BENCHBOOK

MAGISTRATES COURT OF QUEENSLAND

Childrens Court
Child Protection Proceedings

Published in Brisbane by —

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

Published July 2016

Cover page artwork

Daniel Templeman, detail of Confluence 2004, plate aluminium and concrete

Fiona Foley, detail of Witnessing To Silence 2004 bronze, water feature, pavement stone, laminated ash and stainless steel

Judy Watson, detail of heart/land/river 2004 digital print on glass, fibre-optic lighting, stainless- and mild-steel framework

Foreword

The Childrens Court is a unique court which has specialised practice and procedure with regard to children and young people in its child protection jurisdiction. The primary purpose of the *Childrens Court Benchbook* is to assist magistrates as an informative and instructive resource.

The *Benchbook* is not intended to be encyclopaedic but rather to provide relevant articles, papers, references to relevant legislation and case law, and checklists and other aids which might be helpful in the preparation, organisation, conduct or management of matters within the Court's jurisdiction. The *Benchbook* is also intended to provide practical assistance on issues, practices and procedures which arise in the management and conduct of proceedings which may not be addressed in court rules, legislation or case law.

The *Benchbook* is a dynamic document and segments will be added as they are prepared and it will be updated regularly. The Childrens Court and the Office of the Chief Magistrate welcome comments and suggestions on the scope and content of the *Benchbook* with a view to ensuring that it remains current and is of assistance to anyone dealing in the Childrens Court jurisdiction.

Special thanks to various magistrates, The Office of the Public Guardian and Legal Aid Queensland for contributions to this *Benchbook*.

His Honour Judge Orazio (Ray) Rinaudo
Chief Magistrate
MAGISTRATES COURTS QUEENSLAND

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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) and operates under the Act and the Childrens Court Rules 1997 (Qld). 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 matters and young people who commit criminal offences.

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. Recent amendments to the *Childrens Court Act 1992* (Qld) provide 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] These amendments also allow 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] These amendments were made in response to recommendation 13.3 of the Queensland Child Protection Commission of Inquiry (QCPCI), *Taking Responsibility: A Roadmap for Queensland Child Protection* (2013).

Note that further amendments are proposed to the Childrens Court Rules including those arising out of other recommendations of the QCPCI.

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 Children's Court exercising jurisdiction under the Child Protection Act 1999 if a Magistrate's Court in the Rules includes a reference to a magistrate constituting the Children's Court*."

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

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[1] *Childrens Court Act 1992* (Qld) *s 5.*
[2] Ibid s 7.
[3] *Child Protection Reform Amendment Act 2014 s 43.*
[4] Ibid s 42.
[5] *Compass Health Group v KD* [2012] QChCM 2 [9].

In *Cousins v HAL* [2008] QCA 49 Fraser JA considered the question of whether the Children's 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 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 Children's Court is not the District Court for the purpose of s 118(3) so that no appeal lies from a decision of the Children's 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* [2008] QCA 49[7]. In *CAR v Department of Child Safety* [2010] QCA 27 the Court of Appeal unanimously followed *Cousins v HAL* [2008] QCA 49[8].

Her Honour applied the reasoning of Fraser JA in *Cousins v HAL* [2008] QCA 49[9] to conclude that the fact that a Magistrate constitutes a Children's 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 far reaching impact on children, their families and society in general. Despite this, it is an often undervalued and misunderstood jurisdiction.

Court processes dealing with the protection of children must not delay in reaching decisions and must, as far as practicable, allow children to have an audible voice in the decisions that will profoundly affect them.[10]

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 difficult cases – i.e. those families who have not responded effectively to other forms of intervention.

In 2011-12:

- 21,908 children were suspected of being in need of protection in Queensland
- 4,359 children were, following investigation, substantiated as having suffered harm or being at unacceptable risk of harm
- 2,383 of these children were subject to a consent-based intervention with parental agreement
- 1,512 children were admitted to child protection orders pursuant to a court order

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[6] *Cousins v HAL* [2008] QCA 49, 9.
[7] [2008] QCA 49.
[8] [2008] QCA 49.
[9] [2008] QCA 49.
[10] Queensland Child Protection Commission of Inquiry (QCPCI), *Taking responsibility: A Roadmap for Queensland Child Protection* (2013), vol 1 and 2,, xxiv.

- 1,059 children were placed in out-of-home care.[11]

Child maltreatment has been linked to an increased risk of juvenile offending and at 30 June 2012.

72 per cent of children and young people in the youth justice system were known to the child protection system.[12]

Children aged 0 to 17 years are the potential client base of the child protection system and the number of such children is expected to increase by 17 per cent over the next decade. The QCPCI reported in 2013 that children aged 0 to 17 years make up almost a quarter of the Queensland population and almost 7 per cent of these children are Aboriginal or Torres Strait Islander. There are approximately three adults for each child in the general population in Queensland but Aboriginal and Torres Strait Islander children form a much greater proportion of their population with just over one adult per child.[13]

The QCPCI reported that while the most recent report on the health and wellbeing of Queensland's children indicates that children are faring well overall, the increasing rate of children coming into the contact with the child protection system, especially those in need of out of home case, show that some families are struggling and that there are more and more children at risk and needing protection.

Many studies have shown strong links between social disadvantage and child abuse and neglect, **Appendix 1** to this chapter includes an extract from the QCPCI Report which examines those links.

1.3 The purpose and scope of this chapter

The Benchbook chapter deals 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 chapter is addressed to those magistrates.

Many magistrates will already be familiar with most of the material contained herein. However, this has been prepared as a resource for those new to this area of a magistrate's work. Childrens Court magistrates have specialist expertise in the area of child protection applications so magistrates should feel free to seek information or advice from a Childrens Court magistrate when dealing with a child protection matter.

Note QCPCI recommendation 13.8 that the Attorney-General and Minister for Justice, in consultation with the Chief Magistrate appoint existing magistrates as Childrens Court magistrates in key locations in Queensland.

1.4 Terminology

[11] Ibid 21.
[12] QCPCI, above n 10, 36.
[13] QCPCI, above n 10, 43-44.

Chief Executive – the Chief Executive of the Department of Communities, Child Safety and Disability Services (DCCDS)

The Department – the Department of Communities, Child Safety and Disability Services (DCCDS)

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.

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.

Statements in italics throughout this document refer to recommendations of the QCPCI relevant to the Childrens Court child protection jurisdiction which have been accepted by the Queensland Government and are in the process of being implemented.

1.5 Resources (referred to herein or for further reference)

1.5.1 QLD

- *Child Protection Act 1999* (Qld)
- Childrens Court Rules 1997 (Qld)
- *Childrens Court Act 1992* (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; http://www.ccypcg.qld.gov.au/pdf/qg-response-child-protection-inquiry.pdf

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.lawlink.nsw.gov.au/childrenscourt/lawnews.html

1.5.4 Victoria

- Children's Court of Victoria Research Materials, Chapter 5 Family Division – Care and Protection, (December 2013)

1.5.5 Online Databases

- LexisNexis
- Austlii[14]

2. CHILD PROTECTION ACT 1999 (THE ACT)

The *Child Protection Act 1999* (Qld) (the Act) was assented to on 30 March 1999 and proclaimed to commence on 23 March 2000 (some minor sections were proclaimed to commence earlier).

Note QCPCI recommendations that there be a number of amendments made to the Child Protection Act which may change some aspects of the way child protection proceedings are dealt with in the Childrens Court. These amendments arise out of recommendations in Chapters 13 and 14 of the QCPCI Report and are expected to be implemented over the next year or so.

2.1 Purpose and Principles of the Act

The Act is a fairly complex piece of legislation the purpose of which is to provide for the protection of children.[15] In acting pursuant to the Act, magistrates must be cognisant of the paramount and guiding principles of the Act. These are found in Part 2 Division 1 and 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.[16] The Act is to be administered under the principles set out in Division 1, but all other principles in the Act are subject to the paramount principle.[17]

2.1.1 Paramount principle

The main principle for administering the Act is that the **safety, wellbeing and best interests of the child are paramount**.[18]

Note QCPCI recommendation 14.4 that amendments be made to the Act to clarify that the best interests of the child is to guide all administrative and judicial decision making and that a provision be included in the Act setting out the relevant matters to be considered in determining the best interests of a child.

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[14] Including Austlii NoteUp Search.
[15] *Child Protection Act 1999 s 4.*
[16] Ibid s 104.
[17] Ibid s 5.
[18] Ibid s 5A

2.1.2 Other guiding principles

Other general principles for ensuring the safety, wellbeing and best interests of the child are set out in section 5B of the Act:

- A child has a right to be protected from harm or risk of harm;
- A child's family has primary responsibility for their upbringing, protection and development;
- The preferred way of ensuring a child's safety and wellbeing is through supporting the family;
- The State is responsible for protecting a child where there is no parent able and willing to do so;
- The State should only take action warranted in the circumstances when protecting a child;
- If a child is removed, support should be given to the child and the child's family to aim for reunification if it is in the child's best interests;
- The child should have long-term alternative care if they do not have a parent willing and able to give them protection in the foreseeable future;
- If a child is removed from their family consideration should first be given to placing the child in the care of kin (defined as relatives who are significant to the child or another person of significance to the child);
- The child should be placed with siblings to the extent that is possible;
- 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 capacity with assistance or support);
- A child should have stable living arrangements that provide for a stable connection with the child's family and community if in their bests interests, and that meet the child's developmental, educational, emotional, health, intellectual and physical needs;
- A child should be able to maintain connection with parents and kin if appropriate;
- A child should be able to know and maintain their cultural, ethnic, religious and other identity and values; and
- A delay in making a decision for a child should be avoided unless appropriate for the child.

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

- The child should be allowed to develop and maintain a connection with the child's family, culture, traditions, language and community; and
- The long-term effect of a decision on the child's identity and connection with their family and community should be taken into account.

When exercising a power in relation to an Aboriginal or Torres Strait Islander child, section 6(4) of the Act **requires** the Childrens Court to have regard to the views of a recognised entity or member of the community to whom the child belongs and to the general principles that an Aboriginal and Torres Strait Islander child should be cared for within an Aboriginal and Torres Strait Islander community.[19]

[19] The role of recognised entities and where they are located is described at Queensland Aboriginal and Torres Strait Islander Child Protection Peak Ltd, *Recognised Entity: Working Together to Safeguard Children*.

Adherence by the Court and others to the principles underpinning the Act takes on a special importance given that the Childrens Court is not bound by the rules of evidence.[20]

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 Court in reviewing the actions of the Department or other parties, the section states specifically that it does not apply to a court.[21]

Other principles which apply to service providers to meet the protection and care needs of children are set out in section 159B of the Act.

Note QCPCI recommendation 14.5 that the principles in s 159B be combined with those in sections 5B etc.

2.1.3 Comment

Re 'Best Interests';

Dickey QC (2014)[22] 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.[23]

- 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 regards any one social community as better than, or superior to, any other.[24]

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[20] *Child Protection Act 1999* (Qld) *s 105(1).*
[21] Ibid s 5D(2).
[22] Dickey, A. 2014. *Family Law*, 6th Edition, Lawbook Co., pp 306-308.
[23] (*C.D.J v. V.A.J* (1998) 197 CLR 172 at 214, 219, 231 cited in Dickey 2014, p 402)
[24] Dickey, A. 2014. *Family Law*, 6th Edition, Lawbook Co., p 308.

- 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.[25]

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:[26]

> "*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,*[27] *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 QCPCI examined the history of the meaning of 'best interests' in decision-making in the child protection context:

> "*…[T]he 1989 United Nations Convention on the Rights of the Child provides that:*
>
> > *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.*
>
> *Although 'best interests' is stated to be a primary consideration (not the paramount consideration), other articles of the convention reiterate the 'best interests' principle in specific contexts. Of the 1989 convention, one commentator has stated that:*
>
> > *The CRC creates 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.*

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

It is clear that the Child Protection Act 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 (UNROC). These principles are seen by many as appropriate guidelines for the protection of children.*

…[T]he view taken by the 2003–04 Crime and Misconduct Commission Inquiry into Abuse of Children in Foster Care, was that this principle had not been embedded into the Act in a way that was always effective. When the Child Protection Act was passed in 1999, section 5 listed nine principles that governed the administration of the Act, the second of which was that 'the welfare and best interests of a child are paramount.' The 2004 CMC Inquiry, considered, however, that:

> *… there is nothing in the current Queensland legislation that emphasises that children's rights take precedence over parents' rights.*

The CMC Inquiry, therefore, recommended that an additional principle be inserted into section 5 clearly providing that 'any conflict that may arise between the interests of a child and the interests of the child's family must be resolved in favour of the interests of the child'. The principles for the administration of the Act in section 5 were consequently reordered to provide that '[t]his Act is to be administered under the principle that the welfare and best interests of a child are paramount.'

In 2010, the Act was further amended to provide that all other principles in the Act are subject to a new principle: section 5A. The new section 5A shies away from pitting the child and the 'family' directly against one another, but provides that:

> *The main principle for administering this Act is that the safety, wellbeing and best interests of a child are paramount.*
>
> *Example: If the chief executive is making a decision under this Act about a child where there is a conflict between the child's safety, wellbeing and best interests, and the interests of an adult caring for the child, the conflict must be resolved in favour of the child's safety, wellbeing and best interests.*

However, not just in Queensland, but internationally 'criticism continues to be directed toward the imprecision of the criterion and the vagueness of this concept'."

2.2 Basic Concepts

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

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

[28] s 8 *Child Protection Act 1999* (Qld)

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

Note QCPCI recommendation 4.1 that this definition be changed to refer to significant harm.

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.

A narrower definition of parent applies to court proceedings including an application for a temporary assessment order;[34] a court assessment order;[35] a temporary custody order[36] or a child protection order.[37] These definitions are all in the same terms and include:

- The child's mother or father
- A person in whose favour a residence or contact order for the child is in operation under the *Family Law Act 1975* (Cth)
- A person, other than the chief executive, having custody or guardianship of the child under the law of the State, other than the *Child Protection Act 1999* (Qld); or the law of another State
- A long-term guardian of the child.

(See further discussion of 'parent' in parties to the proceedings infra).
Custody granted to the chief executive or another person under the Act is the right to have the child's daily care and the right and responsibility to make decisions about the child's daily care.[38]

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

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[29] s 10 *Child Protection Act 1999* (Qld)
[30] s 9(1) *Child Protection Act 1999* (Qld)
[31] s 9(2) *Child Protection Act 1999* (Qld)
[32] s 9(3) *Child Protection Act 1999* (Qld)
[33] s 9(4) *Child Protection Act 1999* (Qld)
[34] s 23 *Child Protection Act 1999* (Qld)
[35] s 37 *Child Protection Act 1999* (Qld)
[36] s 51AA *Child Protection Act 1999* (Qld)
[37] s 52 *Child Protection Act 1999* (Qld). See also s 51F *Child Protection Act 1999* (Qld)definition of "parent" for the purposes of case planning and family group meetings
[38] s 12 *Child Protection Act 1999* (Qld)

the person having parental responsibility for making decisions about the long-term care, wellbeing and development of the child.[39]

2.2.1 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).

> "*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.*

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[39] s 13 *Child Protection Act 1999* (Qld)

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."[40]

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:[41]

> "*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.*

[40] QCPCI Report, pp 108-109
[41] *Re Hamilton* [2010] CLN 2 at [45]-[49]

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.

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 Children's 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 Children's 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:[42]

> "*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*

[42] At [25]-[26]

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:[43]

> *"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:[44]

> *"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*

[43] See paragraph 28.
[44] *In the Marriage of N and S* (1995) 19 Fam LR 837 at 860

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?

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 Research Materials produced by Reserve Magistrate Peter Power for the Children's Court of Victoria, it was asked, in the context of bail applications, "*When does a risk of harm to a child become an unacceptable risk?*"[45] Reserve Magistrate Power took the view that the test of 'unacceptable risk' in the context of a bail application is equally relevant in the child protection jurisdiction and reviewed a number of cases that discuss the meaning of the term in that context. He referred to the decision of Elliott J in *DOHS v DR* [2013] VSC 579 at [53]-[63] in which His Honour considered section 10(3)(g) of the *Children, Youth and Families Act 2005* (Vic) which states that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child.

Elliott J 'referred with approval to the dicta' of Redlich J in *Haidy v DPP* [2004] VSC 247, "*emphasising by italics the last sentence in paragraph [16]: "What must be established is that there is sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable." His Honour continued:*

[61] That case was recently referred to by the Court of Appeal with approval in a case dealing with s 9(5) of the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic): Nigro, Casimiro v Secretary to the Department of Justice [2013] VSCA 213 [119]-[120] (Redlich, Osborn and Priest JJA). Having set out the passage I have just referred to, the Court of Appeal continued at [120]:

> *'Such an approach is consonant with the view expressed in a number of the authorities in respect of not dissimilar legislation that the question is whether on the evidence before it the court is satisfied that there is a real likelihood though not necessarily more likely than not, that the offender will commit an offence whilst on bail.'*

Another passage earlier in the judgment at [111] is also of some assistance:

> *'An unacceptable risk thus requires consideration of the likelihood of offending and, if it eventuates, what the consequences of such offending are likely to be. Whether the risk is unacceptable will depend not only upon the likelihood of it becoming a reality but also on the seriousness of the consequences if it does.'"*[46]

In Reserve Magistrate Power's analysis of the Act and the cases, he concludes that for the purposes of section 10(3)(g):

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[45] Chapter 5 at 5.10.4, p 5.24 (see hyperlink at para 1.5.5 *supra*)
[46] Chapter 5 at 5.10.4, p 5.24 – 5.25

> "*…[t]he court is required to assess, in the particular circumstances of the case, the likelihood of the conduct in question occurring in the future, together with the nature and extent of any risks of harm to the child associated with the conduct in the event it were to occur*"[47]

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].

Re Parent:

The definitions of parent that apply to applications for orders and to case planning were amended in 2010 to include long-term guardians appointed under the Act:[48]

> "*The effect of the amendment is that long-term guardians who are relatives of a child or other suitable person (excluding the chief executive) against whom allegations of harm are made regarding the child in their guardianship, have the same rights and protections afforded to a parent in relation to court proceedings under the Act.*
>
> *The amendment clarifies the status of the suitable person appointed as the long-term guardian when a child protection order is taken out in respect of a child in their care by specifically including the long-term guardian in the definition. Section 52(c) is amended to clarify that persons granted custody or guardianship under the Child Protection Act 1999 are not captured as parents under that paragraph*."

Re Custody and Guardianship:

Note QCPCI recommendation 14.6 that the Department in its review of the Act incorporate the concept of 'parental responsibility' which is derived from the Family Law Act 1975 (Cth) and combines the concepts of 'custody' and 'guardianship'.

3. APPLICATIONS TO THE COURT: PRELIMINARY ORDERS

The most common applications to the court are for:

- Temporary Assessment Order
- Temporary Custody Order
- Court Assessment Order
- Child Protection Order

The first three of these are preliminary orders in that they are time limited and allow for the Department to do certain things, pending the decision about whether or not to make an application for a child protection order.

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[47] Chapter 5 at 5.10.4, p 5.25
[48] Explanatory Notes to Child Protection and Other Acts Amendment Bill 2010 (Qld), p 37

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 an application for a temporary assessment order, a temporary custody order and/or a court assessment order.

See Procedure for Receiving and Listing Child Protection matters.[49]

Note QCPCI recommendation 13.16 that the Department of Communities, Child Safety and Disability Services enhance its in-house legal service provision by establishing an internal Office of the Official Solicitor within the department which shall have responsibility for:

- *providing early, more independent legal advice to departmental officers in the conduct of alternative dispute-resolution processes and the preparation of applications for child protection orders*
- *working closely with the proposed specialist investigation teams so that legal advice is provided at the earliest opportunity*
- *preparing briefs of evidence to be provided to the proposed Director of Child Protection in matters where the department considers a child protection order should be sought.*

Note QCPCI recommendation 13.17 that the Queensland Government establish an independent statutory agency — the Director of Child Protection — within the Justice portfolio to make decisions as to which matters will be the subject of a child protection application and what type of child protection order will be sought, as well as litigate the applications. Staff from the Director of Child Protection will bring applications for child protection orders before the Childrens Court and higher courts, except in respect of certain interim or emergent orders where it is not practicable to do so. In the latter case, some officers within the Department of Communities, Child Safety and Disability Services will retain authority to make applications.

Note QCPCI recommendation 13.18 that the Department of Communities, Child Safety and Disability Services move progressively towards requiring all court coordinators to be legally qualified and for their role to be recast to provide legal advice (within the Office of the Official Solicitor) or to transfer the role to the independent Director of Child Protection office.

3.1 Temporary Assessment Order

A Temporary Assessment Order (TAO) is a short-term order to authorise 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.[50]

Note the specific definition of parent under this Part.[51]

3.1.1 Application for a Temporary Assessment Order

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[49] http://intranet.justice.govnet.qld.gov.au/divisions-and-branches/justice-services/queensland-courts-services/policies-and-procedures/c/child-protection/child-protection-receiving-and-listing-applications

[50] s 24 *Child Protection Act 1999* (Qld)
[51] s 23 *Child Protection Act 1999* (Qld)

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

Applications are made to a Magistrate in person under section 25 of the Act. The application must be supported by a sworn written statement stating the grounds, the nature of the order sought and the proposed care arrangements. The Magistrate can require further information from the applicant in the form the Magistrate requires.

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 or radio.[52] 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 etc 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 fax). Otherwise the Magistrate must tell the officer the date and time the order was made and the other terms of the order.[53]

A Magistrate can decide an application for a temporary assessment order without notifying the child's parents or hearing them on the application.[54]

3.1.2 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;[55] and
- reasonable steps have been taken to obtain appropriate parental consent or it is not practicable to take steps to obtain the consent.[56]

The order must state the time when it ends which cannot be more than 3 business days after the order is made.[57] 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 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.[58]

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[52] s 30 *Child Protection Act 1999* (Qld)
[53] s 30(4)(b) *Child Protection Act 1999* (Qld)
[54] s 26 *Child Protection Act 1999* (Qld)
[55] s 27(1) *Child Protection Act 1999* (Qld)
[56] s 27(2) *Child Protection Act 1999* (Qld)
[57] s 29 *Child Protection Act 1999* (Qld)
[58] s 28 *Child Protection Act 1999* (Qld)

3.1.3 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:[59]

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[59] *S v Chief Executive of the Department of Child Safety* [2007] QChC 2, p 9

> "*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 Magistrates 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:[60]

> "*[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, 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.*

[60] *IP v Department of Communities and S.C.* [2009] QChC 2 at [6]-[10], [13]-[14]

[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, ~~or~~ 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:[61]

[61] *S v Chief Executive of the Department of Child Safety* [2007] QChC 2, p 10 - 11

"*..[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."

3.1.4 Extension and variation of 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 Child Protection Order within the extension period.[62]

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).

Amendments in 2010 also allow for an extension of a temporary assessment order within a three day maximum period.[63] According to the explanatory notes:[64]

> "*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*

[62] s 34 *Child Protection Act 1999* (Qld)
[63] s 34(5) *Child Protection Act 1999* (Qld)
[64] Explanatory Notes, Child Protection Amendment Bill 2000 (Qld), p 9

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.[65]

An authorised officer or a police officer may apply to a magistrate for an order to vary a temporary assessment order.[66] Again, according to the explanatory notes:[67]

"*[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*".

3.2 Temporary Custody Orders

Temporary custody orders were introduced in 2010 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[68].

The purpose of a temporary custody order is to authorise the action necessary to ensure the immediate safety of a child while the chief executive decides the most appropriate action to meet the child's care and protection needs (e.g. applying for a child protection order)[69].

3.2.1 Application for an order

A written sworn application is to be made by an authorised 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.[70]

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 or radio.[71] 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, etc 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 fax). Otherwise the Magistrate must tell the officer the date and time the order was made and the other terms of the order.[72]

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[65] s 34(4) *Child Protection Act 1999* (Qld)
[66] s 35 *Child Protection Act 1999* (Qld)
[67] Explanatory Notes, Child Protection Amendment Bill 2000 (Qld), p 9
[68] Second reading speech 10 June 2010, Hansard, p2033
[69] s 51AB *Child Protection Act 1999* (Qld)
[70] s 51AC *Child Protection Act 1999* (Qld)
[71] s 51AI *Child Protection Act 1999* (Qld)
[72] s 51AI(4) *Child Protection Act 1999* (Qld)

A Magistrate can decide an application for a temporary custody order without notifying the child's parents or hearing them on the application.[73]

3.2.2 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
- the chief executive 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.[74]

The order must state the time when it ends which cannot be more than 3 business days after the order is made.[75]

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;
- Authority for the officer to enter and search premises where entry has been denied and the officer believes the child is present and the entry is necessary for the effective enforcement of the order.[76]

3.2.3 Extension or variation of an order

An authorised officer can apply to the court for an extension of the term of a temporary custody order.[77] A Magistrate may extend a temporary custody order if satisfied that the order has not ended.[78]

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 officer intends to apply for a Child Protection Order within the extended period.[79] 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.[80] (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).[81]

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[73] s 51AD *Child Protection Act 1999* (Qld). Note: "parent" is defined in s 51AA *Child Protection Act 1999* (Qld)
[74] s 51AE *Child Protection Act 1999* (Qld)
[75] s 51AG *Child Protection Act 1999* (Qld)
[76] s 51AF *Child Protection Act 1999* (Qld)
[77] s 51AH(1) *Child Protection Act 1999* (Qld)
[78] s 51AH(3) *Child Protection Act 1999* (Qld)
[79] s 51AH(4) *Child Protection Act 1999* (Qld)
[80] s 51AH(5) *Child Protection Act 1999* (Qld)
[81] s 51AH(6) *Child Protection Act 1999* (Qld)

An authorised officer may apply to a magistrate for an order to vary a temporary custody order.[82]

3.3 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.[83]

Note the specific definition of parent for this Part.[84]

3.3.1 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.[85] 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.[86]

The child's parents are respondents to the application[87] and the applicant must serve a copy of the application on them or the child's long-term guardians.[88] The child must also be told about the application.

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.[89]

3.3.2 Adjournment

The Court may adjourn a proceeding for a court assessment order but the total period of adjournments must not exceed 4 weeks.[90] 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.[91]

The court has power to make the following interim orders on the adjournment of the proceedings for a court assessment order[92] and the interim order has effect for the period of the adjournment:[93]

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[82] s 51AL *Child Protection Act 1999* (Qld)
[83] s 38 *Child Protection Act 1999* (Qld)
[84] s 37 *Child Protection Act 1999* (Qld)
[85] s 39 *Child Protection Act 1999* (Qld)
[86] s 40 *Child Protection Act 1999* (Qld)
[87] s 42 *Child Protection Act 1999* (Qld)
[88] s 43 *Child Protection Act 1999* (Qld)
[89] s 43 *Child Protection Act 1999* (Qld)
[90] s 66(2) *Child Protection Act 1999* (Qld)
[91] s 66(4) *Child Protection Act 1999* (Qld)
[92] s 67 *Child Protection Act 1999* (Qld)
[93] s 67(5) *Child Protection Act 1999* (Qld)

- Granting temporary custody of the child to the chief executive or a suitable member of the child's family;[94]
- Directing a parent not to have contact or to have only supervised contact with the child;[95]
- Authoring an authorised officer or police officer to have contact with the child;[96]
- Authorising an authorised officer to enter a place and find a child.[97]

See paragraph 4.4 for discussion of interim orders and sample directions.

3.3.3 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.[98]

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.[99]

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;
- Authority for the officer to enter and search premises where entry has been or is likely to be denied and the entry is necessary for the effective enforcement of the order.[100]

3.3.4 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

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[94] s 67(1)(a) *Child Protection Act 1999* (Qld)
[95] s 67(1)(b) *Child Protection Act 1999* (Qld). See definition of 'parent' in s 67(6) *Child Protection Act 1999* (Qld).
[96] s 67(1)(c) *Child Protection Act 1999* (Qld)
[97] s 67(2) *Child Protection Act 1999* (Qld)
[98] s 44 *Child Protection Act 1999* (Qld)
[99] s 47 *Child Protection Act 1999* (Qld).
[100] s 45 *Child Protection Act 1999* (Qld).

order has not ended and the extension is in the child's best interests. Only one extension may be granted.[101]

An authorised office may apply to the Childrens Court for an order to vary or revoke a court assessment order.[102]

4. APPLICATIONS TO THE COURT: CHILD PROTECTION ORDERS

A child protection order is made to ensure the protection of a child the Childrens Court decides is a child in need of protection.[103] Refer to **2.2** (above) regarding who is a child in need of protection.

For the purposes of this Part of the Act, parent is defined in section 52.

See discussion at **3** *(above) of QCPCI recommendations relevant to the making of applications.*

4.1 Application for a child protection order

A written 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.[104] 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.[105] 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.[106] 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 – see page 37 below). The type of order sought might be a:

- Directive order;
- Supervision order;
- Custody order;
- Short-term guardianship order; or
- Long-term guardianship order.

These different child protection orders are explained in more detail at chapter 6 below.

Note QCPCI recommendation 13.21 that will require the applicant's affidavit material to attest to the reasonable steps taken to offer support and other services to a child's family and to work with them to keep a child safely at home.

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[101] s 49 *Child Protection Act 1999* (Qld).
[102] s 50 *Child Protection Act 1999* (Qld).
[103] s 53 *Child Protection Act 1999* (Qld).
[104] s 54 *Child Protection Act 1999* (Qld).
[105] r 5 *Childrens Court Rules 1997*(Qld).
[106] s 54 *Child Protection Act 1999* (Qld).

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.[107]

The child's parents are respondents to the application[108] and the applicant 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.[109] The applicant must also tell the child about the application.[110]

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.[111]

Note QCPCI recommendation 13.5 that the Court Case Management Committee review the disclosure obligations on the department and propose to the Minister for Communities, Child Safety and Disability Services amendments to the Child Protection Act 1999 to introduce a continuing duty of disclosure on the department with appropriate safeguards.

4.1.1 Comment

Re the application
The application (Form 25) will be supported by an affidavit, usually by the caseworker (applicant), with the information aimed at supporting the application including:

- 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.[112]

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

- 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.

Judicial officers are aware that the Childrens Court is not bound by the rules of evidence but that does not mean that the rules should be ignored (see discussion at para **8.2.1**).

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[107] s 55 *Child Protection Act 1999* (Qld).
[108] s 57 *Child Protection Act 1999* (Qld).
[109] s 56 *Child Protection Act 1999* (Qld).
[110] s 56 *Child Protection Act 1999* (Qld).
[111] s 58 *Child Protection Act 1999* (Qld).
[112] Derived from Departmental Resources, *Practice Resource: Writing an Affidavit* (18 July 2016) Department of Communities, Child Safety and Disability Services.

Some Magistrates have developed their own local approach to address the quality of affidavits. For example, Magistrate Hogan at Southport has produced a document "**Applications for Child Protection Orders: Matters of Concern Regarding Applications and Affidavits"** for distribution to practitioners in his jurisdiction (see **Appendix 2**). This document attempts to explain what should be in the child protection application and what should then be included in the affidavit in support of the application.

Magistrate Carroll proposes a different approach to addressing the deficiencies in the form and content of affidavits by requiring applicants to provide an outline of argument prior to the trial. This outline is essentially a section 59 submission which identifies the issues and the various paragraphs in the affidavits and reports which address these issues. See **"Applications for Child Protection Orders – Can we improve the process?"** (see **Appendix 3**).

Re whether it was not practicable to give the respondent notice[113]

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:[114]

> "*[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.*
>
> *[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.*

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[113] s 58 *Child Protection Act 1999* (Qld).
[114] *F v Sturrock* [2004] QChC 4 at [9]-[13].

[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[115]*. 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 **9.1**), Keane JA with whom Muir JA and Lyons J agreed, considered the application of sections 56 and 58 where the child's mother was not present in Queensland at the time of service:[116]

"*[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 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

[115] See for example the comments of Muir J in *Crystal Dawn Pty Ltd & Anor v Redruth Pty Ltd* (1998) QCA 373.
[116] *SBD v Chief Executive, Department of Child Safety* [2007] QCA 318 at [36]-[41].

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."

4.2 First appearance

On the first return date of a child protection application the parents will usually be present at court. There are a range of issues likely to be dealt with at this 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
- Any other person who should be given notice of the proceeding, including if the child is an Aboriginal or Torres Strait Islander, the giving of notice to a recognised entity[117]
- Identification of any non-parties who may wish to make submissions or from whom the Court may wish to hear submissions[118]
- Ensuring the parties' understanding of the nature, purpose and legal implications of the proceedings[119]

[117] s 6 *Child Protection Act 1999* (Qld).
[118] s 113 *Child Protection Act 1999* (Qld).

- Any other custody or guardianship order under the Child Protection Act[120] 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 (rec 13.28)
- 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[121]
- Any criminal charges associated with the proceedings
- The parents representation including that they have a reasonable opportunity to obtain legal representation[122]
- The separate representation of a child[123]
- The direct representation of a child
- How the child's wishes or views, if able to be ascertained, will be put before the court[124]
- 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[125]
- The medical examination or treatment of the child[126]
- The transfer of the proceeding to another court or the joinder of the matter with other proceedings that should be heard with the matter[127]
- The conference to be convened between the parties or family group meeting to be convened[128]
- 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.
- Matters related to the provision of services in respect of, and attendance of a party at, court-directed treatment, testing or programs (*see Rec 13.2(2) and associated Briefing Paper*)
- The content and form of affidavits (*recommended for inclusion in the rules by the Court Case Management Committee*)

Note: At the time of preparing this document the Court Case Management Committee was considering this issue.

4.3 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.[129] The court **must** state the reasons for

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[119] s 106 *Child Protection Act 1999* (Qld).
[120] s 99 *Child Protection Act 1999* (Qld).
[121] s 43 *Domestic and Family Violence Protection Act 2012* (Qld).
[122] s 109 *Child Protection Act 1999* (Qld).
[123] s 110 *Child Protection Act 1999* (Qld).
[124] s 59(1)(d) *Child Protection Act 1999* (Qld).
[125] s 68(1)(a) *Child Protection Act 1999* (Qld).
[126] s 68(1)(b) *Child Protection Act 1999* (Qld).
[127] ss 114 and 115 *Child Protection Act 1999* (Qld).
[128] s 68(1)(d) *Child Protection Act 1999* (Qld).
[129] s 66 *Child Protection Act 1999* (Qld).

the adjournment and **may give directions** to parties about things to be done by them during the adjournment.[130]

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

4.4 Orders on adjournment

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:[131]

- Granting temporary custody of the child to the chief executive or a suitable member of the child's family[132] Directing a parent not to have contact or to have only supervised contact with the child[133] (see below for sample direction)
- 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[134]

The court can also make the following orders on adjournment:

- Requiring a written **social assessment report** about the child and the child's family to be filed in the court[135]. The court must state the issues the report is to address;[136]
- Authorising **medical examination or treatment** of the child and requiring a report on that to be filed in the court[137]. The court must state the particular issues the report must address;[138]
- About the child's **contact** with its family during the adjournment.[139] 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.[140] Note that the court cannot order that contact be supervised by the chief executive unless the chief executive agrees to supervise the contact.[141] 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;[142]
- That **a conference be held** between the parties to decide the matters in dispute or try to resolve the matters;[143] and
- That a child be separately legally represented.[144]

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[130] s 66(4) *Child Protection Act 1999* (Qld).
[131] s 67(5) *Child Protection Act 1999* (Qld).
[132] s 67(1)(a) *Child Protection Act 1999* (Qld).
[133] s 67(1)(b) *Child Protection Act 1999* (Qld);. See definition of "parent" in s 67(6) *Child Protection Act 1999* (Qld).
[134] s 67(2) *Child Protection Act 1999* (Qld).
[135] s 68(1)(a) *Child Protection Act 1999* (Qld).
[136] s 68(2) *Child Protection Act 1999* (Qld).
[137] s 68(1)(b) *Child Protection Act 1999* (Qld).
[138] s 68(2) *Child Protection Act 1999* (Qld).
[139] s 68(1)(c) *Child Protection Act 1999* (Qld).
[140] s 68(4) *Child Protection Act 1999* (Qld).
[141] s 68(5) *Child Protection Act 1999* (Qld).
[142] s 68(1)(d) *Child Protection Act 1999* (Qld).
[143] s 68(1)(e) *Child Protection Act 1999* (Qld).
[144] s 68(1)(f) *Child Protection Act 1999* (Qld).

Note QCPCI recommendation 13.2(2) that the proposed case management framework include: the ability for the Court to give directions to a parent to undertake testing, treatments or programs or to refrain from living at a particular address. The extent to which the parent complies should be considered by the Court in deciding whether to make a child protection order. (The Commission considers that statutory amendments should be made to permit the making of these interim orders, the purpose of which is to provide the parent with an opportunity to participate in treatment or a support program).

Note QCPCI recommendation 13.4 that the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to allow the Court to transfer and join proceedings relating to siblings if the court considers that having the matters dealt with together will be in the interests of justice.

Note QCPCI recommendation 13.15 that parents be supported through child protection proceedings by:

- *the Department of Communities, Child Safety and Disability Services ensuring they are provided with information about how to access and apply for legal advice or representation, and that parents are provided with reasonable time within which to seek such advice*
- *the Childrens Court considering, at the earliest possible point in proceedings, the position of parents to determine whether they are adequately represented before the matter progresses*
- *Legal Aid Queensland amending its policies with a view to providing legal representation to those families where the court has directed the family be legally represented, but where the family are unable to secure representation without legal aid assistance*
- *where a consent order is being sought in the absence of parental legal representation, the Childrens Court reasonably satisfying itself that parents understand the implications and effect of the order before it can be ratified by the court.*

4.4.1 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 *Child Protection Act 1999* (Qld). 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 2008 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 order 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:[145]

> "*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*."

4.4.2 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 member0.

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

[145] *L v Department of Communities* [2004] QChC 3 at [12].

4.4.3 Contact by an authorised officer

Contact by an authorised officer of 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]…

4.4.4 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]…

4.4.5 Social assessment report[146]

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 4**)

4.4.6 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:
    - ……..

[146] Independent Social Assessment Report Referral Form (Childrens Court of Queensland) in Appendix 4.

4.4.7 Contact

As to whether a Magistrate can order contact to be by residence with another person, see *The Department of Communities, Child Safety v M and S* [2013] QChC 27. In that case the Department 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 and 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".[147]

The Department appealed against those parts of the court orders as described in the previous paragraph on the grounds that:[148]

- 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 Ct 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:[149]

> "*[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*

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

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".

[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."

The New South Wales Childrens Court has developed Contact Guidelines for Magistrates to assist them to identify the kinds of matters to be considered by the court in making a decision regarding contact in care proceedings. These guidelines were developed in response to a recommendation in the Report of the Special Commission of Inquiry into Child Protection Services in NSW (the Wood Report). The Wood Report recommended that evidence based guidelines for contact orders be developed by the Children's Court to assist magistrates and to achieve a greater degree of consistency in the kinds of matters taken into account when making contact orders in care proceedings. According to the guidelines, as far as possible evidence based research has been taken into account in developing them. Childrens Court Magistrates in Queensland may find this information useful.

See also Contact Guidelines for Magistrates: Background Paper prepared by Tijana Jovanovic, Research Associate to his Honour Judge M Marien SC, President Children's Court of NSW, July 2010.

8.1.2 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]……

4.4.8 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 ……

4.4.9 Court-ordered conference

The purpose of a court-ordered conference 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 strengths of the family and possible options and strategies to ensure the future wellbeing and safety of the child.[150]

Where the court orders a conference to be held, the registrar is to appoint a chairperson and convene the conference as soon as practicable (some magistrates appoint the conference date).[151] Anything said in the conference is inadmissible in a proceeding before any court except with the consent of all the parties.[152]

The chairperson is to file a report of the conference containing the particulars prescribed under rules of court made under the *Childrens Court Act 1992* (Qld) as soon as practicable after the conference is finished.[153]

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[150] Child Protection Conferencing Unit, Dispute Resolution Branch, *Court Ordered Child Protection Conference Guidelines* (July, 2013) Department of Justice and Attorney General 7-8.

[151] s 69 *Child Protection Act 1999* (Qld).
[152] s 71 *Child Protection Act 1999* (Qld).
[153] s 72(1) *Child Protection Act 1999* (Qld).

If the parties have reached agreement and it is practicable for the matter to be heard earlier than the adjournment date, the registrar must set it down and advise the parties of the new date.[154]

Note QCPCI recommendation 13.6 that the court case management committee propose amendments to the Act to provide a legislative framework for court-ordered conferencing at critical and optimal stages during child protection proceedings. The Committee has recommended:

- *an amendment to the Act to give the court discretion to not order a conference in exceptional circumstances. The Committee acknowledged that nearly all contested matters should be referred to a conference however there may be some limited circumstances in which it may not be appropriate – for example, where there are significant safety or security issues to any person that may outweigh the benefit of holding a conference. The proposed amendment should specify that the Court must give reasons as to why it has decided that ordering a conference would not be appropriate.*
- *that the Childrens Court Rule 39 be amended so that if an agreement has not been reached at the conclusion of a conference, the convenor's report should, in consultation with the parties, identify the issues remaining in dispute to allow the court to allocate sufficient hearing time.*

See also draft Childrens Court Rules state that the report must state whether an agreement in relation to the application the subject of the proceeding has been reached between the parties and if so, the details of the agreement.

9.1.3 Sample order - Court ordered conference

- On adjournment of the proceeding/s I order that a conference by 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.

4.4.10 Separate legal representative for a child

In a proceeding on an application for an order for a child, the Childrens Court **may** order that the child be separately represented if the court considers it is necessary in the child's best interests and the court may make the orders necessary to secure such representation.[155]

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.[156]

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[154] s 72(3) *Child Protection Act 1999* (Qld).. See *Childrens Court Rules 1997* re: conference.
[155] s 110(1) *Child Protection Act 1999* (Qld).
[156] s 110(2) *Child Protection Act 1999* (Qld).

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.[157]

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 order is made having regard to the child's best interests, not the child's wishes. Normally the wishes and interests will be similar; however, this will not always be the case. E.g. a drug dependent child of a drug dependant parent may wish to remain home with the parent (supplier); however, it may be in the child's best interests to remove the child from that environment.

Note – section 110 does not compel the court to order a separate legal 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 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.[158] In determining whether it is in the child's interests, the following list of guidelines was suggested:[159]

- 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 propose to separate siblings;

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[157] s 111 *Child Protection Act 1999* (Qld).
[158] *Re K* (1994) 17 Fam LR 537 at 555.
[159] *Re K* (1994) 17 Fam LR 537 at 555 to 558.

- Custody cases where none of the parties are legally represented; and
- Applications in the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

The order may be made at any time the application is before the court:

- First return date;
- Subsequent return dates after further repost considered;
- When a family meeting is ordered;
- When a pre-hearing conference is ordered; or
- When the application is listed for hearing.

The *Childrens Court Rules* require the order to be sent to Legal Aid Queensland along with the material filed.[160]

Note that Rule 21[161] requires Legal Aid Queensland to advise the registrar in writing of the name and contact details of the separate representative or of any decision not to allocate a separate representative and the reasons for that decision.

4.4.10 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(3) of the Act requires the separate representative to act in the child's best interests regardless of the children's instructions and must as far as possible, present the child's view 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.[162] The parties to the proceeding must act in relation to the proceeding as if the separate representative were a party.[163]

Note QCPCI recommendation 13.14 that the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to provide clarity about when the Childrens Court should exercise its discretion to appoint a separate legal representative and also about what the separate legal representative is required to do. These amendments might require separate legal representatives to:

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[160] r 20 *Childrens Court Rules 1997*
[161] *Childrens Court Rules 1997*
[162] s 110(4) *Child Protection Act 1999* (Qld).
[163] s 104(5) *Child Protection Act 1999* (Qld).

- *interview the child or young person after becoming their separate legal representative and explain their role and the court process*
- *present direct evidence to the Childrens Court about the child or young person and matters relevant to their safety, wellbeing and best interests*
- *cross-examine the parties and their witnesses*
- *make application to the Childrens Court for orders (whether interim or final) considered to be in the best interests of the child or young person.*

4.4.11 Direct representation for a child

A child has a right of appearance in person or to be represented by a lawyer.[164] Direct representatives act on the instructions of a child or young person (cf separate representatives). The court has no explicit power to order that a child be directly represented.

A child can be either separately and/or directly represented. 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 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.

4.4.12 Continuation of orders

According to section 99 of the Act, if a child is in the custody or guardianship of the chief executive or in the custody of a member of the child's family under an order and before the order ends an application is made for an extension of the order or another order, the earlier order continues until the application is decided unless the Childrens Court orders an earlier end to the order.

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.

[164] s 108 *Child Protection Act 1999* (Qld).

4.4.13 Other orders on adjournment

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

4.5 Listing for final hearing

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 …/…../……
- 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.

4.6 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.

The following form provides an example of a review mention checklist to be completed by the parties.

MAGISTRATES COURT

Review Mention Form

Applicant/Respondent/Defendants Name……..……..

Details of Charges/Application……

1. Hearing Date: / /

2. (a) Has a complete Brief been made available and collected? Yes/No

(b) Have all affts etc intended to be relied upon at the hearing been filed and served? Yes/No

(c) If "no" to above what is outstanding?.....

(d) When will outstanding material become available?……..

3. Have all statements/reports/exhibits etc been perused/viewed and/or exchanged? Yes/No

If no why:……..

4. Are there any preliminary applications to be dealt with prior to the hearing?
If so what? (e.g. phone evidence/special witnesses/any special equipment/interpreter)

…….

5. No of witnesses being called……

6. Are all witnesses available? Yes/No
If not why and when will they become available?

7. Confirm the duration of the hearing: days

8. Has Counsel been briefed and confirmed his/her availability? Yes/No

9. Is there any matter/s which may delay the commencement of the hearing and/or which may result in an application for an adjournment? Yes/no

If yes what?.....

……
DPP/Police Prosecutor/Solicitor/ Applicant/ Respondent

5. WITHDRAWAL OF APPLICATION

5.1 Comment

There is some confusion surrounding the process to be adopted by the Department when it decides to withdraw an application before the Childrens Court. There is no procedure specified in the Act or the Rules. It appears to be the view of the Department that the withdrawal can be made without requiring the leave of the court. The Queensland Law Society contend that once an application has been filed, the court should oversee the application to ensure that any withdrawal is in the best interests of the child and that the decision is considered in light of the impact it will have on all the parties (including each parent and the child).

The Victorian Supreme Court considered this issue in *Secretary of the Department of Human Services v Y & Ors* [2001] VSC 231. In the Research Materials produced by Reserve Magistrate Peter Power for the Children's Court of Victoria reference was made to the summary of the central issue by Nathan J in that decision as follows:[165]

> "*Does a protective intervener need the leave of the Court to withdraw or discontinue a protection application once it has been filed and served? On the one hand, the Secretary contends withdrawal or discontinuance is a ministerial act which is not amenable to the Court's jurisdiction. On the other, the Attorney-General … contends that once the Secretary invokes the Court's jurisdiction she becomes subject to it, and to such rules of procedure as the Court may decide. If the Court decides that in governing itself, protection applications can only be withdrawn by way of leave, then the Minister must submit, like any other litigant, to that rule of procedure*.

Nathan J preferred the latter contention and held that the leave of the Court was required:

> *"At [42] he said that "once a protection application has been made, then the jurisdiction of the court is enlivened. It is not for the Secretary to resolve the matters set out in the application, that responsibility is the Courts. The Secretary's functions become cognate once she decides whether or not to pursue the making of an application. The Court is not an appendage to the Secretary's ministerial duties, the very function of the Court is to assess and to deliberate upon the Secretary's application that the children are in need of protection. Adjudication of that issue must proceed before the Court. The Court has the power to decide how that shall best be accomplished. Once the judicial process has been enlivened in this specialist jurisdiction, then it requires a judicial process to bring it to an end. If the Court decides as a matter of process that leave is required, then leave is required."*

Note that the Court Case Management Committee has recommended that there should be an amendment to the Childrens Court Rules to make it clear that the leave of the Court is required for the Department to withdraw a child protection application.

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[165] Childrens Court of Victoria, Research Material, p 3.9

6. MAKING A CHILD PROTECTION ORDER

Note that in a proceeding on an application for an order, 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.[166]

Note QCPCI recommendation 13.10 that the Department of Justice and Attorney-General and the Chief Magistrate collaborate to develop and fund a pilot project in at least two sites, in which the Childrens Court can access expert assistance under s 107 of the Child Protection Act 1999. The pilot project is to be evaluated to determine the extent to which it improves the decision-making of the court and to assess its cost-effectiveness.

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

- The child is **in need of protection** and the order is appropriate and desirable for the child's protection;
- 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)
- 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 4.4.9 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 is unlikely to be achieved by **any less intrusive order**.[167]

Prior to making a child protection order the Childrens Court **must** be satisfied:[168]

a) The child is a child in need of protection and the order is appropriate and desirable for the child's protection; and
b) There is a case plan for the child –
    (i) that has been developed or revised under part 3A; and
    (ii) that is appropriate for meeting the child's assessed protection and care needs; and
c) if the making of the order has been contested, a conference between the parties has been held or reasonable attempts to hold a conference have been made; and
d) the child's wishes or views, if able to be ascertained, have been made known to the court; and
e) the protection sought to be achieved by the order is unlikely to be achieved by an order under this part on less intrusive terms.

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.[169]

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[166] s 107 *Child Protection Act 1999* (Qld).
[167] s 59 *Child Protection Act 1999* (Qld).
[168] s 59(1) *Child Protection Act 1999* (Qld).
[169] s 59(4) *Child Protection Act 1999* (Qld).

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.

Section 5E of the Act sets out the requirements when giving a child an opportunity to express their views under this Act including use of appropriate language and communication, helping a child to express their views if needed, explaining decisions to the child and giving them an opportunity to respond to any decision affecting them.

The Childrens Court may make an order that the court considers appropriate in the circumstances:

- Directive order;
- Supervision order;
- Custody order;
- Short-term guardianship order; and
- Long-term guardianship order.

Note QCPCI recommendation 13.4 that the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to forbid the making of one or more short-term orders that together extend beyond two years from the making of the first application unless it is in the best interests of the child to make the order (subject to any proposed legislative amendment to the best interests principle arising from rec. 14.5).

6.1 A directive order

There are two types of directive order. The first one directs a parent of the child to do or not do something directly related to the child's protection.[170] 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.[171]

The second type places restriction on parental contact with the child, either by directing that no contact occur or that only supervised contact occur.[172] 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".[173]

Note QCPCI recommendation 13.22 that the Department of Communities, Child Safety and Disability Services increase its capacity to work with families under an intervention with parental agreement or a directive or supervisory order with appropriate support services and develop a proposal for legislative amendments to provide for effective sanctions for non-compliance with supervisory or directive orders.

6.1.1 Comment

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[170] s 61(a) *Child Protection Act 1999* (Qld).
[171] Explanatory Notes to the Child Protection Bill 1998, p 27.
[172] s 61(b) *Child Protection Act 1999* (Qld).
[173] Explanatory Notes to the Child Protection Bill 1998, p 27.

The Department is likely to apply for an order under section 61(a) of the Act when all of the following circumstances are present:

- the parents will not take the action required on a voluntary basis;
- the child can safely remain at home, as long as the parents take certain actions;
- the action is able to be clearly defined, and what is required of parents is easily understood by them;
- a specific order is able to be made by the court;
- failure on the parents' part to comply with the order will place the child at unacceptable risk of harm; and
- the parents are likely to adhere to the recommended order.[174]

Departmental officers are advised that an order under section 61(b) of the Act may be applied for in one of the following circumstances:

- the child could remain at home with a protective parent if the other parent who may be at risk of harming the child was subject to restricted or no 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.[175]

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

6.2 A supervision order

A supervision order requires the chief executive to supervise the child's protection in relation to the matters stated in the order[176]. For example, the order may require the chief executive to supervise the parents' care of the child in relation to necessary medical care.[177]

(*See note re QCPCI recommendation 13.22 at 6.1 above)*

6.2.1 Comment

[174] Child Safety Practice Manual, Department of Communities, Child Safety and Disability Services 2012, Chapter 3
[175] Child Safety Practice Manual, Department of Communities, Child Safety and Disability Services 2012, Chapter 3 – note there is a July 2013 version online - https://www.communities.qld.gov.au/resources/childsafety/practice-manual/cspm-collated.pdf
[176] s 61(c) *Child Protection Act 1999* (Qld).
[177] Explanatory Notes to the Child Protection Bill 1998, p 27.

Departmental officers are advised to apply for a supervision order when all of the following circumstances are present:

- the child is in need of protection, but supervision and direction by Child Safety will enable:
  - the child to safely remain at home
  - Child Safety to monitor the situation to ensure that the matters specified in the order are addressed by the parents
- it is possible to specify the areas relating to the child's care that are to be supervised by Child Safety;
- failure on the parents' part to comply with Child Safety requirements will not place the child at immediate risk of harm;
- the intervention needed, with the child residing in the home, will not be accepted by the parents on a voluntary basis; and
- it is appropriate for the parents to retain their custody and guardianship rights and responsibilities.[178]

6.3 A custody order

A custody order grants custody of the child to a suitable family member other than a parent of the child[179] or to the chief executive[180] and cannot be made for longer than two years.

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.[181] (See part **12** for further discussion about domestic violence and child protection).

6.3.1 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.

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[178] Child Safety Practice Manual, Department of Communities, Child Safety and Disability Services 2012, Chapter 3 - note there is a July 2013 version online - https://www.communities.qld.gov.au/resources/childsafety/practice-manual/cspm-collated.pdf
[179] s 61(d)(i) *Child Protection Act 1999* (Qld).
[180] s 61(d)(ii) *Child Protection Act 1999* (Qld).
[181] s 59(5) *Child Protection Act 1999* (Qld).

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.

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:[182]

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.[183] 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:[184]

> "*…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.[185] However, His Honour went on to conclude:[186]

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[182] *Department of Communities v LE and Ors* [2011] QChC 4 at [2].
[183] *Department of Communities v LE and Ors* [2011] QChC 4 at [18].
[184] *Department of Communities v LE and Ors* [2011] QChC 4 at [18].
[185] *Department of Communities v LE and Ors* [2011] QChC 4 at [23].
[186] *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."

6.4 A short-term guardianship order

A short-term guardianship order can only be made to the chief executive[187] and only for up to two years.

6.4.1 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.

6.5 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. Before making a long-term guardianship order, the court **must** be satisfied 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 in favour of

[187] s 61(e) *Child Protection Act 1999* (Qld).

- a suitable family member other than a parent of the child;[188]
- a suitable person other than a family member nominated by the chief executive.[189] The court **must not** make this order unless the child is already in custody or guardianship under a child protection order;[190]
- the chief executive[191]. The court **must not** make this order if the court can properly grant guardianship to another suitable person.[192]

Note QCPCI recommendation 13.24 that the Court Case Management Committee examine whether the Childrens Court in making a long-term guardianship order can feasibly make an order for the placement and contact arrangements for the child. In this examination, the Committee should take account of the impact of such a proposal on the court case management system and the departmental case management processes.

6.5.1 Comment

The Explanatory Notes to the Child Protection Bill 1998 provide an example of circumstances which might meet the child's need for emotional security:

> "*If an older child in care has been with the same care provider family for many years, it may best meet the child's emotional needs in the long term to remain with the care*."

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*".[193]

In practice, long-term guardianship orders are sought if:

- efforts have been made to locate both parents;
- significant work has been undertaken to assist the family to care for the child; and
- the department's assessment is that a long-term stable living arrangement should be pursued, and that the child's need for emotional security and stability will be best met in the long-term by the order.[194]

6.5.2 When orders can be made

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.

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[188] s 61(f)(i) *Child Protection Act 1999* (Qld).
[189] s 61(f)(ii) *Child Protection Act 1999* (Qld).
[190] s 59(7)(a) *Child Protection Act 1999* (Qld).
[191] s 61(f)(iii) *Child Protection Act 1999* (Qld).
[192] s 59(7)(b) *Child Protection Act 1999* (Qld).
[193] Department of Communities, Child Safety and Disability Services 2012c.
[194] Department of Communities 2011b.

6.6 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?

Note QCPCI recommendation 13.20 that the Childrens Court, before making a child protection order, be satisfied that all reasonable efforts have been made to provide support services to the child and family.

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

6.7 Consent orders

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

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.[195]

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."[196] 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.

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:[197]

> "*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:[198]

> "*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

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[195] *T v N* [2003] FAM CA 1129 at [12]-[13].
[196] KD v Department of Child Safety and Others [2011] QChC 8 at p 3.
[197] KD v Department of Child Safety and Others [2011] QChC 8 at p 14 – 15.
[198] KD v Department of Child Safety and Others [2011] QChC 8 at p 15.

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:[199]

> "*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…*
>
> *…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 to investigate and assist if necessary (**see Appendix 6**).

Note QCPCI recommendation 13.15 that parents be supported through child protection proceedings by, where a consent order is being sought in the absence of parental legal representation, the Childrens Court reasonably satisfying itself that parents understand the implications and effect of the order before it can be ratified by the court.

6.8 Duration of orders

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

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[199] *KD v Department of Child Safety and Others* [2011] QChC 8 at p 15 – 17.

- 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.[200]

The order ends at the stated time unless it is extended or earlier revoked. All orders end when a child turns 18.

6.8.1 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 order and make further orders with respect to the children. On 8 January when the matter came on for hearing, the learned magistrate decided the 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 said:[201]

> "*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*."

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[200] s 62 *Child Protection Act 1999* (Qld).
[201] *Director-General v G-H & Ors* [2007] QChC 6 at [8]-[12].

6.9 Extension of orders

An authorised officer can apply to the Childrens Court to extend a child protection order (other than a long-term guardianship order). The application must be made before the order ends[202].

Before the court makes an order to extend (or makes a further) custody order or short-term guardianship order, the court must have regard to the child's need for emotional security and stability[203].

If the court refuses to extend an order, refer to Transition orders (below).

6.10 Variation or revocation of child protection orders

An authorised officer, 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.[204]

Where a court revokes a child protection order, see 7.1 Transition Orders (below).

7. DECLINING TO MAKE A CHILD PROTECTION ORDER

7.1 Transition Orders

Transition orders were introduced into the Act in 2010 to provide the Court with the discretionary power when it declines to make certain further orders, to set a future end date for an existing child protection order. 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.[205]

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:[206]

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

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[202] s 64 *Child Protection Act 1999* (Qld).
[203] s 59(8) *Child Protection Act 1999* (Qld).
[204] s 65(1) *Child Protection Act 1999* (Qld).
[205] 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.
[206] s 65A *Child Protection Act 1999* (Qld).

- 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 the chief executive.

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.[207]

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.[208]

8. GENERAL PROVISIONS TO NOTE RE: PROCEEDINGS

8.1 Court to give reasons

When making a decision under the Act, the Childrens Court must state the reasons for its decision.[209]

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.[210]

8.1.1 Comment

See Justice Michael Kirby, "*Ex tempore* judgments – reasons on the run" [1995] *University of Western Australia Law Review* 18; (1995) 25 *University of Western Australia Law Review* 213 for a discussion of *ex tempore* judgments:

8.2 Court not bound by rules of evidence (s 105)

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

8.2.1 Comment

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*" [2012] Monash U Law Rw 19; (2012) 38(2) Monash University Law Review 181 @ 198.[211]

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[207] s 65B(1) *Child Protection Act 1999* (Qld).
[208] s 65B(2) *Child Protection Act 1999* (Qld).
[209] s 104 *Child Protection Act 1999* (Qld).
[210] s 106 *Child Protection Act 1999* (Qld).
[211] 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.

"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.[212] *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.[213]

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.[214] *Evidence must always be relevant,*[215] *and reliable,*[216] *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."*

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 and the child in the absence of the Department.[217].

Note QCPC recommendation 13.20 that the Minister for Communities, Child Safety and Disability Services propose an amendment to the Child Protection Act 1999 to provide that participation by a parent in a family group meeting and their agreement to a case plan cannot be used as evidence of an admission by them of any of the matters alleged against them.

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[212] *Children and Young People Act 2008* (ACT) ss 712, 716; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93; *Care and Protection of Children Act 2009* (NT) s 93; *Child Protection Act 1999* (Qld)) s 105; *Children.'s Protection Act 1993* (SA) s 45; *Children, Young Persons and Their Families Act 1997* (Tas) s 63; *Children, Youth and Families Act 2005* (Vic) s 215; *Children and Community Services Act 2004* (WA) ss 145.–6.
[213] (1933) 50 CLR 228, 256. See also *Local Government Board v Arlidge* [1915] AC 120, 132, 137, 147.
[214] *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 4 ALD 139,156.
[215] *Casey v Repatriation Commission* (1995) 60 FCR 510. See also *Goldsmith v Sandilands* [2002] HCA 21; (2002) 190 ALR 370, 377; *Nicholls v The Queen* [2005] HCA 1; (2005) 219 CLR 196.
[216] *R v Board of Visitors of Hull Prison; Ex parte St Germain [No 2]* [1979] 1 WLR 1401, 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.
[217] *Department of Communities, Child Safety and Disability Services v S & Anor* [2013] QChC 33 at [19].

8.3 Proof on the balance of probabilities

The standard of proof in Childrens Court proceedings is the civil standard – on the balance of probabilities.[218]

8.4 Hearing the views of children

Before making a child protection order, the Childrens Court must be satisfied that the child's wishes or views, if able to be ascertained, have been made known to the Court.[219] 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; and
- Through the affidavit material filed by the departmental officers during the proceedings; or
- In person themselves where age appropriate.

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.[220]

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

Article 12 of the United Nations *Convention on the Rights of the Child* 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.

Note QCPCI recommendation 13.13 that the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to require the views of children and young people to be provided to the court either directly, that is personally (through an independent child advocate or direct representative) or through a separate legal representative where children and young people are of an age and willing and able to express their views.

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[218] s 105(2) *Child Protection Act 1999* (Qld).
[219] s 59(1)(d) *Child Protection Act 1999* (Qld).
[220] *Child Protection Act 1999* (Qld). s 105 to assist or *Oaths Act 1867* (Qld) s17.

8.4.1 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* (see hyperlink at 1.5.3)

8.5 Parties to the proceeding and representation

The parties to child protection proceedings are:

- The applicant (authorised officer of the Department);[221]
- The respondent parents;[222] and
- The child.[223]

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.[224]

If the child, parent or other party has a difficult 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.[225]

The child, the child's parents and other parties have a right to appear or they may be represented by a lawyer. A court coordinator is entitled to appear in a proceeding on behalf of the Department.[226]

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.[227]

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.

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.[228]

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

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[221] s 54 *Child Protection Act 1999* (Qld).
[222] s 57 *Child Protection Act 1999* (Qld).
[223] s 106 *Child Protection Act 1999* (Qld).
[224] s 106(1) *Child Protection Act 1999* (Qld).
[225] s 106(2) *Child Protection Act 1999* (Qld).
[226] s 108A *Child Protection Act 1999* (Qld).
[227] s 110 *Child Protection Act 1999* (Qld).
[228] s 109 *Child Protection Act 1999* (Qld).

matter relevant to the proceeding. A submission may be made by a non-party's lawyer.[229] 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.

8.5.1 The role of the Public Guardian in child protection proceedings

The *Public Guardian Act 2014* (Qld) (date of Assent, 28 May 2014) amends the *Child Protection Act 1999* (Qld) to provide that the Public Guardian has a right of appearance in child protection proceedings in the Childrens Court. The statutory right of intervention will allow the Public Guardian to communicate the child's wishes, appear, make submissions, lead and test evidence in the proceedings as required to advocate for and provide support to a child. 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 7).

Note QCPCI recommendation 13.11 that the State Government review the priority funding it provides to Legal Aid Queensland with a view to ensuring that increased funding is applied for the representation of vulnerable children, parents and other parties in child protection court and tribunal proceedings.

Note QCPC recommendation 13.12 that Legal Aid Queensland review the use of Australian Government funding received for legal aid grants to identify where funding can be used for child protection matters.

Note QCPCI recommendation 13.19 that the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to permit the Childrens Court discretion to allow members of the child's family or another significant person in the child's life to be joined as a party to the proceedings where the court agrees the person has a sufficient interest in the outcome of the proceedings. These parties should also have the right to be legally represented.

Note QCPCI Recommendation 13.26 that the Family and Child Council develop key resource material and information for children and families to better assist them in understanding their rights, how the child protection system works including court and tribunal processes and complaints and review options in response to child protection interventions.

8.6 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 21B of the *Childrens Court Act 1992* (Qld) 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

[229] s 113 *Child Protection Act 1999* (Qld).

- 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 under section 21B(2). 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 21B(2) of the *Childrens Court Act 1992* (Qld) to allow a person who it considers will be of assistance to the court to be present for the proceedings.

8.7 Restriction on publication of certain information for proceedings

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 *Child Protection Act 1999* (Qld) of an allegation of harm or risk of harm;[230] or
- a child in the chief executive's custody or guardianship under the *Child Protection Act 1999* (Qld);[231] or
- a child for whom an order is in force.[232]

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;[233] 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.[234]

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

8.8 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.[235]

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[230] s 189(1)(a) *Child Protection Act 1999* (Qld).
[231] s 189(1)(b) *Child Protection Act 1999* (Qld).
[232] s 189(1)(c) *Child Protection Act 1999* (Qld).
[233] s 189(2)(a) *Child Protection Act 1999* (Qld).
[234] s 189(2)(b) *Child Protection Act 1999* (Qld).
[235] s 26 *Childrens Court Act 1992* (Qld).

8.9 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.

Note QCPCI recommendation 13.23 that the Minister for Communities, Child Safety and Disability Services propose amendments to section 116 of the Child Protection Act 1999 to allow the Childrens Court discretion to make an order for costs in exceptional circumstances.

8.9.1 Comment

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 *Child Protection Act 1999* (Qld).

8.10 Interface with QCAT

Section 99M of the Act provides that it there is a review application before QCAT and some or all of the matters to which the reviewable decision relates are also before the court, the president must suspend the tribunal's review if the president 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.

The QCPCI report noted that despite these arrangements, there have been situations in which concurrent proceedings of QCAT and the Childrens Court have occurred and a decision has been made by the tribunal without the knowledge of the Childrens Court or of all the parties. The report concluded that where there is a child protection proceeding underway in the Childrens Court the court should decide review applications about contact and placement.

Note QCPC recommendation 13.28 that the Minister for Communities, Child Safety and Disability Services propose amendments to the Child Protection Act 1999 to allow the Childrens Court to deal with an application for a review of a contact or placement decision made to the Queensland Civil and Administrative Tribunal if it relates to a proceeding before the Childrens Court.

9. 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.[236]

[236] s 60 *Child Protection Act 1999* (Qld).

9.1 Comment

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 Child Protection 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 3.1.3 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 that:

> "*…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*".[237]

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[237] *S v Chief Executive of the Department of Child Safety* [2007] QChC 2, 17.

10. APPEALS

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.[238] The appeal lies to a Childrens Court constituted by a judge (see definition of 'appellate court' in Schedule 3 Dictionary)

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.[239] 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. If the decision at first instance was made by a Childrens Court constituted by a judge, the appeal lies to the Court of Appeal.[240] Sections 118 to 121 set out procedures and other information relevant to the hearing of appeals.

10.1 Comment

In *FY 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:[241]

> "*[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 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*

[238] *Child Protection Act 1999* (Qld) s 117(1).
[239] Ibid s 117(2).
[240] Ibid sch 3 see definition of "appellate court".
[241] *The Department of Communities, Child Safety v M & S* [2013] QChC 27, [4]-[5], [10].

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 4.4.7 for further discussion of this case).

11. 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:[242]

- 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.

11.1 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 except for an interim order under section 67 of the Act or an order granting long-term guardianship to a person other than the chief executive.[243] 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 are excluded because the State does not have responsibility for the child[244].

The Act provides for administrative transfers and judicial transfers. Judicial transfers are applied for by the chief executive under section 212 of the Act. The procedure to be followed is set out in s 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:[245]

- The home order[246] is not subject to an appeal;
- The interstate officer has given written consent to the transfer and the provisions of the proposed interstate order;[247] 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

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[242] *Child Protection Act 1999* (Qld) s 198.
[243] Ibid s 206.
[244] Explanatory Notes, Child Protection Amendment Bill 2000 (Qld) 18.
[245] *Child Protection Act 1999* (Qld) s 214.
[246] Ibid s 200 for definition.
[247] Ibid.

- 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:[248]

- The proposed interstate order is one that could be made under the law of that State;
- The protection sought 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.[249]

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.[250]

11.2 Transfer of order from another State

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[251] and the order is taken to be a child protection order of the Childrens Court in Queensland made in the day of its registration, except for the purposes of an appeal against the order.[252]

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.[253]

11.3 Judicial transfer of proceedings to another State

An authorised officer 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.[254] 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.[255]

The registrar is to fix the time and place for hearing[256] and the applicant is to serve a copy on the parents and notify the child.[257]

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[248] Ibid s 215.
[249] Ibid s 215(2).
[250] Ibid ss 215(3)-(4).
[251] Ibid s 222.
[252] Ibid s 223.
[253] Ibid s 224 for the details of the revocation application.
[254] Ibid s 225(1).
[255] Ibid s 225(2).
[256] Ibid s 226.
[257] Ibid s 227.

The Court may order the transfer of the proceeding to a participating State if the interstate officer has given written consent to the transfer.[258] In deciding whether to order the transfer, the Court must have regard to the following:[259]

- 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. The interim order must state the time for which it has effect, which may not exceed 30 days.[260]

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 *Child Protection Act 1999* (Qld).[261]

11.3 Transfer of proceedings from another State

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.[262]

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.[263]

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.[264]

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.[265] 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.[266] However, the court may not extend or vary the

[258] Ibid s 228.
[259] Ibid s 229.
[260] Ibid s 230.
[261] Ibid s 232.
[262] Ibid s 234.
[263] Ibid s 236.
[264] Ibid s 236(3).
[265] Ibid s 237(1).
[266] Ibid s 237(2).

order[267] and the court can revoke the order and make another order under s 67 of the Act.[268]

Section 238 of the Act sets out who can apply to revoke the registration and the process for that.

11.4 Appeals against transfer decisions

An appeal lies to the appellate court[269] 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.

12. DOMESTIC VIOLENCE AND CHILD PROTECTION INTERFACE

There is no doubt that there are strong links between domestic violence and child protection. The Department of Communities, Child Safety and Disability Services' analysis of parents with children in the child protection system found that over one-third of substantiated households (35%) had two or more incidents of domestic violence within the past year[270] (see **Appendix 1**).

The connection between the two issues is reflected in the legislation with the *Domestic and Family Violence Protection Act 2012* (Qld) (DFVPA), s 43 providing that the Childrens Court when hearing a child protection proceeding may make a protection order against a parent of a child.

12.1 Making a protection order under the DFVPA in child protection proceedings

The court may make a protection order against a parent of a child for whom a protection order is sought if

- The court is satisfied that a protection order could be made against the parent under s 37 of the DVFPA; and
- The aggrieved person is also a parent of the child.[271]

If there is already a domestic violence order in force against a parent, the court must consider the order and whether in the circumstances is needs to be varied including whether the ends date needs to be changed or whether terms of the order need to be changed to be consistent with a proposed child protection order.[272]

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[267] Ibid s 237(3).
[268] Ibid s 237(4).
[269] Ibid sch 3 for the definition of "appellate court".
[270] Queensland Child Protection Inquiry, above n 10, 49.
[271] *Domestic and Family Violence Protection Act 2012* (Qld) s 43(2).
[272] Ibid s 43(3).

The protection order or variation can be made on the court's own initiative or on the application of a party to the child protection proceedings.[273] 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.[274] 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.[275]

The court may make the protection order of 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.[276]

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 them; and
- may issue any direction that it considers necessary.[277]

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 of order the issue of a warrant for the parent to be taken into custody.[278]

Section 43 DFVPA does not limit the power of the court to make any order under the *Child Protection Act 1999* (Qld).

The *Child Protection Act 1999* (Qld) 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.[279]

12.1.1 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 and Issues in crime and criminal justice, No 419 (June 2011);

- Australian Domestic and Family Violence Clearinghouse, *Domestic Violence and Child Protection: Challenging directions for practice*, Issues Paper No 13 (May 2007).

For further discussion of the links between domestic violence and child protection, including references to research, legislation and practice, see Department of Communities, Child

[273] Ibid s 43(4).
[274] Ibid s 43(5).
[275] Ibid s 43(10).
[276] Ibid s 43(6).
[277] Ibid s 43(7).
[278] Ibid s 43(8).
[279] Ibid s 59(5)..

Safety and Disability Services, *Domestic and family violence and its relationship to child protection: Practice Paper* (October 2012).

For information about the relevance of domestic violence in child protection proceedings, see Robert McLachlan, 'Domestic Violence: Its Relevance and Proof in Care Proceedings', Children's Law News (online), August 2002.

- "Domestic Violence – its relevance and proof in care proceedings" by Robert McLachlan, solicitor and
- "Direct and Indirect Effects on Domestic Violence on Non-Violent Partner and Children", Literature compiled by Carol Boland, clinical psychologist in Childrens Law News 2002, No 6

Appendix 1

LINKS BETWEEN SOCIAL DISADVANTAGE, CHILD ABUSE AND NEGLECT

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. The following extract from the QCPCI Report describes these links in more detail. While the information provides the best estimate based on available information, it should be noted that the data sources are from administrative systems or self-reported surveys and so the information might not provide an entirely accurate representation of the issue. (p 45)

23.1 Extract from QCPCI Report 2013 (pp 45-50)

> **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:[280]
>
> > In a 2011 longitudinal study conducted by Micah Projects with families accessing crisis and planned support from agencies based in inner Brisbane, the numbers of parents who reported recent or current contact with child safety services ranged from over 10% to just over 25%. Furthermore, it is possible that this is an under-report due to the stigma attached to involvement. Connecting housing with family support is an effective intervention for vulnerable families with involvement, or at risk of involvement, in the child protection system.[281]
>
> Research, particularly from the United States, has shown that housing difficulties often precipitate admission to foster care and delay family reunification.[282]

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[280] Karen Healey, *A Study of Crisis Intervention and Planned Family Support with Vulnerable Families* (December 2011) Micah Projects Inc..
[281] Submission of Micah Projects Inc., April 2013 [p22].
[282] Karen Healey, *A Study of Crisis Intervention and Planned Family Support with Vulnerable Families* (December 2011) Micah Projects Inc..

Homelessness is a significant problem facing families with children and young people, with almost half of those seeking emergency housing being families with children (see Figure 2.20). National reporting on the 42,930 clients accessing specialist homelessness services in 2011–12 in Queensland reveals that:

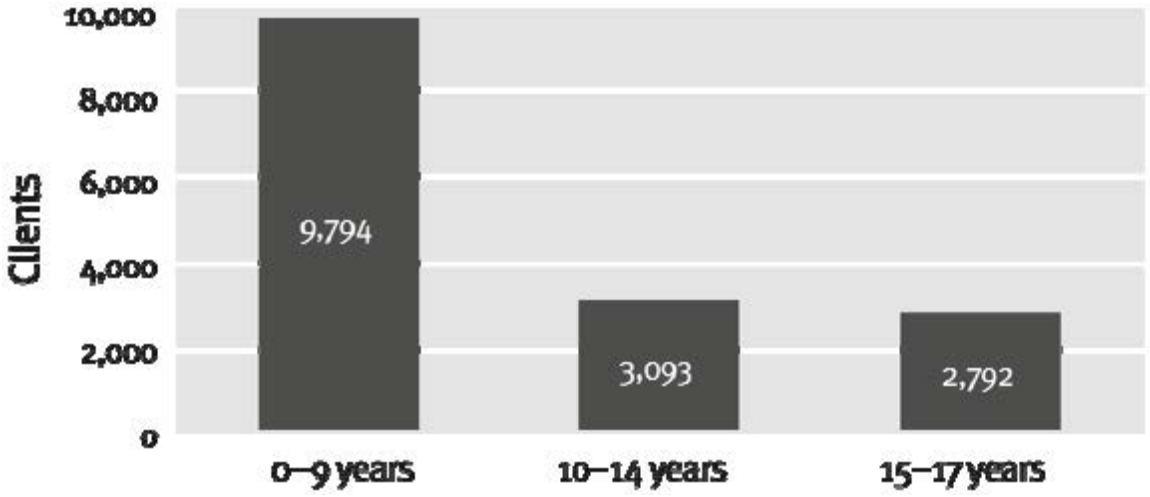
- 14,710 clients were single adults with their children (34% of all clients)
- 4,763 clients were couples with their children (11%).[283]

In addition, just over a third (37%) of all Queensland clients were aged under 18, with:

- 9,794 aged under 10 years
- 3,093 aged 10 to 14 years
- 2,792 aged 15 to 17 years

Almost a third (5,021 or 32%) of clients aged under 18 were Aboriginal and Torres Strait Islanders.

Figure 2.20: Children aged 0–17 years accessing homelessness services by age, Queensland, 2011–12



Source: Australian Institute of Health and Welfare 2012, Specialist Homelessness Services 2011–12, Table Qld2.1

The main reasons for Queenslanders seeking homelessness services in 2011–12 were financial difficulties (19%) and domestic and family violence (15%). Domestic violence was more likely to be the main reason for seeking assistance for female clients (21% of female clients).

Nationally, there were increases of 5 to 7 per cent each year in people using specialist homelessness services between 2008–09 and 2010–11. However, the Australian Institute of Health and Welfare notes that the relatively large increase recorded between 2010–11 and 2011–12 (18%) might not necessarily reflect an increase in homelessness.[284] These need to

[283] Australian Institute of Health and Welfare 2012, Specialist homelessness services 2011–12, cat. no. HOU 267, Canberra.
[284] Australian Institute of Health and Welfare 2012, Specialist homelessness services 2011–12, cat. no. HOU 267, Canberra.

be considered in the context of recent policy and service delivery changes and increased investment in homelessness support.[285]

Young parents. Evidence linking young parenting and the risk of child abuse and neglect is inconsistent[286]. However, as noted in the next section, the median age of parents with children in the child protection system was younger than the median age of all parents.

In 2011 there were 63,253 births in Queensland, of which 5,256 were Aboriginal and Torres Strait Islander births (8%) and 57,997 were non-Indigenous births (92%).[287] Of these:

- 952 Aboriginal and Torres Strait Islander births were to mothers aged under 20 years (18% of all Aboriginal and Torres Strait Islander births)
- 2,344 non-Indigenous births were to mothers aged under 20 years (4% of all non- Indigenous births).

Over the last five years, age-specific fertility rates for 15–19-year-olds for Aboriginal and Torres Strait Islander females (84.6 births per 1,000 females in 2011) have been three to four times higher than the rate for all females 15–19 years (24.7 births per 1,000 females). Queensland and Tasmania have teenage fertility rates that are the second highest in Australia, although these are well below the rate in the Northern Territory. Queensland is also the only state with increases in teenage fertility rates over the last five years.

Risk factors for child abuse and neglect

The former Department of Child Safety analysed the characteristics of parents with children in the child protection system in 2007.[288] Demographic characteristics identified for parents in substantiated households included:

- **Younger parents**: The median age for parents at the time of giving birth was younger than that of the general population, by around five years on average. However, while teenage parents were over-represented to some extent, they comprised just 6 per cent of mothers and 2 per cent of fathers at the time of the substantiation. Young households (with at least one parent aged 21 years or less) were assessed as vulnerable.

- **Aboriginal and Torres Strait Islander parents**: Aboriginal and Torres Strait Islander parents were significantly over-represented in the child protection system with 21 per cent compared with 3 per cent in the Queensland population.

- **Single parents**: There was a higher propensity for children from single-parent households to be assessed as vulnerable and in need of ongoing departmental intervention.

The analysis identified parental risk factors associated with child abuse and neglect, and 71 per cent of households had at least one of these factors:

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[285] See National affordable housing agreement (2012) and National partnership agreement on homelessness (2012).
[286] Goldman, J, Salus, M, Wolcott, D & Kennedy, K 2003, A coordinated response to child abuse and neglect: the foundation for practice, US Department of Health and Human Services, Washington.
[287] Australian Bureau of Statistics 2012, Births, Australia, 2011, cat. no. 3301.0, Commonwealth of Australia, Canberra.
[288] Department of Child Safety 2009, Characteristics of parents involved in the Queensland child protection system report 6: summary of key findings, Queensland Government, Brisbane.

- drug or alcohol problem: in nearly half of all substantiated households (47%) one or both parents had a current or previous drug and/or alcohol problem
- domestic violence: over one-third of substantiated households (35%) had two or more incidents of domestic violence within the past year
- mental illness: about one-fifth of primary parents (19%) had a current or previously diagnosed mental illness intergenerational abuse: one-quarter of primary parents (25%) were abused or neglected as a child
- criminal history: about one-fifth of primary parents (21%) had a criminal history.

The analysis also showed that nearly half (44%) of substantiated households had more than one of the five risk factors, and these households were more than twice as likely to progress to ongoing intervention compared with households with one or no risk factors (59% compared with 25%). Parental risk factors were more prevalent in Aboriginal and Torres Strait Islander households and young households with the vast majority in both cases having at least one of the five risk factors (86% and 93% respectively). These households were also most likely to have multiple risk factors (over 55% and 63% respectively).

While having one or more of the risk factors was common across most of the causes of harm listed in the Act (physical, psychological, emotional abuse, neglect, sexual abuse/exploitation), the notable exception was for sexual abuse/exploitation.[289] Over one-third (37%) of households substantiated for sexual abuse and in need of ongoing intervention did not display any of the five parental risk factors.

Alcohol and drug abuse

The 2008 Child Safety study on the characteristics of parents who had children in substantiations found some groups were more likely to have drug and/or alcohol problems:

- just over half (55%) of single-mother households with substantiations
- 62 per cent of young households (at least one parent aged 21 years or less) with substantiations
- nearly two-thirds (64%) of substantiated households with at least one Aboriginal or Torres Strait Islander parent.

Alcohol was the most common substance misused by parents with children in the child protection system. Further information collected by the department suggested that 51 per cent misused alcohol and 23 per cent misused marijuana. Smaller proportions were also reported to be misusing heroin, prescription drugs and other substances. The study cautions that actual rates of substance misuse among parents are likely to be higher than reported.

The Australian Institute of Health and Welfare found in its national drug and alcohol use survey that the proportion of daily drinkers in Australia aged 14 and over remained largely unchanged from 1993 to 2007 at around 8 per cent. [290] However, between 2007 and 2010 there was a decrease in daily drinkers in all jurisdictions except for Queensland where the proportion remained at 8 per cent. The National Health Survey found there appeared to be

[289] Department of Child Safety 2008, Characteristics of parents involved in the Queensland child protection system report 2: parental risk factors for abuse and neglect, Queensland Government, Brisbane.
[290] Australian Institute of Health and Welfare 2011, 2010 National drug strategy household survey report, Drug statistics series no. 25, cat. no. PHE 145, Canberra.

little change in the proportion of adults drinking at risky or high-risk levels between 2004–05 and 2011–12.[291]

Other findings at a national level were that:

- males were far more likely to drink at levels considered risky than females (20% compared with 7%)
- Aboriginal and Torres Strait Islander people were 1.4 times as likely as non-Indigenous Australians to abstain from drinking alcohol, but were also about 1.5 times as likely to drink alcohol at risky levels
- people living in remote or very remote areas were more likely to drink at risky levels than those living in other areas.

Of those with dependent children, 17 per cent of single parents and 14 per cent in couple households had more than four standard drinks on one occasion at least once a week. According to the 2009 National Health and Medical Research Council guidelines about alcohol consumption, more than four drinks on one occasion is a risk for an alcohol related injury, with the risk increasing with the amount consumed.[292]

Illicit drug use includes illegal drugs such as cannabis and illicit or inappropriate use of pharmaceuticals and other substances such as inhalants. The 2010 national survey found:

- the proportion of Australians aged 14 years and older who had used an illicit drug in the last 12 months had increased between 2007 and 2010 from 13.4 per cent to 14.7 per cent
- statistically significant increases in recent illicit drug use by females and those aged 30 to 39 and 50 to 59
- illicit drug users (whether used in previous 12 months or previous month) were more likely to be diagnosed or treated for a mental illness
- a higher proportion of Aboriginal and Torres Strait Islander people had recent use of illicit drugs (25%).

Maternal drug and alcohol use during pregnancy. Further to the elevated risks of child maltreatment stemming from parental drug and alcohol abuse are the potential effects on an unborn child from maternal substance misuse during pregnancy. Almost all drugs are known to have some effect on the developing foetus. Cigarette smoking and illicit drugs have been associated with a range of problems including increased risk of spontaneous abortions, perinatal death, preterm delivery and low birth weight. Longer-term effects on behaviour, cognition and language are also apparent from prenatal exposure to nicotine, marijuana and cocaine.[293]

The most serious neurobehavioral effects on the foetus are from exposure to alcohol. This can result in permanent and irreversible brain damage. Foetal alcohol spectrum disorder (FASD) is the overarching term for a range of conditions with symptoms that can include: brain damage, developmental delay, poor growth, problems with vision and hearing, memory problems, and social and behavioural problems.[294] Although the risk of birth defects is

[291] Australian Bureau of Statistics 2012, Australian health survey: first results, 2011–12, cat. no. 4364.0.55.001, Commonwealth of Australia, Canberra.
[292] Australian Institute of Health and Welfare 2011, 2010 National drug strategy household survey report, Drug statistics series no. 25, cat. no. PHE 145, Canberra.
[293] Behnke, M & Smith, V 2013, Prenatal substance abuse: short- and long-term effects on the exposed fetus, Pediatrics, vol. 131, no. 3, e1009.
[294] Standing Committee on Social Policy and Legal Affairs 2012, FASD: the hidden harm – inquiry into the prevention, diagnosis and management of fetal alcohol spectrum disorders.

greatest with high, frequent maternal alcohol intake during the first trimester, alcohol exposure throughout pregnancy can have consequences for the foetal brain. [295] For that reason, the national guidelines recommend not drinking at all as the safest option for pregnant and breastfeeding women.

Evidence from international studies presented to the recent parliamentary Inquiry into Foetal Alcohol Spectrum Disorders indicates that children with FASD are overrepresented in the child protection system. The national FASD inquiry heard from a number of foster carers who outlined the serious long-term effects of FASD on the children in their care.[296]

The inquiry recommended the development of a national strategy to prevent, identify and manage FASD that would operate across all sectors — health, education, criminal justice and social support. The implications of alcohol misuse, and concerns about the high prevalence of FASD in Aboriginal and Torres Strait Islander communities, are explored further in Chapter 11.

Domestic violence

The department's analysis of parents with children in the child protection system found that over one-third of substantiated households (35%) had two or more incidents of domestic violence within the past year.

Data on domestic violence are limited and the available information can only give an indication rather than an accurate measure of prevalence. The 2005 Personal Safety Survey found that:

- 2.1 per cent of women and 0.9 per cent of men had experienced violence from their
- current partner, and half of these (49%) had children in their care at some time during the relationship. An estimated 27 per cent said that children had witnessed the violence
- Women (15%) and men (4.9%) reported higher levels of violence from previous partners. Of these, 61 per cent had children in their care at the time and 36 per cent said that children had witnessed the violence.[297]

Evidence provided to the Commission indicates that in 2011–12 the Queensland Police Service recorded approximately 44,800 children associated with or exposed to domestic violence (that is, children were present or lived in the residence).[298] Some children were involved in repeat incidents and overall the domestic violence reports related to 31,700 distinct children. Police policy mandates that police refer a child resident at domestic violence locations to Child Safety Services. Between the introduction of the policy in 2005 and 2011, the number of recorded child victims at domestic violence incidents doubled from approximately 21,700 to 43,300. These reports and the implications of the reporting policy are discussed in Chapter 4.

Mental illness

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[295] National Health and Medical Research Council 2009, Australian guidelines to reduce health risks from drinking alcohol.
[296] Standing Committee on Social Policy and Legal Affairs 2012, FASD: the hidden harm – inquiry into the prevention, diagnosis and management of fetal alcohol spectrum disorders.
[297] Australian Bureau of Statistics 2006, Personal safety, Australia, 2005 (reissue), cat. no. 4906.0, Commonwealth of Australia, Canberra.
[298] Statement of Ian Stewart, 4 April March 2013 [p1].

The 2011–12 Australian Health Survey found there had been an increase in the proportion of people reporting they had a mental or behavioural condition.[299] In 2001, 9 per cent of Queenslanders reported having a mental or behavioural condition, which increased to 14 per cent in the 2011–12 survey. These proportions were similar to the Australian averages. Nationally, these sorts of conditions were more common among women than men (15% compared with 12%).

Higher levels of psychological distress (an indicator of mental health problems) have been found in Aboriginal and Torres Strait Islander people, with 29 per cent of adults reporting high or very high levels of psychological distress compared with 12 per cent of non-Indigenous adults.[300] The Longitudinal Study of Australian Children found that of parents in the study:

- 11–17 per cent of mothers and 9–12 per cent of fathers experienced moderate/high levels of psychological distress
- lone mothers experienced psychological distress (one in four) at double the rate for coupled mothers
- psychological distress in both parents in couple families was rare (1–3%)
- mothers and fathers in jobless households had about twice the rate of psychological distress compared to parents with living in jobless households.[301]

Of parents with children with substantiated abuse or neglect, single mothers were most likely to have a diagnosed mental health problem: 32 per cent compared with 19 per cent of parents in substantiations overall.[302]

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[299] Includes organic mental problems, alcohol and drug problems, mood (affective) problems and other mental and behavioural problems. Australian Bureau of Statistics 2012, Australian health survey: first results, 2011– 12, cat. no. 4364.0.55.001, Commonwealth of Australia, Canberra.
[300] Steering Committee for the Review of Government Service Provision 2013, Report on government services 2013, Indigenous compendium, Productivity Commission, Canberra.
[301] Australian Institute of Family Studies 2012, The longitudinal study of Australian children: annual statistical report 2011, Australian Institute of Family Studies, Melbourne.
[302] Department of Child Safety 2008, Characteristics of parents involved in the Queensland child protection system report 2: parental risk factors for abuse and neglect, Queensland Government, Brisbane.

Appendix 2

"Applications for Child Protection Orders: Matters of Concern Regarding Applications and Affidavits" (by a magistrate)

Firstly, the person seeking a court order files a document setting out the orders they want and why they think the court should make those orders. With CPO applications, this is an application which I understand is in Form 10.[303] This requires the applicant to state the order sought and "the grounds upon which the application is made". In other civil cases, it may be a claim. The *Uniform Civil Procedure Rules 1999* (Qld)[304] provides guidance as to how a claim or other pleading should be prepared. See Chapter 6 of the UCPR. For example, Rule 149 says:

Each pleading must—

> (a) be as brief as the nature of the case permits; and
> (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved;...

There is an important distinction between a statement of fact and the evidence used to prove that fact.

I take the view that an application for a CPO must state facts, not evidence. The issues must be clearly and succinctly defined. This may require particulars. Rule 157 of the Rule says:

> A party must include in a pleading particulars necessary to—
> (a) define the issues for, and prevent surprise at, the trial; and
> (b) enable the opposite party to plead; ...

A possible example of a part of such a pleading in a CPO application might be:

> *3. The mother of the child is addicted to methyl amphetamine.*
> *(a) She was convicted of possession of methyl amphetamine by the Magistrates Court at Southport and elsewhere on 4 occasions between 3 June 2013 and 7 March 2014;*
> *(b) She was impaired by drugs on 23 December 2013 when child safety officers visited her home on that date;*
> *(c) ...*
> *4. Because she is so addicted, she is unwilling or unable:*
> *(a) to maintain a clean and tidy house;*
> *(b) to provide food and sustenance to the children according to their needs;*
> *(c) to provide loving emotional support for the children;*
> *(d) ...*

Evidence which will establish those facts takes a different form. For example, to prove the allegation in 3(b) above, a child safety officer might include in her affidavit:

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[303] 1 cannot be sure of this because although the form is available on the Department's web site, it is locked. I'm not permitted to see it. So as a preliminary point, I would appreciate someone from the Department sending me a blank copy of the approved form.
[304] 1 recognize there are important differences between the UCPR and the Childrens Court Rules. However the UCPR provide some guidance as to the traditional way courts proceed, and are worthy of consideration in this context.

On 23 December 2013,1 paid an unannounced visit to the mother's address. When she opened the door, I saw that she was staggering and unsteady on her feet, her speech was slow and slurred, her eyes were glassy ...etc.

An application for a CPO setting out clear and succinct grounds enables the court to assess whether the affidavit filed in support of the application contains material which is relevant. For example, if the application makes no reference to the mother having mental health issues affecting her ability to care for her child, it should not be raised in an affidavit. The touchstone of relevance should be the issues clearly defined in the application.

I have given examples here merely to illustrate the general principles. My intention is that I should be understood. I do not intend to educate or train Departmental officers in the preparation of applications and affidavits. That is the Department's responsibility.

This then brings me to the problem of Departmental affidavits. I take the view that if an affidavit in support of an application is 20 pages or less, it is unlikely to be objectionable. Of course, if an objection is made to an affidavit, I will decide that objection.

However recently I have received affidavits which are over 60 pages in length. This does not include the exhibits. These affidavits are often repetitive, contain irrelevant material, are poorly organised, contain inadmissible hearsay, contain inadmissible opinion evidence, and contain argument, not evidence of facts. By "argument", 1 mean an attempt to persuade the court as to a conclusion. Argument may be presented orally or by written submissions. Indeed, in certain situations, written submissions are highly desirable. But they should not be in an affidavit.

Rule 7 of the *Childrens Court Rules 1997* (Qld) says:

(1) An affidavit must state only facts of which the person making it has knowledge.
(2) However, an affidavit may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief

Rule 17 of the *Childrens Court Rules 1997* (Qld) says:

If there is scandalous or oppressive matter in an affidavit, the court may order that—
(a) the affidavit be removed from the file; or
(b) the affidavit be removed from the file and destroyed; or
(c) the scandalous or oppressive matter in the affidavit be struck out.

Apart from this rule, the court has an inherent power to ensure the proceedings are conducted fairly. This would extend to the power to exclude evidence usually considered inadmissible[305].3

In the light of the above discussion, it is my intention to adopt the following measures when any new application is filed.

- The application should succinctly and clearly set out the grounds of the application without setting out the evidence in support of those grounds.
- If the application is deficient in this regard, I propose to direct that the applicant file and serve an amended application which complies with this guideline.

[305] Whilst the court is not bound by the rules of evidence (section 105), it does not mean that the court must disregard such rules, or that the court would not have power to exclude evidence which was in breach of a rule of evidence

- I will examine every supporting affidavit exceeding 20 pages in length to see if it contains "scandalous or oppressive matter" or in other respects contains inadmissible or objectionable material.
- If it does, I will consider ordering that it be removed from the file.

Appendix 3

Applications for Child Protection Orders – Can we improve the process? (by a magistrate)

The purpose of this paper is to look at ways in which we can improve the processing of Applications for Child Protection Orders.

I would like to focus on the following matters:-

(a) Section 59 Submissions;
(b) Outline of argument at hearing;
(c) Form and content of affidavits in support of applications;
(d) Exhibits.

Section 59 Submission

Section 59 of the *Child Protection Act 1999* (Qld) is in these terms:

59 "Making of child protection order

(1) The Childrens Court may make a child protection order only if it is satisfied—

(a) the child is a child in need of protection and the order is appropriate and desirable for the child's protection; and

(b) there is a case plan for the child—

(i) that has been developed or revised under part 3A; and
(ii) that is appropriate for meeting the child's assessed protection and care needs; and

(c) if the making of the order has been contested, a conference between the parties has been held or reasonable attempts to hold a conference have been made; and

(d) the child's wishes or views, if able to be ascertained, have been made known to the court; and

(e) the protection sought to be achieved by the order is unlikely to be achieved by an order under this part on less intrusive terms.

(2) Before making a child protection order, the court may have regard to any contravention of this Act or of an order made under this Act.

(3) When deciding whether a case plan is appropriate under subsection (1)(b)(ii), it is not relevant whether or not all persons who participated in the development or revision of the plan agreed with the plan.

(4) An application for Child Protection Orders are supported by, inter alia, one or more affidavits prepared by Child Safety Offices and sometimes, a Social Assessment Report. Occasionally, psychological and psychiatric reports are also provided.

(5) The court must not make a child protection order unless 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 have been filed in the court.

(6) Also, before making a child protection order granting custody or guardianship of a child to a person other than the chief executive, the court must 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.

Editor's note—

Section 95 deals with reports about the person's criminal history, domestic violence history and traffic history.

(7) In addition, before making a child protection order granting long-term guardianship of a child, the court must be satisfied—

(a) there is no parent able and willing to protect the child within the foreseeable future; or

(b) the child's need for emotional security will be best met in the long term by making the order.

(8) Further, the court must not grant long-term guardianship of a child to—

(a) a person who is not a member of the child's family unless the child is already in custody or guardianship under a child protection order; or

(b) the chief executive if the court can properly grant guardianship to another suitable person.

(9) Before the court extends or makes 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.

(10)This section does not apply to the making of an interim order under section 67."

In my experience most Child Protection Orders are made at a callover. Often, the latest case plan will be presented to the Court and the magistrate will be asked to make an order. This will involve "getting a handle" on affidavit material which can be quite voluminous.

Given the time constraints at the child protection call over – we allocate a maximum of fifteen families per callover – and the significant volume of affidavit material to be considered before making an order in accordance with s 59, I require the applicant to tender what I call a "*Section 59 Submission*". Two specimen submissions are attached.

The main purpose of this submission is to require the applicant to direct me to the passages in the affidavit and expert reports which address the relevant limbs of s 59.

The submission has been of great help in enabling me to get an understanding of the issues in the matter and going directly to the evidence which addresses these issues. I often get these submissions on the morning of the callover which is held after lunch. I can usually read the submissions before going into court.

I understand that a number of Child Protection Officers have adopted the practice of tendering these submission to the Court.

Outline of arguments at a hearing

At a Review Hearing I ask the parties, and in particular, the applicant, to provide an outline of argument before the trial. This is essentially a Section 59 Submission which again identifies the issues and the various paragraphs in the affidavits and reports which address these issues.

The Form and content of affidavit material

The Section 59 Submission, having addressed one issue as outlined above, highlighted another. i.e. while the affidavit material might contain the evidence upon which an order is made, it is usual the relevant evidence is scattered throughout the affidavit. Again I refer to the attached sample submissions.

I appreciate the Child Safety Officers who prepare these affidavit have qualifications in the social sciences and not in law. They do not know how to draft an affidavit and nor do they understand that evidence not relevant to an issue in the matter is not admissible. The affidavits tend to comprise a narrative of the management of the file rather than specifically addressing the issues under section 59 of the Act.

Rules 7 and 8 of the *Childrens Court Rules 1997* (Qld) are as follows:

"7 Contents of affidavit

(1) An affidavit must state only facts of which the person making it has knowledge.

(2) However, an affidavit may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief.

8 Form of affidavit

(1) An affidavit must be in the approved form.

(2) A note must be written on an affidavit stating the name of the person making it and the name of the party on whose behalf it is filed.

(3) An affidavit must be made in the first person.

(4) An affidavit must describe the person making it and state the person's residential or business address or place of employment.

(5) The body of an affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

(6) Each page of an affidavit must be numbered."

As far as I am aware, unlike the UCPR which does contain a form of affidavit, there is no such form in the *Childrens Court Rules 1997* (Qld).

Rule 30 provides that "The president may approve forms for use under these rules". I have been unable to find any form of affidavit approved by the President.

As we all know, it is not uncommon for affidavits prepared by Child Safety Officers to extend well beyond 60 pages. I have seen them up to 100 pages or more.

Apart from dealing with issues such as qualifications of the deponent, the child's family constellation, history of orders, views of the parents and children and references to the case plan and review reports, the great bulk of the affidavit is taken up with a recording of the investigations undertaken and the outcomes of those investigations.

These paragraphs consist of the contents of file notes of telephone conversations/interviews being "dumped" from the file into the affidavit without any proper regard as to whether or not the material is relevant to an issue in the matter. Secondly, as can be seen from the sample submissions attached, evidence about a particular issue can be scattered throughout the affidavit rather than being placed in an orderly fashion in consecutive paragraphs.

Affidavits rarely identify the issues in the matter or, put another way, succinctly state the reasons why a particular child is "a child in need of protection" or "the protection sought to be achieved by the order is unlikely to be achieved by an order…on less intrusive terms".

Rule 8(5) is somewhat helpful but it does not require that where a subject is dealt with over a number of paragraphs, those paragraphs should be numbered consecutively and the issues identified in those paragraphs should be addressed in chronological order.

The UCPR is pitched at lawyers who are expected to be skilled in drafting affidavits and have a basic understanding of the rules of evidence. Affidavits in child protection proceedings are rarely, if ever, prepared by a lawyer. Rather, they are prepared by people who have little or no understanding of the rules of evidence nor do they have any skills in preparing affidavits. It's fair to say that in the main, the affidavits contain significant quantities of unnecessary and irrelevant material. In order to address these issues, I propose that rules 7 and 8 be amended as follows:-

1. Rule 7 be amended by adding a sub rule 3 in these terms,

   "(3) An affidavit must not contain facts or opinions which are not relevant to an issue before the court".

3. Rule 8 should be amended by inclusion of a new sub rule 8(6) and rule 8(6) being renumbered as 8(7). The new sub rule would be in these terms,

> **"8(6) Where an issue or subject matter is dealt with in more than one paragraph, that subject matter/issue must be dealt with in chronological order in consecutive paragraphs."**

An example of what I have in mind is as follows. These paragraphs should appear after the formal introduction paragraphs of the affidavit so that the reader obtains an early but clear picture of the issues in the matter,

"In my view the reasons why AB is a child in need of protection are:
(i) Domestic violence between the parents – see paragraphs 15-20
(ii) Drug abuse by the parents – see paragraphs 21-25

The reasons the protection sought to be achieved is unlikely to be achieved by an order on less intrusive terms are as follows:-
(i)… see paragraph 50
(ii)…see paragraph 55

Given that nearly all affidavits are prepared by people who are not qualified lawyers, we should not hesitate to be quite prescriptive in what we consider to be the satisfactory form and content of an affidavit.

The foregoing issues were picked up by Commissioner Carmody when undertaking the recent Commission of Inquiry into Child Protection. At page 481 of his report "Taking Responsibility: a Road Map for Queensland Child Protection", he wrote,

> "It is clear to the Commissioner that there is widespread mistrust and concerns in relation to the conduct of proceedings by the department and its ability to present material that is sufficiently supported by relevant evidence. Those factors that appear to be materially contributing to this mistrust and concern are:
> - a blurring of the role of Child Safety workers to include responsibilities usually discharged by a legal officer
> - affidavits being prepared and sworn by Child Safety officers with little understanding of the implications of swearing an affidavit including the standards of evidence required
> - lack of early 'independent' legal advice
> - need for professional separation of the department's internal processes linked to child protection proceedings.
>
> The Commission is of the view that a two-pronged approach is necessary to address the concerns. This would involve improving access to early, more independent, legal advice within the department and establishing a new independent statutory office – the Director of Child Protection – to make applications for care and protection orders on behalf of the department. (The Commission acknowledges that this body would not be delivering child protection services and so is using the working title "Director of Child Protection: to denote the statutory body that will be responsible for bringing child protection applications before the court.)"

The report addressed ways of overcoming these problems. At p 482 the Commissioner wrote:

"…It is proposed there be a professional separation between the delivery of frontline child protection services (at both the regional level and Child Safety service centre level) and the provision of advice in relation to child protection proceedings. This is to be achieved by establishing a team of dedicated legal officers and specialist support officers within a separate office in the department to be known as the Office of the Official Solicitor. The Office of the Official Solicitor will be headed by the Official Solicitor who will only be subject to internal directions by the director-general and will oversee Court Services, the Court Coordinators and the Court Service Advisers. **The Official Solicitor will prepare the applications on behalf of the department for all child protection proceedings before the Queensland Civil and Administrative Tribunal (where allowed), the Childrens Court and in appellate courts, and in all formal alternative dispute-resolution processes.** The office's in-house legal officers will work closely with the proposed specialist investigative teams to provide advice at the earliest opportunity, and should also have access to independent expert advice such as through obtaining of social assessment reports and other advice related to child protection"

The Commissioner included the following recommendations in his report:-

"Recommendation 13.16
That the Department of Communities, Child Safety and Disability Services enhance its in-house legal service provision by **establishing an internal Office of the Official Solicitor within the department which shall have responsibility for**:

- providing early, more independent legal advice to departmental officers in the conduct of alternative dispute-resolution processes **and the preparation of applications for child protection orders**
- working closely with the proposed specialist investigation teams so that legal advice is provided at the earliest opportunity
- preparing briefs of evidence to be provided to the proposed Director of Child Protection in matters where the department considers a child protection order should be sought.

NB: The highlighting is added.

Recommendation 13.17
That the Queensland Government establish an independent statutory agency – the Director of Child Protection – within the Justice portfolio to make decisions as to which matters will be the subject of a child protection application and what type of child protection order will be sought, as well as litigate the applications. Staff from the Director of Child Protection will bring applications for child protection orders before the Childrens Court and higher courts, except in respect of certain interim or emergent orders where it is not practicable to do so. In the latter case, some officers within the Department of Communities, Child Safety and Disability Services will retain authority to make applications.

Recommendation 13.18
That the Department of Communities, Child Safety and Disability Services move progressively towards requiring all court coordinators to be legally qualified and for their role to be recast to provide legal advice (within the Office of the Official Solicitor) or to transfer the role to the independent Director of Child Protection office."

Recommendation 13.18 is one of the six Recommendations accepted in principle but not in full by the government. I do not know how long it will be before the lawyers are preparing child protection applications as per recommendations 13.16 and 13.17. Reform along the lines suggested above can only assist in any transition to that situation.

The Exhibits

Until I issued the practice direction in May 2013, copy attached, individual exhibits were always difficult to find because they were not paginated. This practice direction has made it much easier to find exhibits.

Appendix 3A

CHILD PROTECTION ACT 1999
PRACTICE DIRECTION

1. This Practice Direction should be read in conjunction with the Childrens Court Rules 1997 and in particular Rules 7 and 8.

2. The purpose of this Practice Direction is to address concerns about the quality of affidavit material presented to the Court, particularly in relation to Applications for Child Protection Orders.

3. To ensure the orderly disposition of these Applications, the following Directions are to apply from 1 April 2014:-

(a) Affidavits must not contain fact or opinions which are not relevant to any issue before the Court;

(b) Where an issue or subject matter is dealt with in more than one paragraph of an affidavit, that subject matter or issue must be dealt with in chronological order in consecutive paragraphs;

(c) After the formal introductory paragraphs of the affidavit, the deponent must swear to the following matters:-

(i) the reason or reasons why the subject child is a child in need of protection and that it is desirable that the Order be made for the protection of the child;

(ii) identify the paragraph numbers which contain the evidence to support the matters referred to in sub-paragraph (i) above;

(iii) the reason or reasons why the protection sought to be achieved by the Order is unlikely to be achieved by an Order on less intrusive terms;

(iv) identify the paragraph numbers which contain the evidence in support of the matters referred to in paragraph (iii) above;

(v) if Section 59(6) of the *Child Protection Act* 1999 applies:-

A. The reason or reasons why there is no parent willing and able to protect the child within the foreseeable future; or

B. The reason or reasons why the child's need for emotional security will be best met in the long term by the making of the Order

C. Identify the paragraph numbers which contain the evidence to support the matters referred to in paragraphs A or B above.

4. Where an affidavit refers to Exhibits, those Exhibits shall be filed and secured in one bundle, separate from the affidavit and containing a cover sheet in the form attached. Each page of these Exhibits must be numbered in accordance with column 3 of the schedule.

President

Appendix 4

(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

(iii) the chief executive.

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 ensure a recognised entity for the child is given an opportunity to participate in the process for making a decision about where or with whom the child will live.

(3) However, if because of urgent circumstances the chief executive makes the decision without the participation of a recognised entity for the child, the chief executive must consult with a recognised entity for the child as soon as practicable after making the decision.

(4) In making a decision about the person in whose care the child should be placed, the chief executive must give proper consideration to placing the child, in order of priority, with—

(a) a member of the child's family; or

(b) a member of the child's community or language group; or

(c) another Aboriginal person or Torres Strait Islander who is compatible with the child's community or language group; or

(d) another Aboriginal person or Torres Strait Islander.

(5) Also, the chief executive must give proper consideration to—

(a) the views of a recognised entity for the child; and

(b) ensuring the decision provides for the optimal retention of the child's relationships with parents, siblings and other people of significance under Aboriginal tradition or Island custom.

(6) If the chief executive decides there is no appropriate person mentioned in subsection (4)(a) to (d) in whose care the child may be placed, the chief executive must give proper consideration to placing the child, in order of priority, with—

(a) a person who lives near the child's family; or

(b) a person who lives near the child's community or language group.

(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.

Appendix 5

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 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

Part 2 – Information about the subject

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 respondent –

Name:

DOB:

Address:

Contact no:

Solicitor: N/A

Address: N/A

Contact no: N/A

Part 4 – History of the current application

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 :

The affidavit of Name dated Date outlines the harms allegedly experienced by the in family of origin, and parents' willingness and ability to protect the . A table detailing the child protection history is exhibit to this affidavit.

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 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 's views and wishes are set out in the affidavit of Name dated Date and can be summarised as follows:

-

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** ☐

Do you want the report writer to liaise with the children's 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

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

1. Subpoenas

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

Appendix 6

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.

1. 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, and only for the areas of decision making for which the guardian is appointed.

1.1 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 sch 2 pt 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 sch 4 of the GAA. QCAT may decide whether a person is an interested person for an adult pursuant to s 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 – *Guardianship and Administration Act 2000* (Qld); and

- Report by medical and related health professionals – *Guardianship and Administration Act 2000* (Qld).

1.2 Appointment of a guardian

QCAT may appoint a guardian for an adult if satisfied that the conditions outlined in s 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.

1.3 Capacity

The definition of 'capacity' is outlined under sch 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.

2. Scope of role 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 advocating and making substitute decisions for the adult where required.

2.1 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 Communities, Child Safety and Disability Services 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.

2.2 Making substitute decisions

In making substitute decisions for an adult, the Public Guardian must consider:

- the General Principles pursuant to sch 1 of the GAA (**see attached**), 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 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.

2.3 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; and
- Provide case management services.

Appendix 7

ROLE OF THE OFFICE OF THE PUBLIC GUARDIAN IN RELATION TO CHILDREN AND YOUNG PEOPLE IN CHILD PROTECTION PROCEEDINGS

The Office of the Public Guardian ("OPG") was established as an independent statutory body on 1 July 2014 to protect and promote the rights and interests of vulnerable Queenslanders[306]. In accordance with statutory functions defined in *Public Guardian Act 2014* (Qld) *(PGA 2014)* ss 6 and 7, the Public Guardian ("PG") operates from the following purpose and principles:

- relevant children, young people and adults under the Act are involved in making decisions that affect their rights and interests,
- that the voices of vulnerable people are heard and their views are considered when decisions are made that affect them,
- assistance is given to vulnerable people to negotiate statutory systems and resolve disputes.

In 2013 the Queensland Child Protection Commission of Inquiry (QCPCI) recommended that the OPG provide enhanced individual advocacy for children and young people in the child protection system, to safeguard, support and manage the rights of relevant children and young people in the child protection system[307]. Additionally, the QCPCI called for the OPG to assume the responsibilities of the community visitor program and re-focus this function on young people considered to be the "most vulnerable"[308].

Scope of role of the Public Guardian in child protection proceedings in relation to relevant children

Pursuant to *PGA 2014* s 10(2), the Public Guardian has a statutory duty to protect to protect rights and interests of relevant children and children staying at visitable sites. Section 52 of the *PGA 2014* defines 'relevant children' as children and young people subject to:

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[306] *Public Guardian Act 2014* (Qld) s 5.
[307] QCPCI, above n 10, 413-8 in particular recommendation 12.7.
[308] Ibid 418-20 in particular recommendation 12.8.

- Intervention with Parental Agreement (*Child Protection Act 1999* (Qld)) chapter 2, part 3B, division 2),
- Care Agreement (*CPA 1999* s 51 ZE),
- Temporary Assessment Order (*CPA 1999* s 27(1)),
- Court Assessment Orders (*CPA 1999* s 27 (1) or s 44),
- Temporary Custody Order (CPA 1999 s 51AE),
- Child Protection Order including a Supervision Order, Directive Order, Custody or Guardianship Order (CPA 1999 s 61) including a child protection order that continues in force under a transition order made under *CPA 1999* s 65A.

PGA 2014 s 52 (2) provides that a child or young person stops being a relevant child if they stop being subject to an intervention, agreement or order or they turn 18.

However, the Public Guardian has some flexibility to continue to provide advocacy for a child or young person beyond that where the Public Guardian believes it is appropriate to finish providing help or the Public Guardian the child or young person requires particular help to review a decision ending the intervention, agreement or order. (*PGA 2014* s 52 (3))

Where a young person is transitioning to independence they can ask the Public Guardian for help and if the Public Guardian is satisfied that they continue to need help it can be offered after they turn 18 for the transition to independence process. (*PGA 2014* s 52 (4))

When the Public Guardian provides particular help beyond the strict definition of relevant child, the young person stops being a relevant child when the Public Guardian finishes providing the help and lets the person know that they are no longer a relevant child under the Act.

PGA 2014 s 7 establishes that the main principle to be applied by persons performing functions or exercising powers under the Act with respect to relevant children (as defined by *PGA 2014* s 52) or visitable sites (as defined by *PGA 2014* s 51) is ***that the best interests of the child are paramount.***

PGA 2014 s 7(2) establishes that persons performing functions or exercising powers under the Act must also apply the following general principles:

(a) the child's family has primary responsibility for the child's upbringing and development and should be supported in that role;
(b) the child is a valued member of society;
(c) the child is—
(i) to be treated in a way that respects the child's dignity and privacy; and
(ii) to be cared for in a way that protects the child from harm, promotes the child's wellbeing and allows the child to reach his or her full potential;
(d) the child's emotional, moral, social and intellectual development is important and must be taken into account;
(e) the child is entitled to be heard, even if others may not agree with the views expressed by the child;
(f) the child should be able to exercise his or her rights and participate in decisions that affect his or her life;
(g) the child should be able to access available services necessary to meet his or her needs;
(h) an ongoing relationship between the child and the child's family is important for the child's welfare and wellbeing and must be taken into account;
(i) an ongoing connection with the child's culture, traditions, language and community is important for the child's welfare and wellbeing and must be taken into account.

In addition *PGA 2014* s 54, confirms that the overarching consideration in exercising child advocate functions is to seek and take into account the views and wishes of children to the greatest extent possible. It provides that 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.

*(4) In this section— **child** means a relevant child or a child staying at a visitable site.*

These principles reflect the United Nations Convention on the Rights of the Child Article 12[309] in domestic child protection legislation, ensuring children's views and wishes are heard in judicial and administrative proceedings. The *Child Protection Act 1999* (Qld) *(CPA 1999)* also enshrines these principles, mandating separate representatives pursuant to *CPA 1999* s 110 to, in so far as possible, present the child's views and wishes to the Court.

Additionally, the Explanatory Notes to the Public Guardian Bill 2014 (Qld) emphasise 'that children in the child protection system are particularly vulnerable and need to have their voices heard'[310].Further they articulate that the Public Guardian's function is 'to support… child[ren] in all legal proceedings' by providing the Public Guardian with 'the statutory right to intervene in any legal proceedings in the Childrens Court… in relation to a child protection matter… [to] effectively affectively advocate for children'.[311]

Role of child advocate

CPA 1999 s 108B provides a statutory right of appearance for the Public Guardian in a proceeding for an order an order for a child. *CPA 1999* s 108C 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

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[309] *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.
[310] Explanatory Notes, Public Guardian Bill 2014 (Qld) 1.
[311] Ibid 4.

examination. The Public Guardian is empowered to delegate those functions to Child Advocate-Legal Officers (Child Advocates).[312]

Pursuant to *CPA 1999* s 108D the Public Guardian may access a document, and make copies of the document, if a party to the proceeding may also access the document.
A Child Advocate can be involved in child protection proceedings in relation to assessment orders, temporary custody order and child protection orders irrespective of whether a separate representative[313] is appointed by the Court, or a direct representative is instructed by the child[314].

It should be noted that there is no mechanism for the Court to directly appoint a Child Advocate in a proceeding. However, a referral can be made to OPG Legal Services either by the Court or a stakeholder by e-mailing the OPG at legal@publicguardian.qld.gov.au. This email address is monitored daily. The referral will be assessed and a response sent in terms of whether it is accepted.

Advocating for a children and young people in the Childrens Court

The PGA 2014 s 13 sets out the statutory functions of the child advocate which include helping the child to seek or respond to the revocation or variation of a child protection order[315] and for a proceeding before a court making submissions, calling witnesses and testing evidence[316].

Additional child advocate functions also include, but are not limited to:

- supporting the child at, and participating in-
    - Conferences or mediations ordered or facilitated by a court or the tribunal at which the child may attend; or

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[312] *Public Guardian Act 2014* (Qld) s 146.
[313] *Child Protection Act 1999* (Qld) s 110.
[314] Ibid s 108(1).
[315] *Public Guardian Act 2014* (Qld) s 13(i).
[316] Ibid s 13(m.)

    - Family group meetings; or
    - Any other meetings.

- supporting the child at a proceeding before a court or the tribunal.

- 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.

Future Inclusions

QCPCI recommended that the Department of Communities, Child Safety and Disability Services implement the Signs of Safety practice framework (or similar) throughout Queensland (rec 7.1)

This recommendation was accepted by the Queensland Government which said in its response:

> The government accepts this recommendation. From mid-2014 the Department of Communities, Child Safety and Disability Services will implement a new practice framework that supports effective engagement with families and children to improve their outcomes.