



Child Protection: Practice & Procedure

11 MARCH 2022

REBECCA AOUKAR

Child Protection: Practice & Procedure

Topics to be covered

1. When does the DFFH (Child Protection) get involved with families?
2. What triggers Child Protection initiating proceedings in the Children's Court?
3. Interim Accommodation Orders (the various IAOs and their limitations)
4. Important concepts defined – “child”, “parent”, “parental responsibility” and “major long-term issues”
5. Procedure in the Children's Court: representation of children and family division court hearings
6. Child Protection Orders
7. Child Protection Applications
8. Practical tips when clients have related family law, criminal law or IVO issues

1. Child Protection – When does the DFFH get involved with families?

The Department get involved whenever they are worried the child is at risk of harm that has been caused by or is likely to be caused by being subjected to or exposed to:

❖ abuse, ill treatment, violence or other inappropriate behaviour from which parents have not protected them or are unlikely to be able to protect them.

This abuse can include:

❖ physical abuse, emotional or psychological abuse, sexual abuse, neglect.

Anyone can make a Report to Child Protection which can trigger an investigation.

Reporter details must not be disclosed. Penalties apply.

Mandatory Reporters from different professions must report concerns to child protection. Penalties apply.

2. What triggers Proceedings in the Children's Court?

- The Family Division of the Children's Court is primarily involved with child protection proceedings and intervention order proceedings involving children.
- Matters will warrant court intervention when there is either no compliance voluntarily, or where the issues are ongoing and the DFFH have assessed they cannot remain open on a voluntary basis any longer.
- Applications can be made to the Court by emergency care or by notice depending on whether the child is deemed to be at an *immediate* risk of harm.
- A protection application [Form 10] is a notice alleging that a child is in need of protection on any one or more of the 6 grounds set out in s.162(1) of the CYFA.
 - a. abandonment
 - b. Death or incapacity
 - c. Physical harm
 - d. sexual abuse
 - e. Emotional/psychological abuse
 - f. Neglect
- Each ground can be proved on likelihood or actual harm.
[The protective intervention can be initiated, where appropriate, before a child has actually been harmed.]

3. Interim Accommodation Orders (IAOs)

❖- IAO to Parent

- Any order placing the child **out of parental care** must be because the Court has determined that a child is at an UNACCEPTABLE risk of harm.

❖- IAO to Suitable Person (family or friend)

❖- IAO to OOHC

- Home based foster care or residential unit, and child can be moved between carers within the same out of home care agency. Parents must be advised.)

❖- IAO to Declared Hospital (limit of 21 days duration and can be extended)

❖- IAO to SWS

- Limit of 21 days duration but can be extended for one further period of 21 days *if there are exceptional circumstances*.

❖- IAO to Mother & Baby Unit (limit of 21 days duration and can be extended)

❖- IAO undisclosed

- Must be in the best interests of child to be kept undisclosed, not necessarily whether it is in the carer or the DFFH's interests to have it undisclosed - as a parent has a right to know the child's whereabouts.

4. Important concepts defined: “child” and “parent”

❖ Definition of “child” under the CYFA is defined under s 3(1) as a child under 17 years.

❖ Definition of “parent” under the CYFA is defined in very broad terms in s.3(1) as including:

- (a) the father and mother of the child; and
- (b) the spouse of the father or mother of the child; and
- (c) the **domestic partner** of the father or mother of the child; and
- (d) *any person who has parental responsibility for the child, other than the Secretary; and*
- (e) a person whose name is entered as the father of the child in the register of births in the Register maintained by the Registrar of Births, Deaths and Marriages under Part 7 of the Births, Deaths and Marriages Registration Act 1996; and
- (f) a person who acknowledges that he is the father of the child by an instrument of the kind described in s.8(2) of the Status of Children Act 1974; and
- (g) a person in respect of whom a court has made a declaration or a finding or order that the person is the father of the child.

'**domestic partner**' of a person is defined in s.3 as "a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender)".

Note: This list is not exhaustive and leaves it open to argue for a “psychological parent” to be considered a “parent” under the Act.

4. Important concepts defined – “parental responsibility” and “major long term issue”

❖ “parental responsibility” – s 3(1) CYFA

“all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children”.

❖ “major long term issue” – s (3)(1) CYFA

- (a) the child’s education (both current or future);
- (b) the child’s religious and cultural upbringing;
- (c) the child’s health; and
- (d) the child’s name.

5. Procedure in the Children's Court: Representation of Children in the Family Division

❖ The role of the child's lawyer in the family division, child protection matters:

Section 525(1) of the CYFA - a child aged 10 years or more must be legally represented.

The role of the child's lawyer in the family division is to act on instructions - not best interests model (ICL) - unless appointed under s 524(4) of the CYFA.

Section 524(4) of the CYFA – If, in exceptional circumstances, the Court determines that it is in the best interests of a child aged under 10 years or a child aged 10 years or more whom the Court determines under subsection (1B) is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court may adjourn the hearing of the proceeding to enable that legal representation to be obtained.

ICL - A lawyer appointed under s.524(4) is required by s.524(11)-

- (a) to act in accordance with what he or she believes to be in the best interests of the child; and
- (b) to communicate to the Court, to the extent to which it is practicable to do so, the instructions given or wishes expressed by the child.

5. Family division Court Hearings

❖ Family Division Court Hearings

- Hearing after child placed in emergency care – Contested Submissions
- Reserved Submissions
- Mention Hearing (DFFH to file & serve PR & RR by 1st Mention)
- Conciliation Conference / Judicial Resolution Conferences
- First directions hearing/DH preceding a contest
- Readiness hearings
- Contested hearings – IAO and Final hearings

6. Child Protection Orders

Under s.274 of the CYFA, if the Court finds that a child is in need of protection, one of the following orders can be made.

A protection order can only be made after the Court has received and considered a disposition report and it is satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child. (s.276(1) of the CYFA)

Consider s.276 (2) of the CYFA when the Court is being asked to make a protection order removing the child from the care of a parent.

Consider s.276A of the CYFA as it provides what matters the Court must consider when making a protection order.

❖ Child Protection Orders

- Undertaking
- Family Preservation order
- Family Reunification Order
- Care by Secretary Order
- Long-term care order
- Permanent Care Order
- Therapeutic treatment & Therapeutic Treatment Placement Orders

7. Child Protection Applications

❖ PRIMARY APPLICATIONS

- Protection Application by Notice or Emergency Care
- Application for I/D / TAO / PCO / TTO

❖ SECONDARY APPLICATIONS

- Application to extend protection order
 - (Only for IAO, FPO, TTO/TPO, CBSO (max 24 months) and FRO with limits of one year the first time and up to 24 months after the first 12 month period. Additional 6 months allowed for covid related issues.)
- Application to breach protection order (by notice or emergency)
 - (only on an FPO & IAO)
- Application to vary protection order
 - (only on TAO, IAO, Undertaking, FPO, interim variation for FRO, PCO, TTO/TTPO)
- Application to revoke protection order
 - (only on CBSO, LTOC, PCO)
- Application for new IAO

8. Practical tips when clients have related family law, criminal law or IVO issues

- ❖ Once a PA is filed, family law court orders are automatically suspended.
- ❖ In relation to criminal matters - have charges have been laid or not? And if remanded, is client likely to remain in custody or not?
- ❖ Sometimes final orders will not be made until criminal matters are dealt with depending on the nature of the criminal allegations and how it impacts the children and their placement.
- ❖ IVOs often are obtained by parents, children (supported by the DFFH) and police while CP proceedings are on foot. Compliance with IVOs will be a relevant consideration by the Children's Court.

Child Protection Resources

Children, Youth and Families Act 2005

PD 2 of 2022 Children, Youth and Families Act 2005 (for Melb & Moorabbin) (regional courts and Broadmeadows will provide their own practice directions)

This Practice Direction is issued pursuant to section 592 of the Children, Youth and Families Act 2005 (the Act). This Practice Direction applies to Family Division child protection proceedings with effect from 21 March 2022.

Research Materials available on the Children's Court website:

<https://www.childrencourt.vic.gov.au/research-materials/about-research-materials>

Research Materials assembled by former Magistrate Peter Power.

Judicial College of Victoria, Children's Court Bench Book

<https://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#61532.htm>