and

(ii) for the child's developmental, educational, emotional, health, intellectual and physical needs to be met;

(m) a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values

61 Types of child protection orders

The Childrens Court may make any 1 or more of the following child protection orders that the court considers to be appropriate in the circumstances—

(a) an order directing a parent of the child to do or refrain from doing something directly related to the child's protection;

(b) an order directing a parent not to have contact, direct or indirect—

(i) with the child; or

(ii) with the child other than when a stated person or a person of a stated category is present;

(c) an order requiring the chief executive to supervise the child's protection in relation to the matters stated in the order;

(d) an order granting custody of the child to—

(i) a suitable person, other than a parent of the child, who is a member of the child's family; or

(ii) the chief executive;

(e) an order granting short-term guardianship of the child to the chief executive;

(f) an order granting long-term guardianship of the child to—

(i) a suitable person, other than a parent of the child, who is a member of the child's family; or

(ii) another suitable person, other than a member of the child's family, nominated by the chief executive; or

(ii) the chief executive.

Note—

The parents of the child may apply to vary or revoke a long-term guardianship order—see section 65(1).

(g) an order (a permanent care order) granting long-term guardianship of the child to a suitable person, other than a parent of the child or the chief executive, nominated by the chief executive.

Note—

Only the litigation director may apply to vary or revoke a permanent care order—see section 65AA.

83 Additional provisions for placing Aboriginal and Torres Strait Islander children in care

(1) This section applies if the child is an Aboriginal or a Torres Strait Islander child.

(2) The chief executive must, in consultation with the child and the child's family, arrange for an independent Aboriginal or Torres Strait Islander entity for the child to facilitate the participation of the child and the child's family in the process for making a decision about where or with whom the child will live.

(3) However, the chief executive is not required to arrange for the involvement of an independent Aboriginal or Torres Strait Islander entity for the child under subsection (2) if—

(a) it is not practicable because an entity is not available or urgent action is required to protect the child; or

(b) the chief executive is satisfied that an entity's involvement—

(i) is likely to have a significant adverse effect on the safety or psychological or emotional wellbeing of the child or any other person; or

(i) is not otherwise in the child's best interests; or

(c) the child or the child's family does not consent to the entity's involvement.

(4) In making a decision about the person in whose care the child should be placed, the chief executive must, if practicable, place the child with a member of the child's family group.

(5) However, if it is not practicable to place the child with a member of the child's family group, in making a decision about the person in whose care the child should be placed, the chief executive must place the child with—

(a) a member of the child's community or language group; or

(b) if it is not practicable to place the child in the care of a person mentioned in paragraph (a), an Aboriginal or Torres Strait Islander person who is compatible with the child's community or language group; or

(c) if it is not practicable to place the child in the care of a person mentioned in paragraph (a) or (b), another Aboriginal or Torres Strait Islander person; or

(d) if it is not practicable to place the child in the care of a person mentioned in paragraphs (a) to (c), a person who—

(i) lives near the child's family, community or language group; and

(ii) has a demonstrated capacity for ensuring the child's continuity of connection to kin, country and culture.

(6) Also, the chief executive must give proper consideration to—

(a) the views of the child and the child's family; and

(b) ensuring the decision provides for the optimal retention of the child's relationships with parents, siblings and other people of significance to the child under Aboriginal tradition or Island custom.

(7) Before placing the child in the care of a family member or other person who is not an Aboriginal person or Torres Strait Islander, the chief executive must give proper consideration to whether the person is committed to—

(a) facilitating contact between the child and the child's parents and other family members, subject to any limitations on the contact under section 87; and

(b) helping the child to maintain contact with the child's community or language group; and

(c) helping the child to maintain a connection with the child's Aboriginal or Torres Strait Islander culture; and

(d) preserving and enhancing the child's sense of Aboriginal or Torres Strait Islander identity.

19 Appendix 3 – Common Directive Orders Magistrates may make on Adjournment

On adjournment of proceedings for a CHILD PROTECTION ORDER, after considering the material filed by the parties I am satisfied that the following Orders are appropriate:

[ ] I order that a written **Social Assessment Report** about the child and the child's family be prepared and filed in the Court on or before the …….

[ ] I order the Chief Executive convene a **Family Group Meeting** to develop (or revise) a Case Plan, and to consider or make recommendations relating to the Child's wellbeing and care and protection needs.

[ ] I order the Chief Executive to arrange for a private convener to convene a **Family Group Meeting** to develop (or revise) a Case Plan, and to consider or make recommendations relating to the Child's wellbeing and care and protection needs.

[ ] I order that a **Conference** be held between the parties at …. am/pm on …./…./…. in respect to this application.

[ ] I order a **Separate Representative** be appointed in the best interests of the Child;

I request that Legal Aid Queensland facilitate such representation. I direct the Registrar of this Court is to promptly advise Legal Aid Queensland as to the making of this Order.

[ ] I make the following **Directions** for the conduct of the hearing:

- That the evidence in chief of all witnesses shall be by way of affidavit.
- That the **applicant** file with the Registry and serve upon the parties all affidavit material intended to be relied upon on or before 4:00pm on the / /
- That the **Separate Representative** file with the Registry and serve upon the parties all affidavit material intended to be relied upon on or before 4:00pm on the / /
- That the **respondent(s)** file with the Registry and serve upon the parties all affidavit material intended to be relied upon on or before 4:00pm on the / /
- The **applicant** and the **separate representative** file with the Registry and serve upon the parties any material in reply on or before 4:00pm on the / /

[ ] BY CONSENT the application is further adjourned to the for MENTION (for purposes of the return date of subpoenaed material) in Court at am/pm.

[ ] BY CONSENT the application is further adjourned to the for REVIEW MENTION in Court at am/pm. **(Appearances required on this date – if the parties fail to appear, I now inform the parties that I may proceed to determine the application based upon the filed material.)**

[ ] BY CONSENT this application is adjourned to the for MENTION / HEARING in Court at am/pm

[ ] I **note that pursuant to Section 99 of the Act the previous child protection order will continue** to have effect.

[ ] **I MAKE AN INTERIM ORDER**:

[ ] Granting temporary custody of the child to the chief executive;

[ ] Directing and not to have contact, direct or indirect, with the child other than when an authorized person is present.

This order remains in force until / / .

[ ] The interim order is enlarged to / / .

Other orders that may be made on adjournment

1. **<u>Subpoenas</u>**

Standard Direction:

[Standard Direction to be considered]

Objective to the direction:

1. Parties must complete a Form 23 (Request for a subpoena) and Form 24 (Subpoena) as soon as practicable after the proceedings are commenced so that documents can be produced and inspected in a timely manner.
2. A sealed copy of the subpoena must be served on the other parties to the proceedings.
3. Prior to the subpoena return date, parties should confirm with the court registry that eh documents sought to be produces pursuant to the subpoena, have been produced.
4. In circumstances where a party makes an application to set aside a subpoena written notice of that application, stating the grounds relied upon is to be provided to the court and the issuing party prior to the return date for the subpoena.
5. When an application to set aside the subpoena is to be made the applicant and the issuing party is to attend the court on the return date for the subpoena.
6. Where a party to a proceedings or the producer of the documents objects to the access to the documents, written notice of the objection it to be provided to the court and to the issuing party prior to the return date for the subpoena.

7. Where the documents have been produced and no objection to their access has been raised, the court may make the following standard direction
8. Where a party is not represented by a legal practitioner access to subpoena documents is take place in the presence of a member of the registry staff. Ability to photocopy may only be provided to an unrepresented party with leave of the court.
9. If photocopy access is granted to any document produced pursuant to a subpoena, it shall be condition of photocopy access that the copy shall not be used for any purpose other than the proceedings for which the document has been produced, unless the court otherwise directs.
10. Original documents produced on subpoena and not admitted to evidence during the court of the proceedings will be returned to the producer at the conclusion of the matter

20 Appendix 4 – Comparing the long-term Child protection Orders

The following table compares the differences between available long-term orders open to the Children's Court.[379] It should be used as a guide only.

Permanent Care Order (PCO)	Long-Term Guardianship to suitable other person (LTG-O)	Long-Term Guardianship to the Chief Executive (LTG-CE)
Applicable time periods		
The child has to be in permanent guardian's care for 12 months immediately prior to making the application (except where there are exceptional circumstances).[380]	An LTG application can be filed at any stage during ongoing intervention.	An LTG application can be filed at any stage during ongoing intervention.
Contact with Child Safety during course of order		
Minimal or no contact with the department.	Yearly contact with the child by the department in accordance with s 51VA.	The child is still subject to regular contact and case planning cycles.
Case planning required by the Act		
A case plan is required. CE must ensure that a case plan is developed for each child who the CE is satisfied is a child in need of protection; and needs ongoing help under the Act.[381] An order cannot be made by a court unless it is satisfied that a case plan has been developed and is appropriate to meet the child's care and protection needs.[382] At any time the child or permanent guardian may request CE to review the case plan.[383]	CE must ensure that a case plan is developed for each child who the CE is satisfied is a child in need of protection; and needs ongoing help under the Act.[384] An order cannot be made by a court unless it is satisfied that a case plan has been developed and is appropriate to meet the child's care and protection needs. CE required to contact the child yearly to allow child to comment or ask queries or seek a review of the case plan. At any time the child, the child's parents or the LTG-O may	The child is still subject to the regular case planning cycle.

[379] Department of Child Safety, Youth and Women, *Let's get ready kit for NGOs - Implementation of the Child Protection Reform Amendment Act 2017*, 2018, pg. 46-49.
[380] s 59(7A)-(7B) *CPA*.
[381] s 51C(a)-(b) *CPA*.
[382] s 59(1)(b) *CPA*.
[383] s 51VB(2) *CPA*.
[384] s 51C(a)-(b) *CPA*.

	request CE to review the case plan.[385]	
Information sharing and privacy[386]		
Permanent guardian has specific obligations to tell the parents where the child is living; provide information about the child's care; and provide an opportunity for contact between the child and the child's parents and appropriate members of the child's family as often as it is appropriate in the circumstances. Note: The Court may order an exemption from this in certain circumstances.	LTG-O has specific obligations to tell the parents where the child is living; provide information about the child's care; and provide an opportunity for contact between the child and the child's parents and appropriate members of the child's family as often as it is appropriate in the circumstances. Note: the Court may order an exemption from this in certain circumstances	The child will still be in contact with the department in accordance with the regular case planning cycle.
Revocation[387]		
Only DCPL may apply to vary or revoke. If satisfied that the child has suffered significant harm, or is at unacceptable risk of suffering significant harm; and the child's permanent guardian is not able and willing to protect the child from harm; or if the permanent guardian is not complying, in a significant way, with the obligations under s 79A(1).	The DCPL, a child's parent or the child may apply to vary, revoke or revoke and make another child protection order in its place.	The DCPL, a child's parent or the child may apply to vary, revoke or revoke and make another child protection order in its place.
Aboriginal and/or Torres Strait Islander families		
For an Aboriginal or Torres Strait Islander child it must be considered: "Is the permanent guardian a member of their family or community and can this situation satisfy the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle?"	For an Aboriginal or Torres Strait Islander child it must be considered: "Does the placement satisfy the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle and address the emphasis on permanency?"	For an Aboriginal or Torres Strait Islander child it must be considered: "Does the placement satisfy the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle and address the emphasis on permanency?"

[385] s 51VA *CPA*.
[386] ss 80-80A *CPA*.
[387] ss 65-65AA *CPA*.

The Childrens Court must regard Aboriginal tradition and Island custom with respect to the child's family as well as the elements of the Aboriginal and Torres Strait Islander Child Placement Principle. The Childrens Court can only make a PCO if the child's case plan includes detail about the child's connection to community and culture and language group and consultation with the child (if appropriate) has occurred.[388]		
Obligations on the Department[389]		
The child must be told about: • The Charter of Rights for a Child in Care and given written information about these rights in language appropriate for the child and in a way appropriate for the child; • The Public Guardian and other entities; • The obligations of the child's permanent guardian under s79A; • Their right to contact the CE if the child has any questions or concerns about their protection and care needs; and • Their right to ask for a review of their case plan.	The child must be told about: • The Charter of Rights for a Child in Care and given written information about these rights in language appropriate for the child and in a way appropriate for the child; • The Public Guardian and other entities; • The obligations of the child's permanent guardian under s 79A; • Their right to contact the CE if the child has any questions or concerns about their protection and care needs; • Their right to ask for a review of their case plan.	The child must be told about: • The Charter of Rights for a Child in Care and given written information about these rights in language appropriate for the child and in a way appropriate for the child; • The Public Guardian and other entities; • Assistance to be provided to the child to transition from care to adulthood.
Obligations on guardians[390]		
The PCO guardian must: • Comply with the Charter of Rights for a Child in Care; • Help the child transition from care to adulthood; • Preserve the child's identity	The LTG-O guardian must: • Comply with the Charter of Rights for a Child in Care; • Help the child transition from care to adulthood;	The CE must: • Ensure that the child is provided with help in the transition from care to adulthood, and ensure the help is available to the child/young

[388] s 59A *CPA*.
[389] ss 74(4) and (5), 74A, 51VA(4) & 51VB(2) *CPA*.
[390] ss 75, 79, 79A, 80, 80A *CPA*.

and connection to the child's culture of origin and help maintain the child's relationships with the child's parents, family members and other persons of significance to the child; • If the permanent guardian believes the arrangement is likely to end or has ended they must immediately give the CE notice that the care has ended and, if the permanent guardian knows, where the child is living; • Keep the CE informed about where the child is living; • Tell the parents where the child is living, give them information about the child's care and provide opportunity for contact between the child and the child's parents and family Members.	• If the LTG-O believes the arrangement is likely to end or has ended they must immediately give the CE notice that the care has ended and, if the permanent guardian knows, where the child is living; • Keep the CE informed about where the child is living; • Tell the parents where the child is living, give them information about the child's care and provide opportunity for contact between the child and the child's parents and family members; • Allow the CE to have contact with the child at least once every 12 months.	person for the period starting when the person turns 15 and ending when the person turns 25; • This includes help to access entitlements (including social security allowances and payments), accommodation, education and training, employment, legal advice, health and community services, support in maintaining family relationships, in accessing information in the CE's possession or control about the person, counselling and any other assistance based on the person's needs, provided by the CE.

21 Appendix 5 – If an Adult Party to a Proceeding is Thought to Lack Capacity

Where an adult lacks capacity to make decisions for themselves, does not have a formal attorney acting for them under the *Powers of Attorney Act 1998* (Qld), and their informal supports are not sufficient to meet and protect their rights and interests, a guardian may be appointed by the Queensland Civil and Administrative Tribunal ("QCAT") as the adult's substitute decision maker.

Procedure for the appointment of a guardian for an adult with impaired capacity

Pursuant to s 82 of the *Guardianship and Administration Act 2000* (Qld) ("GAA"), the Queensland Civil and Administrative Tribunal ("QCAT") has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity for matters. A guardian may be appointed for an adult's personal matters whilst an administrator may be appointed for an adult's financial matters.

A guardian can only make decisions for an adult when appointed for the adult, only for the areas of decision making for which the guardian is appointed, and only for the period of their appointment.

Application to QCAT

Where an adult appears to lack capacity to make decisions in relation to child protection matters before the Court, an application to QCAT for the appointment of a guardian for *legal matters not relating to financial or property matters* may be required. A *legal matter* is defined under schedule 2 part 3 of the GAA.

In addition to the appointment of a guardian for legal matters not relating to financial or property matters, QCAT also has the jurisdiction to appoint a guardian to make decisions for other matters, such as accommodation or service provision. Schedule 2 Part 2 of the GAA provides examples of possible areas for which a guardian may be appointed for an adult.

'Section 115 GAA – Scope of applications

(1) An application may be made, as provided under the QCAT Act, to the tribunal for a declaration, order, direction, recommendation or advice in relation to an adult about something in, or related to, this Act or the *Powers of Attorney Act 1998* (Qld).
(2) The application may be made by –
    (a) the adult concerned; or
    (b) unless this Act or the *Powers of Attorney Act 1998* (Qld) states otherwise – another interested person'.

An *interested person*, for a person, means a person who has a sufficient and continuing interest in the other person, as defined under schedule 4 of the GAA. QCAT may decide whether a person is an interested person for an adult pursuant to section 126 of the GAA.

To apply for the appointment of a guardian, the applicant must complete and lodge the following to QCAT:

- Form 10 – Application for administration/guardianship appointment or review; and
- Report by medical and related health professionals.

The QCAT website will have these forms available for any interested party.

Appointment of a guardian

QCAT may appoint a guardian for an adult if satisfied that the conditions outlined in section 12 of the GAA have been met.

'Section 12 GAA – Appointment

(1) The tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied—
  (a) the adult has impaired capacity for the matter; and
  (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
  (c) without an appointment —
    (i) the adult's needs will not be adequately met; or
    (ii) the adult's interests will not be adequately protected.
(2) The appointment may be on terms considered appropriate by the tribunal.
(3) The tribunal may make the order on its own initiative or on the application of the adult, the public guardian or an interested person.
(4) This section does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B'.

Should the need for a guardian be met, QCAT would then need to consider who would be the appropriate person to be appointed as a guardian. Pursuant to s 14(2) of the GAA, the Public Guardian may only be appointed as guardian for a matter if there is no other appropriate person available for appointment. This means the person applying to QCAT should confirm whether there is a more appropriate person who can act as a guardian for the adult, before recommending the Public Guardian. The Public Guardian is only appointed as guardian for adults as an absolute last resort.

Capacity

The definition of 'capacity' is outlined under schedule 4 of the GAA as follows:

''Capacity, for a person for a matter, means the person is capable of –
  (a) understanding the nature and effect of decision about the matter; and
  (b) freely and voluntarily making decisions about the matter; and
  (c) communicating the decisions in some way'.

The Queensland Handbook for Practitioners on Legal Capacity is available to assist the adult's legal practitioner with a conceptual framework for assessing whether a client has capacity to give legal instructions. Chapter 4 of the handbook sets out the following basic principles of legal capacity:

- All adult persons are presumed to have capacity to make all decisions unless there is evidence to rebut the presumption;
- Capacity is time-specific, domain-specific and decision-specific, meaning at a given time a client may have capacity for some decisions but not others;
- The capacity to make a decision must be distinguished from the content of the decision itself, meaning 'bad' decisions are not indicative of impaired capacity;
- Capacity should not be assessed solely on the basis of appearance, age, behaviour (including communication style), disability or impairment;
- Capacity may be increased with appropriate support; and
- Substituted decision making is a last resort.

Scope of the Public Guardian's role in child protection proceedings where appointed for an adult with impaired capacity for legal matters

Where the Public Guardian is appointed by QCAT as guardian for an adult's legal matters not relating to property or financial matters, the Public Guardian's role is to promote and protect the rights and interests of the adult with impaired capacity by supporting the adult's participation in and understanding of proceedings, advocating for their views, rights and interests, and supporting the adult to make decisions about a matter including instructions to a legal representative. This includes where a solicitor may not be able to get competent instructions from the adult, then the adult's legal guardian can support the adult to decide how to proceed.

Advocating for the adult

The Public Guardian assists the adult to provide their views and wishes and advocating on their behalf in relation to:

- contact decisions;
- seeking that the Department of Child Safety, Youth and Women coordinate the support required by the adult to meet any child protection concerns;
- providing greater context and explanation of the adult's impairment and possible support needs, to assist stakeholders to communicate with the adult in a beneficial way as to ensure the adult's participation and understanding of matters to the greatest extent possible; and
- attending and participating in Family Group Meetings, Court Ordered Conferences and Court attendances as required and relevant stakeholder meetings as appropriate.

Making decisions

In supporting an adult to make decisions, the Public Guardian must consider:

- the General Principles pursuant to schedule 1 of the GAA, including but not limited to, recognising and taking into account an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life;

- the ‘acknowledgements’ set out in section 5 of the GAA, including but not limited to acknowledgments that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with to the least extent possible, and an adult with impaired capacity has a right to adequate and appropriate support for decision-making.
- the adult’s level of impairment, understanding that:
    - capacity is time-specific;
    - capacity is domain-specific;
    - capacity is decision-specific;
    - capacity may be increased with appropriate support; and
    - substituted decision making is a last resort.

Decisions for an adult’s legal matters in child protection proceedings may include:

- Obtaining a legal representative for the adult;
- Providing instructions to the legal representative as to the further conduct of the adult’s legal matters on the basis of the adult’s views and wishes and legal advice received;
- Making a decision to oppose or not oppose an application before the Court; and
- Seeking reviews of reviewable decisions if appropriate.

Limits of the role of the Public Guardian

While the Public Guardian can make substitute decisions in relation to a matter, these decisions are not enforceable under the GAA.

The Public Guardian cannot:

- Force an adult to engage in a process that they are not willing to engage in;
- Provide direct legal representation to the adult; or
- Provide case management services.

22 Appendix 6 – Child Advocates and their Role

The Office of the Public Guardian ("OPG") was established as an independent statutory office on 1 July 2014. The Public Guardian's purpose includes to protect and promote the rights and interests of relevant children and children staying at visitable sites.[391]

Section 52 of the *Public Guardian Act 2014* (Qld) defines 'relevant children' as children and young people subject to:

- Intervention with Parental Agreements or care agreements,
- Temporary Assessment Orders,
- Court Assessment Orders,
- Temporary Custody Orders,
- Child Protection Orders including Supervision orders, Directive Orders, Custody or Guardianship Orders, and Permanent Care Orders,
- An application for one of the above orders.

The Public Guardian provides **child advocate functions** in relation to relevant children. These functions are outlined in section 13 of the *Public Guardian Act 2014* (Qld) and include:

(a) developing a trusting and supportive relationship with the child, so far as is possible;
(b) providing advice and information to the child about matters the child is concerned about;
(c) supporting the child at, and participating in—
    (i) conferences or mediations ordered or facilitated by a court or the tribunal at which the child may attend; or
    (ii) family group meetings; or
    (iii) any other meetings;
(d) helping the child to resolve issues or disputes with others;
(e) monitoring any plan prepared for the child's health, education or benefit to ensure it is being adhered to;
(f) working with government agencies that provide a service or facility to the child and other non-government providers of a service or facility to the child;
(g) seeking to resolve, with the chief executive (child safety), disputes about reviewable decisions as defined under section 128(1);
(h) helping the child to make an official complaint about a matter to someone;
(i) helping the child to seek, or respond to, the revocation or variation of an order made under, or taken to be an order for, the *Child Protection Act 1999* (Qld) affecting the child;
(j) helping the child to initiate or, on the child's behalf, initiating an application to the tribunal for review of a child protection matter;
(k) helping an independent Aboriginal or Torres Strait Islander entity for the child to support the child in referring a matter to the tribunal;
(l) supporting the child at a proceeding before a court or the tribunal;

[391] s 5 *Public Guardian Act 2014* (Qld).

(m) for a proceeding before a court relating to a court assessment order or child protection order—making submissions, calling witnesses and testing evidence in the proceeding, including by cross-examining witnesses;
(n) for a proceeding before the tribunal relating to a child protection matter—making submissions, calling witnesses and testing evidence in the proceeding, including by cross-examining witnesses.

In addition section 54 of the *Public Guardian Act 2014* (Qld) confirms that the overarching consideration in exercising Child Advocate functions is to seek and take into account the views and wishes of the child to the greatest extent practicable. It provides that:

> *(1) To the greatest extent practicable, the public guardian or another entity who performs a child advocate function or exercises a power under this Act in relation to a child must seek, and take into account, the views and wishes of the child when performing the function or exercising the power.*
>
> *(2) The child's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.*
>
> *(3) The child's views and wishes should be taken into account in a way that has regard to the child's age and maturity.*

These functions reflect Article 12 of the United Nations Convention on the Rights of the Child,[392] ensuring children's views and wishes are heard in judicial and administrative proceedings.

Role of Child Advocate Legal Officers in Child Protection proceedings

Child Advocate Legal Officers are lawyers who support subject children to participate in child protection proceedings, including participation at family group meetings, court ordered conferences, court mentions and hearings. A Child Advocate may support the child to attend court proceedings pursuant to sections 108 and 108C of the Act, or may attend court proceedings on the child's behalf and advocate for their views and wishes. A Child Advocate will speak with the child outside of court to support them to understand the child protection proceedings and their options to participate in the proceedings.

Section 108B of the Act provides a statutory right of appearance for the Public Guardian in a proceeding on an application for an order for a child. Section 108C of the Act gives a statutory right for the Public Guardian to support children by presenting their views and wishes to the Childrens Court, and to make submissions, call witnesses and test evidence, including through cross examination. The Public Guardian may access a document, and make copies of the document, if a party to the proceedings may also access the document.[393]

---

[392] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ratified by Australia in December 1990.
[393] s 108D *CPA*; r 45 *CCR*.

Section 108C provides a Child Advocate can be involved in child protection proceedings irrespective of whether a separate representative[394] is appointed by the Court, or a direct representative is instructed by the child.[395]

Child Advocates may provide instructed advocacy for a child/young person who is considered to be Gillick competent. Non-instructed advocacy can be provided to children/young people who are assessed not to have capacity to provide instructions in the proceeding. In these cases, a Child Advocate will undertake advocacy that seeks to ensure that the child/young person's rights and interests are protected, in accordance with their rights under the Act.

The Child Advocate role is not limited to only court proceedings, and can include QCAT advocacy (to review a reviewable decision), education advocacy (to challenge decisions to refuse to enrol, suspend or exclude a child/young person from school) and Child Safety advocacy (general advocacy to ensure the child's rights and interests are being protected).

Referrals for a Child Advocate

There is no mechanism for the Court to directly appoint a Child Advocate in a proceeding. However, anyone can make a referral for a Child Advocate on the OPG website publicguardian.qld.gov.au via this form. Questions can be emailed to Child-advocate-refer@publicguardian.qld.gov.au. Upon receipt of a completed referral form, the referral will be assessed, and a response provided to advise the outcome of the referral. A Child Advocate referral will generally not be accepted where the child does not want a Child Advocate, or where there are other parties who are able to perform the function requested of the Child Advocate.

[394] s 110 *CPA*.
[395] s 108(1) *CPA*.

23 Appendix 7 – Comparison of Child Representatives

Separate Representative	Direct Representative	OPG Child Advocate
Function?		
To represent the child's best interests in court proceedings and decision-making processes (such as Family Group Meeting or Court Ordered Conference).[396]	To act in accordance with child's instructions in child protection proceedings.	To advocate for legal rights of children under Child Safety intervention. In context of Court proceedings, this includes the right to participate and to have their views and wishes taken into account.[397]
Do they take Instructions?		
No – Acts based on separate representative's opinion as to best interests of the child.[398]	Yes – Takes instructions from child if they are deemed to have capacity to instruct.	Both – Can take instructions of child, different level of capacity required to a direct rep as a child may have capacity to know what they want and what their views are, but not have capacity to give instructions on legal proceedings. However, can also perform non-instructed advocacy, where a child does not have capacity to instruct. This advocacy is based on a child's legislative rights (for example, a child has the right to family contact and a safe and stable placement and does not need to be aware of these rights in order to benefit).
How are they funded?		
Legal Aid grant.	Legal Aid grant (Usually, although not mandatory).	Employed by the Office of the Public Guardian, a statutory organisation under the Queensland Department of Justice and Attorney-General.
How to get one		
Separate representatives can only be appointed by order of the Court. This order is sent to Legal Aid Queensland and Legal Aid allocates a separate representative.	Children and young people can contact Legal Aid Queensland, or alternatively approach a Legal Aid preferred supplier directly, like a	Referrals can be made to the Office of the Public Guardian by anyone. Referral will be assessed by the Children and Young People Legal Team and if the referral is accepted, a Child Advocate will be assigned.

[396] s 110 *CPA*.
[397] s 13 *Public Guardian Act 2014* (Qld).
[398] s 110(5) *CPA*.

	respondent parent would.	
Right to appear in appeals to Children's Court of Queensland constituted by a Judge?		
Yes[399]	Yes	No[400]

[399] s 110(8) *CPA*.
[400] s 108C(4) *CPA*.

24 Appendix 8 - Table of Cases with Reference to Issue

Case Name	Issue
• *Compass Health Group v KD* [2012] QCHCM 2 • *Cousins v HAL* [2008] QCA 49 • *CAO v Dept of Child Safety* [2009] QCA 169 • *CAR v Department of Child Safety* [2010] QCA 27	Whether the Childrens Court is a Magistrates Court.
• *Re Hamilton* [2010] CLN 2 • *B v B* [1988] HCA 66	Best interests principle
• *Re Hamilton* [2010] CLN 2 • *AF & MJ v Department of Communities, Child Safety and Disability Services & Ors* [2016] QChC 7	'Unacceptable risk' of harm
• *ASW & ECW v Director General, Department of Communities (Child Safety)* [2011] QChC 23 • *DCPL v PAV & HOK (No. 2)* [2016] QChC 14 • *AG & TG v DCPL [2017]* QChC 14 • *MDS v DCPL & Ors* [2017] QChC 6 • *DCPL v PMK & Ors (No. 2)* [2018] QChC 4 • *DCPL v YDO & Ors* [2017] QChC 1 • *Landsdowne v ODPP (Qld)* [2013] QMC 19	Subject of significant harm
• *DCPL v PAV & HOK (No. 2)* [2016] QChC 14	Interface with Family Law Act 1975 (Cth)- 69ZK of the Family Law Act that child protection proceedings take precedence
• *S v Chief Executive of the Department of Child Safety* [2007] QChC 2	Compliance with section 27(1)
• *IP v Department of Communities and S.C.* [2009] QChC 2	Compliance with section 27(2)
• *IP v Department of Communities and S.C.* [2009] QChC 2 • *S v Chief Executive of the Department of Child Safety* [2007] QChC 2	Effect of section 99
• *Department of Child Safety v WTY* [2018] QChC 23 • *KP v Director of Child Protection Litigation & Anor [2020] QChC 16*	Temporary Custody orders - Making an order
• *MDS v DCPL* [2017] QChC 6	Applications for a child protection order – Quality of evidence
• *F v Sturrock* [2004] QChC 4 • *SBD v Chief Executive, Department of Child Safety* [2007] QCA 318	Applications for a child protection order – Re whether it was not practicable to give the respondent notice
• *Obrenovic and McCauley* (1985) FLC 91-655 • *DCPL v SP & ZC [2018] QChC 19* • *J v W* [1999] FamCA 1002	Orders on adjournment
• *L v Department of Communities* [2004] QChC 3	Meaning of 'on an adjournment'

• *PAV v Director of Child Protection Litigation & Ors (No 2)* [2016] QChC 17	Meaning of "for the period of the adjournment" in section 67(5)
• *The Department of Communities, Child Safety v M and S* [2013] QChC 27	Whether a Magistrate can order contact that has the effect of residing with another person
• *Re K* (1994) 17 Fam LR 537	Role of separate legal representative for a child
• *Lewis v DCPL & Ors* [2018] QChC 22	Withdrawal of application
• *MDS v DCPL & Ors* [2017] QChC 6	A directive order
• *MDS v DCPL & Ors* [2017] QChC 6 • *DCPL v ADB & Ors* [2018] QChC 30	A supervision order
• *DCPL v PMK & Ors (No. 2)* [2018] QchC4	Duration and consecutive short-term orders
• *Department of Communities v LE and Ors* [2011] QChC 4 • *Grassby v R* [1989] HCA 45	Can the court attach conditions to a custody order?
• *DCPL v PMK & Ors (No. 2)* [2018] QchC4 • *Director of Child Protection Litigation v MCE & Anor* [2020] QChC 15	A long-term guardianship order
• *T v N* [2003] FAM CA 1129	Consent orders
• *KD v Department of Child Safety and Others* [2011] QChC 8 • *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16	Parental capacity to understand proceedings - efficacy of the Appellant's consent in view of her mild intellectual disability and absence of legal representation
• *Director-General v G-H & Ors* [2007] QChC 6 • *Director of Child Protection Litigation v KC & PC* [2021] QChCM 1	Duration of orders
• *GGD v Director of Child Protection Litigation & Ors* [2021] QDC 309	Application in proceedings – can be oral application
• *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16 • *DCPL v FGE & FPA (No. 2)* [2018] QChC 17	General provisions to note re: proceedings - Court to give reasons
• *MDS v DCPL & Ors* [2017] QChC 6 • *DCPL v MAP & CJS* [2018] QChC 20 • *Department of Communities, Child Safety and Disability Services v S & Anor* [2013] QChC 33 • *DCPL v LGC & DJC* [2019] QCHM 1 • *PJR v Director of Child Protection Litigation & Ors* [2022] QChC 3	Court not bound by rules of evidence
• *MDS v DCPL & Ors* [2017] QChC 6 • *AG & TG v DCPL & Anors* [2017] QChC 14 • *DCPL v ADB & Ors* [2018] QChC 30	Proof on the balance of probabilities
• *GGD v Director of Child Protection Litigation & Ors* [2021] QDC 309	Self-represented parties and duty to assist
• *Director of Child Protection Litigation v SYA & Anor* [2021] QChC 5	Hearing the views of children
• *DCPL v EM* [2021] QDC 298	The non-party does not need to fall within the definition of 'family member'
• *FY & Anor v Dept of Child Safety* [2009] QCA 67	Costs

• *SBD v Chief Executive, Department of Child Safety* [2007] QCA 318 • *Billington v Secretary, Department of families, Housing, Community Services and Indigenous Affairs* [2013] FCA 480	Extraterritoriality
• *S v Chief Executive of the Department of Child Safety* [2007] QChC 2	Re whether the Court had jurisdiction to make a child protection order where the child and parent were within jurisdiction when the application was made but out of jurisdiction at the time of hearing.
• *Jennifer Glover, Separate Representative v DCPL & Ors* [2016] QChC 16	Court assessment order or child protection order
• *FY v Dept of Child Safety* [2009] QCA 67 • *SBD v Chief Executive , Department of Child Safety* [2008] 1 Qd r R 474; [2007] QCA 318 • *KAA v Schemionech & Anor (No 2)* [2007] QCA 449 • *The Department of Communities, Child Safety v M and S* [2013] QChC 27	Interstate transfer decisions
• DCPL v EM [2021] QDC 298 • *Cousins v HAL & Anor* • *SBD v Chief Executive, Department of Child Safety*	Decision on the Application
• SB v Department of Communities & Ors [2014] QChC 7	Process for Deciding Appeals
• *STC v DCPL* [2016] QChC 19	Judicial transfer of child protection order to another state
• *KP v Director of Child Protection Litigation & Anor* [2020] QChC 16	Covid-19 Practice Directions

25 Appendix 9 - Table of Cases

Cases