

**Children's Participation Rights During Child Protection  
Proceedings:  
Recognition, Legal Representation, and the Redistribution of  
Care in Victoria's Children's Court**

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## **Abstract**

This research documents the first ethnography and case file study in any Australian or international child protection jurisdiction where direct, instructions-based legal representation is the primary participation model for children. The study aimed to conduct a holistic examination of how participation happens from the beginning of statutory intervention through to judicial decisions about children's best interests in the Victorian Children's Court. Two types of data were collected. The ethnography included 37 lawyers and observations with 56 children across 50 cases. The case file study sampled all cases with a final contest decision made by a magistrate in one year, focusing on a content analysis of cases with a written judgment available. An interpretation of Nancy Fraser's (2009) integrated theory of justice is applied to develop knowledge about recognition of children, their legal representation, and redistribution of care between the state and parents.

Legal representation, particularly when children have the direct model, is shown to satisfy children's participation rights to a strong extent and children's perspectives about their care further illustrate this. Recognition ethics, whereby lawyers respect children as participants and use their skills to scaffold participation, emerge as the defining feature of relationships between lawyers and children. Lawyers are also found to implement representation in ways that can support parity of participation for children in decision-making processes occurring outside and inside the courtroom. The quality of recognition contained in magistrates' judgments varies considerably according to the age of a child and whether the child had direct representation. Procedural and forensic aspects of recognition in magistrates' judgments are evident when responding to children's views. These findings provide evidence for a relationship between participation and children's care and safety when determining their best interests.

However, institutional governance structures of the child protection system and the conduct of adults can impede children's participation rights. There are inadequate legislated provisions for participation rights and the fragmented structure of the child protection system misframes representation when the redistribution of care becomes more intrusive. In light of the findings, changes to the Victorian child protection system since 2013 substantially reduce children's participation with legal representation and diminish oversight of child protection intervention and safety in their lives.

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## **Declaration**

This thesis contains no material which has been accepted for the award of any other degree or diploma, except where due reference is made in the text of the thesis. To the best of my knowledge, this thesis contains no material previously published or written by another person except where due reference is made in the text of the thesis.

The thesis has been copy-edited and proofread by Dr Jillian Graham (Articulate Writing Solutions), whose services are consistent with those outlined in Standards D and E of the Australian Standards for Editing Practice (ASEP). Dr Graham's own fields of study encompass Musicology, Social History, Women's Studies and Psychoanalysis.

Signed:

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# Chapter One

## Introduction

In July 2014, the Children’s Court of Victoria, Australia, heard a case which revealed that a group of young children was experiencing violent, ongoing sexual and physical abuse while placed at a residential unit in the care of the Department of Human Services. The abuse came to the attention of the Court because a lawyer was representing two of the children, who were siblings younger than 10 years old, and the children disclosed to their lawyer what was happening to them. The Children’s Court found that the Secretary of the Department was “...in fundamental breach of her duty of care” for the children and the Department had obstructed investigations (Law Institute of Victoria 2014a; Oakes 2014a, 2014b).

Again in March 2015, it was a lawyer who represented and supported one of the older victims, a 10-year-old child (Jonathon, not his real name), when the Department pursued criminal charges against him and a Therapeutic Treatment Order for sexually-abusive behaviours (*Department of Health and Human Services v Jonathon* [2015] VChC1). The Children’s Court found that the Department’s actions and response to Jonathon “demonise him” when instead “...he should have been regarded (and treated) as much as a victim as the other children in this very disturbing series of events”. Lawyers representing Jonathon and the other children played a significant role in their protection and care, and provided a way for these children to voice their traumatic experiences. It was only by having an opportunity to share their experiences with an independent legal representative that they could be heard and responded to. Most applications in the Children’s Court concern the care of children in their families, but these examples show that judicial oversight and accountability of the state is another function of the Children’s Court. However, not every child receives legal representation in child protection proceedings in the Victorian Children’s Court.

Increasing numbers of children and young people are involved in child protection court proceedings in Australia every year (Australian Institute of Health Welfare (AIHW)

2015). Comparable to the United Kingdom (UK), United States of America (USA), and other Western societies, contemporary Australian society responds to the social problems of child maltreatment through government-led child protection intervention when families are unable or unwilling to adequately care for children (Gilbert 2012; see Gilbert, Parton & Skivenes 2011 for international comparisons, not including Australia). Child protection matters are considered to be the most complex areas of state intervention in family life. A significant reason why these matters are complex is because children's vulnerabilities intersect with their human rights in decisions about their care. Tensions also arise in responding to children's various human rights when judges decide their best interests, as can also happen in other legal contexts (Tobin & McNair 2009).

Children's human rights are conferred internationally via the United Nations Convention on the Rights of the Child, and locally via the *Children, Youth and Families Act 2005* (Vic.). Their rights include the right to be cared for by their families, to be safe, and to be participants in decisions affecting their welfare when the state intervenes in their families. The vulnerabilities of children and young people in child protection intervention and protection of their rights are usually understood in relation to their experiences of maltreatment or risk in their families. Another form of vulnerability is present in their position as subjects of state power when statutory child protection authorities intervene in their lives to the extent that they may be removed temporarily or permanently from their families. This research investigates the legal construction and implementation of children and young people's participation rights when their families become involved with statutory child protection in Victoria, Australia.

## **The Victorian child protection system**

Australia does not have national legislation governing statutory child protection. For constitutional reasons, states and territories exercise this aspect of legislative power. Generally the operation of child protection authorities is similar between jurisdictions, but there are some significant differences. These include how government departments and courts implement their processes, deliver services, and decide whether a child

should be subject to permanent out-of-home care (Bromfield et al. 2005; Ross 2008; Sheehan & Borowski 2014). Further important differences include legal definitions that apply when a child is in need of protection, and when children can access legal representation. The introduction of the National Framework for Protecting Australia's Children, developed through the Council of Australian Governments (COAG) (2009), aimed to improve the consistency and coordination of child protection systems. National Standards for Out-of-Home Care (FaHCSIA 2011) have also been introduced. As yet, however, neither of these national initiatives appears to have improved legal consistency across jurisdictions and wider progress has been slow for children in out-of-home care. For example, monitoring of a basic participation standard for children in out-of-home care continues to be postponed (Bessell 2015). Also, progress on the National Framework for Protecting Australia's Children has tended to focus on raising awareness of the Framework, practice innovation and a patchwork of knowledge development (Babington 2011). Therefore, there continues to be no uniform regulation of child protection, despite a history of recommendations that national standards apply to legislation, services, and children's participation with legal representation (Australian Law Reform Commission (ALRC) 1997).

Child protection in Victoria is a complicated and contested field, just as it is in other Australian and international jurisdictions (see for example: Special Commission of Inquiry into Child Protection Services in New South Wales 2008; Queensland Child Protection Commission of Inquiry 2013; Munro 2011). There have been no fewer than 10 substantial reviews specifically into the Victorian child protection system over the last 30 years, five of which have occurred since 2009 (Protecting Victoria's Vulnerable Children Panel of Inquiry (PVVC) 2012; Victorian Law Reform Commission (VLRC) 2010; Victorian Ombudsman 2009, 2010, 2011). The ongoing Australian Royal Commission into Institutional Responses to Child Sexual Abuse is also concerned about historical and current child protection systems, including the sexual abuse and sexual exploitation of children while in the state's care. In response to the increasing community concern about women and children being murdered by partners and fathers, the current Royal Commission into Family Violence in Victoria is due to report in February 2016. Its terms of reference include the functions of the child protection



system, legal system and government agencies (Royal Commission into Family Violence (Victoria) 2015).

The inquiries and developments evidence the dynamic nature of child protection in Victoria, and provide a complex backdrop to the policy, practice and legal environment in which this research was completed. Yet the inquiries and subsequent changes to Victoria's child protection system have occurred in the absence of empirical knowledge about legal representation for children, including research from the perspectives of lawyers working in the jurisdiction, evidence about the influences of any such representation upon decision-making processes and judicial decisions, and evidence about how children might actually participate. This research is all the more important in this context for understanding how children's participation rights are constructed, implemented, and politicised in the name of their best interests.

## **The research**

Empirical socio-legal evidence is needed to understand how human rights are implemented in local settings so as to record progress, limitations, and ways to improve legal systems for the benefit of people who are notionally rights bearers (Banakar & Travers 2005; Cotterrell 1998; Schmidt & Halliday 2004). Previous research and multiple reviews of Australia's compliance with the United Nations Convention on the Rights of the Child have established that children do not have sufficient access to participation rights in decisions about their lives when they live in out-of-home care (Bessall 2015; Bessant & Broadley 2014; Cashmore 2002; CREATE Foundation 2010; Kiraly & Humphreys 2012; United Nations Committee on the Rights of the Child (UN Committee) 2005, 2012). However, there has not been any systematic research about children's participation rights in the legal proceedings associated with child protection intervention. These are the proceedings that can lead to children living in out-of-home care and can monitor out-of-home care. My research offers such inquiry specific to the participation rights of children and young people in the Victorian child protection legal system.

The aim of this study was to conduct a holistic examination of the participation provisions in law and policy, and how those provisions come to be put into practice from the beginning of statutory intervention through to judicial decisions about children's best interests. A socio-legal research method with two parts was designed and implemented. Part one is an ethnographic study using participant observation with lawyers, including observations with lawyers and children and young people together. Part two comprises a content analysis of case files in the Children's Court of Victoria in which there has been a final decision made by a magistrate as a result of a contested hearing. It is important to set the timeframe of fieldwork for this research. Research commenced in April 2010, and fieldwork was conducted in the Children's Court between March 2011 and March 2012. The research refers to the legislative context during that timeframe unless specified otherwise.

This is the first ethnography and case file socio-legal research in any Australian or international child protection jurisdiction where children, from approximately seven years of age and older, instruct a lawyer as the primary model of participation. It is also the first Australian study to document what children and young people instruct about their care, and how magistrates respond to children's participation in a child protection context. A multi-country study of child welfare decision-making in Norway, Finland, England and the USA is underway by Skivenes and colleagues (2012-2016) and their forthcoming findings may offer future comparison with my case file study.

A theoretical approach supports this socio-legal research. Nancy Fraser's (2009) integrated theory of justice is applied to support the interpretation of the empirical findings so that higher-level epistemological principles may be derived. In this way the knowledge developed in this research sheds light on important and previously-unexplored aspects of the specific local context in which it is generated, and assists in the development of theoretical insights that have a wider application. Research that is both empirical and theoretical in character, like this research, can develop understanding of the legal and social determinants that influence whether particular approaches to children's participation rights are effective or ineffective. This requires an approach to theorising justice for children's rights that "improves, or increases the likelihood of improved outcomes in legal practice" (Ferguson 2013, p.177). It is timely for

developing knowledge about the legal practices shaping children's participation in this jurisdiction.

## **Concepts and key terms**

Below I offer a brief outline of seven concepts and terms referred to in this research: the United Nations Convention on the Rights of the Child, children and young people, best interests, participation, models of participation in child protection proceedings, child maltreatment, and out-of-home care.

### **United Nations Convention on the Rights of the Child**

Any discussion, research, or academic inquiry about the law and children must consider the United Nations Convention on the Rights of the Child (UNCRC) (Freeman 2007a). The UNCRC is an international agreement relating to the human rights and fundamental freedoms of all children below the age of 18 years old (Lopatka 2007, p.xxxvii). It is considered to set a minimum standard for children's rights "below which states should not go" (Lopatka 2007, p.xxxvii). The Convention was adopted by United Nations member states on 20<sup>th</sup> November 1989 as General Assembly Resolution 44/25, and became available for signature on 26<sup>th</sup> January 1990. It entered into force on 2<sup>nd</sup> September 1990 when the first 20 states had ratified it. Australia ratified the Convention in December 1990. The UNCRC sets the background for my research by providing a minimum standard for the rights that all children and young people in Victoria are entitled to under Australia's responsibilities as a signatory state. The Convention, as a treaty, comprises 54 Articles (an Article contains the legal provision). Article 3, the best interests of the child, and Article 12, the participation principle, are explained in further detail in Chapter Two and analysed in Chapter Three in relation to debates in the literature and my application of Fraser's integrated theory of justice.

## **Children and young people**

There is no universal consensus on the definition of children and childhood, including when a child becomes an adult (Lansdown 2005). The most common definition of ‘a child’ as being a person under 18 years of age is consistent with the UNCRC (Article 1). However, this definition does not accommodate the differentiated experiences of childhood between children and young people, or the differentiated social and cultural constructions of childhood experiences between societies (Cregan and Cuthbert 2014; Lansdown 2005). Children and young people are distinguished further from each other by physical development, adolescence, educational transitions, needs of care and protection, and legal responsibilities and entitlements, such as working conditions.

For these reasons I refer to ‘children and young people’ as persons under the age of 18 years, with a young person further distinguished as being 14 years and older. Reference will be made to ‘children and young people’ within this research, but this may be shortened to ‘child’ or ‘children’ to simplify the text for the reader. This approach is similar to that taken by the ALRC (1997) when it reviewed legal processes for children and young people in Australia.

## **Best interests**

Best interests is “a dynamic concept that requires an assessment appropriate to the specific context” in which it is levied (UN Committee 2013, p.3). For the purpose of defining my use of this concept, best interests refers broadly to what constitutes the rights, welfare, wellbeing, care, and safety of a child or young person in any intervention sanctioned by law, the state, or person of significance (Alston 1994; Eekelaar 1992; Freeman 2007a; Parker 1994). Safety and wellbeing includes cultural safety and integrity of identity, especially for Indigenous children and children from culturally-diverse families who are known to be deprived of these aspects of childhood during child protection intervention (Human Rights and Equal Opportunity Commission (HREOC) 1997; Long & Sephton 2011; van Krieken 2010). Conceptually, best interests can also be shaped by personal values, social norms, and political objectives that do not necessarily reflect children’s rights (Dempsey 2004; Freeman 1997; James, Curtis &

Birch 2008; Skivenes 2010). The construction of best interests is discussed in Chapter Three.

## **Participation**

It is difficult to define the concept of participation. Morrow (2008, p.122) has pointed out that the concept of participation in relation to children and young people “is not straight forward”, just as it is also complex for adults. The meaning of participation is shaped by who the subjects of participation are, the context in which it is applied, and how it may or may not be experienced (Percy-Smith & Thomas 2010a). A cautious approach must also be applied when defining children’s participation to avoid emphasising the discursive voice-based understanding that is currently dominant in international participation literature and policy (Wyness 2013a). ‘Voice’ underestimates the importance of practical requirements and adult power that influence participation for children (Lundy 2007; Percy-Smith 2012; Wyness 2013a, 2013b).

With these considerations in mind, the definition I have developed in this research has two aspects: status and implementation. Status refers to the position of being a participant, and means a child or young person has parity of status within the particular context. In the context of child protection legal proceedings, this refers to the child or young person having legal status on par with the Department and parents or other parties. This aspect reflects the UN Committee (2009, para.1) definition of participation and does not make notions of capacity or autonomy a prerequisite for participant status. This is examined in more detail in Chapter Three when I apply Fraser’s (2003, 2009) concept of participatory parity.

Implementation is the second aspect of my definition of participation. Implementation means there is access to opportunities for participation in a particular context; preparation, information and facilitation to be involved to any extent as desired; being respectfully listened to; having any views expressed considered; having appropriate influence in the process and outcome; receiving feedback about how any views were considered and accounted for; an explanation of the outcome and reasons for it; and a mechanism for lodging complaints or appeal (Bessell 2011; Lundy 2007; UN

Committee 2009). Therefore, a right to participate or **participation rights** means to have both status as a participant and resources necessary for implementation.

### *Models of participation in Victorian child protection proceedings*

Representation by a lawyer is the only formal mechanism for participation of children and young people in any child protection decisions in Victoria. There were two models of participation with a lawyer that could be made available to children: direct representation and best interests representation.

In brief, **direct representation** involves children and young people being entitled to instruct a lawyer (Ross 2008). Theoretically, direct representation is similar to adult legal representation, whereby legal options are explained; the lawyer then follows the client's instructions and argues for the client's view on their behalf to the court (Blackman 2002; Ross 2008). **Best interests representation** requires a lawyer to form an opinion about what outcome is in the best interests of a child (Ross 2008). A best interests lawyer may or may not meet with a child to discuss their views, and has discretion as to whether they advocate for a child's views. The difference between the models essentially means a lawyer effecting direct representation is obliged to act consistent with the child's views, whereas a best interests lawyer is not. A best interests lawyer has an overall obligation to form an opinion on the outcome that would be in the best interests of the child, and to advocate for that outcome, although they may have a statutory obligation to inform the court of a child's views.

### **Child maltreatment**

**Child maltreatment** is a broad term that encompasses unintentional and intentional harm experienced by children and young people. The legislative and policy provisions for child protection intervention mean there must be serious concerns about the safety and wellbeing of a child while in the care of their parent or other guardian (AIHW 2011). Maltreatment is formulated around specified types of abuse and neglect. However, serious concerns are usually related to multiple and complex problems faced

by families, especially parental disabilities, persistent poverty, substance misuse (alcohol and other drugs), mental health problems, and family violence (Bromfield et al. 2010; Dawe, Harnett & Frye 2008; Gilbert et al. 2009). These concerns are frequent reasons for families coming to the attention of statutory child protection, rather than allegations about a particular type of child abuse being committed by a parent (Bromfield et al. 2010).

### **Out-of-home care**

Children and young people may be placed in **out-of-home care** as a result of child maltreatment. Out-of-home care means a child or young person is no longer in the full-time day-to-day care of their parents, and instead is living in foster care, kinship care with relatives, a group home (residential unit) or some type of care arrangement under the management of the state child protection authority (AIHW 2012). Out-of-home care in Victoria includes secure welfare for a period of up to 21 days (or more in exceptional circumstances). Secure welfare is a locked facility, similar to involuntary detention, when a child or young person is believed to be at risk of harming themselves, others, or property.

Children and young people living in out-of-home care may still have their guardianship (parental responsibility) maintained by a parent or other family member, depending on the type of Children's Court order they are subject to. Alternatively, children may be under the guardianship of the Secretary of the Department under a type of guardianship order. Types of orders referred to in this research are listed in Appendix A.

### **Research questions and argument**

The principle aim of this research is to analyse how participation rights of children and young people are constructed and implemented in child protection legal proceedings in Victoria, Australia.

The three research questions answered by this research are:

1. How are participation rights of children and young people legally constructed in the Victorian Children's Court statutory child protection proceedings?
2. In particular, what influences, if any, does legal representation have on a child or young person's participation?
3. How do magistrates respond to participation rights of a child or young person when determining his or her best interests in these proceedings?

Based on my empirical findings, I argue that status and implementation of children's participation rights with legal representation are required to respond effectively to their care and safety in statutory child protection. Lawyers can scaffold participation of children and young people during decision-making outside and inside the courtroom. Responding to participation can also bring qualities of procedural and forensic recognition to magistrates' decisions about children's best interests. Overall, these findings document how participation is inseparable from children's care and safety when deciding their best interests. However, I also argue that barriers to children's status as participants and effectuating participation involve multiple legal and institutional governance structures and the conduct of adults – lawyers, the Department, parents and the Children's Court. I argue that rather than vulnerability being a justification for protecting children from participation, the findings show that safety and power imbalances relative to parents and the state necessitate recognition and representation for children in this context.

## **Structure of this thesis**

This thesis consists of nine chapters in total. Following this introductory chapter, Chapter Two provides a background to the UNCRC and statutory child protection systems as a response to child maltreatment. Features of the Victorian statutory child protection system are described in more detail, and an overview of the *Children, Youth and Families Act (2005)* (Vic.) provided. The functions and powers of the Children's Court and the role of Victoria Legal Aid are also explained.

Chapter Three introduces Nancy Fraser's integrated theory of justice. I offer an interpretation of her key concepts of framing, participatory parity, recognition,



redistribution, and representation. My interpretation of recognition also draws on Axel Honneth to develop an analysis of adults' ethical orientations towards children's participation rights. That literature sets the scene for a critique of the debates about best interests and participation rights for children and young people. I conclude by considering what the legislative provisions might mean for children's participation rights in Victorian child protection proceedings.

The research methods are set out in Chapter Four. Development of the research methods and fieldwork for the ethnography and case file studies are detailed. An introduction to the samples achieved in both studies and their key characteristics are presented in relation to lawyers, children, and cases.

Chapters Five to Eight set out the research findings, and are structured to follow the process of participation that typically happens when children experience child protection proceedings. Chapter Five starts with the beginning of statutory child protection intervention, ending with judicial decisions as a result of a finalised contest hearing in Chapter Eight. The ethnography study is the focus of Chapters Five and Six. Chapter Five begins by introducing the concept of scaffolding. I then present findings about how children gain access to legal representation, the strengths and limitations of the direct and best interests models, and ethnographic data about the relationships formed between lawyers and children as a means to implement participation rights. Ethnographic findings continue in Chapter Six to reveal how lawyers implement representation for children and young people during the various decision-making processes outside and inside the courtroom. Strengths and limitations of representation during negotiations and the strategies used by lawyers inside the courtroom are discussed with regard to parity of participation for children. Chapter Six also looks at how outcomes from Children's Court hearings are communicated to children.

The case file study is the focus of Chapters Seven and Eight. Chapter Seven documents what children and young people instruct about their care, and evidence about the context of their care experiences. A content analysis of unpublished judgments given by magistrates in finalised contested cases provides insights into children's views about their care and contact arrangements, how their views compare with those of the Department and parents, and themes about their care experiences. Chapter Eight builds

on those findings by examining how magistrates recognise participation rights of children and young people in judgments. Barriers to recognition of children by magistrates are also identified according to child level, child protection system, and individual professional practice issues.

Chapter Nine concludes the research. The findings are reviewed across each of the three research questions. I argue the findings support a conclusion that recognition, legal representation and redistribution of care are integrated dimensions of justice in order for child protection proceedings to constitute a child's best interests. Practical recommendations are offered to address the construction of children's participation, fragmentation in the child protection legal system, and the need for an independent complaints mechanism for children living in out-of-home care.

A Post-script explains children's participation rights in light of changes to the Victorian child protection system since completion of the fieldwork. I explain how fewer children have access to legal representation. I also explain how children and young people have lost the right to participate with legal representation in decisions affecting their care, safety, and contact under most types of orders to be made in the Children's Court.

## **Chapter Two**

### **Participation rights of children and young people and the Victorian statutory child protection system**

This chapter contains four parts that set up the international and local context of children's rights and statutory child protection for this research. Part one establishes background knowledge about children's rights and the UNCRC. Part two examines the development of statutory child protection systems and explains the operation of the Victorian child protection system, including the *Children, Youth and Families Act (2005)* (Vic.). The Victorian Children's Court is introduced in part three. Details are provided about the Court's decision-making processes and powers. Part four introduces Victoria Legal Aid and its functions as the statutory body for legal representation.

#### **The UNCRC: History, maltreatment of children, and children's rights**

The social category of childhood as a specialised life stage and seeing children as a discrete part of the population underwent historical transformation during the nineteenth century (James & James 2004; Turmel 2008; see also Heywood 2001 for critique of Philippe Ariès). This provided the cultural background for the child rights movement, beginning from the late nineteenth century through to the UNCRC in the present day. Child rights have been principally concerned with maltreatment experienced by children since the first wave of the child rights movement gained momentum in the nineteenth century. The first legally-recognised case of child abuse was recorded in the New York Supreme Court in 1874, and led to a chain of events from which children's rights became established at an international level (Shelman & Lazowitz 2005). This was the case of Mary Ellen, a nine year-old girl who had suffered extreme abuse at the hands of her caregivers. The founder of the American Society for the Prevention of Cruelty to Animals, Henry Bergh, his lawyer and Etta Wheeler successfully advocated for Mary

Ellen's right to protection from harm, just as any living creature or animal should be protected (Jalongo 2006; Watkins 1990).

Mary Ellen's case established that children have rights to humane treatment via law and the courts. This set in motion the interrelationship between child rights advocates, law and child protection non-government agencies. Henry Bergh, encouraged by Etta Wheeler, established the New York Society for the Prevention of Cruelty to Children, and legislative reform occurred through their activism for children's rights (Fogarty 2008; Jalongo 2006). Similar children's societies and law reforms for the protection of children from cruelty and neglect followed in Canada, the UK and Australia (Eekelaar & Maclean 2013; Fogarty 2008). In Victoria, the Victorian Society for the Prevention of Cruelty to Children formed by 1896, later operating as the Children's Protection Society, and was responsible for statutory child protection until the 1980's.

Child rights continued to be formalised during the early twentieth century in the context of children's extreme suffering and widening inequalities throughout World War I (Fass 2011; Marshall 1999). The International Labor Organisation also produced a treaty regulating children's working conditions in 1919, the first legally-binding child rights agreement (Fass 2011, p.17). The League of Nations Declaration of Child Rights followed this in 1924, which was influenced by the Save the Children International Union under the leadership of Eglantyne Jebb (Milne 2008; Office of the United Nations High Commissioner for Human Rights (OUNHCHR) 2007). However, children were more an "object of protection" than bearing rights of their own (OUNHCHR 2007, p.3).

The second wave of child rights emerged after World War II, along with broader human rights developments with the Universal Declaration of Human Rights, civil rights and women's rights (Alston, Tobin & Darrow 2005; Dolgin 1997; Fass 2011). The United Nations Declaration of the Rights of the Child in 1959 further specialised children's rights in relation to protection for children's wellbeing and duties of both the state and non-state persons (i.e., non-government organisations) (Alston et al. 2005; OUNHCHR 2007). The period marked what Australian sociologist Robert van Krieken (2010, p.242) identified as a "paradigm shift", "disaggregating" individuals as bearers of rights, such that children were also seen as individuals, not just part of a family unit.

The term ‘best interests’ was enshrined in international law for the first time, but possibly because of the emphasis on protection that surrounded the concept at this time, there was still no recognition of participation rights (Krappmann 2010, p.503).

Despite the strengthening of children’s rights during the twentieth century, the global maltreatment, exploitation, and oppression of children and young people continued (Alston et al. 2005; Fass 2011). A third wave of child rights gained momentum in the 1970’s with the hope of advocating for children to be recognised more as ‘beings’ than objects of protection or future adults in the making (‘becomings’) (Freeman 2012, p.3-4).

### **Becomings and Beings – tensions in the third wave of children’s rights**

Uprichard (2008, p.304) offers a succinct distillation of the literature framing differences between the concepts of ‘becoming’ and ‘being’ in childhood:

...the ‘being’ child is seen as a social actor in his or her own right, who is actively constructing his or her own ‘childhood’, and who has views and experiences about being a child; the ‘becoming’ child is seen as an ‘adult in the making’, who is lacking universal skills and features of the ‘adult’ that they will become...

Although the debate about children being conceptualised as ‘becomings’ and ‘beings’ tends to be associated with the rise of childhood studies since the 1990s, these concepts can be traced to the period prior to and during the development of the UNCRC (Alderson 2013; Freeman 2012; James & Prout 1997).

The notion of children as ‘becomings’ characterised by dependence, incompetence, innocence and developmental stages has long been a dominant understanding of childhood in academia and broader society (Burman 2008; Coady 2008). Becomings has been tied to the powerful influence of developmental psychology since the mid-twentieth century, whereby all children are seen as having universal needs that can be scientifically measured and chronologically ordered (Woodhead 1997). The becomings concept of childhood comes with a duty upon a child to be a disciplined adult-in-the-making, and a duty upon adults to protect and nurture a child’s development (Mayall

2000a; Skott-Myhre & Tarulli 2008; Uprichard 2008). However, the ‘becomings’ emphasis on children as lacking capacity and autonomy has enabled cultural and legal resistance to children’s rights (Federle 1994).

Until the rise of the new sociology of childhood, sociology was another discipline intertwined with the dominant becomings approach because socialisation theory ascribed a functionalist purpose to childhood (Mayall 2000a; Turmel 2008). Functions of childhood emphasised transmission of culture and becoming human in the adult, rational sense (Turmel 2008). Turmel (2008, p.264) explains the intersection between children as ‘becomings’, developmentalism and socialisation theory in this way:

Whether in the sites of the family, the school or the peer group, whether through the processes of constraint, inclusion or patterning, a homogenous process is ongoing under the umbrella of developmental thinking: to transform a child in becoming into a competent, rational, mature adult being.

By contrast, the ‘beings’ approach to childhood slowly gained momentum in the period between World War I and II, but remained less prominent until the rise of the third wave of child rights later in the twentieth century. For example, advancing an understanding of children as capable of forming and expressing views was part of Poland’s initiative in proposing a new child rights convention in 1978 (Lopatka 2007).

Two other developments placed children at the centre of thinking in the 1970s. One focused on the child liberation movement of John Caldwell Holt in 1975, while the other emphasised children’s self-determination rights through the work of Richard Farson in 1978. These developments illustrated moves towards advancing an understanding of children’s autonomy and exposing inequalities between children and adults (Freeman 1997). By the 1980’s, sociologists had begun to examine how adults treat children, their economic status and human rights (Hill & Tisdall 1997). The late 1980’s and early 1990’s saw the ascendance of new sociological understandings about childhood being differentiated by gender, class, ethnicity, culture, and geography, similar to the way diversity of women’s experiences became a concern in feminism (Alanen 1988; James & James 2004; James & Prout 1997). The pioneering work of Leena Alanen (1988) challenged the dominance of socialisation theory. Alanen (1988) advanced knowledge about children and young people as social actors in the present,

and argued that children were active participants in their own socialisation. The post-1990 UNCRC era increased the understanding of children as active beings to the extent that an “emergent paradigm” supported children’s perspectives as “worthy of study” in their own right (James & Prout 1997, p.8).

The earlier positioning of becomings and beings as an ‘either-or’ conceptual debate has evolved into understanding that children, young people, and adults alike can experience both qualities, and the concepts are not mutually exclusive (Cregan and Cuthbert 2014; Uprichard 2008). The becomings approach to childhood and the developmentalism embedded within that understanding is only one form of knowledge about children, and children’s agency and own standpoints have meaning and value (Mayall 2000a, 2000b). Nevertheless, notions of the child as characterised by dependence and developmental stages remain dominant images in childhood discourse, academia, and broader society, despite a growing understanding that children form a diverse social category (Alderson 2013; Burman 2008; Hogan 2005). The UNCRC did strengthen the position of children as agentic beings, but it was also imbued with the dominant becomings approach to childhood, and children’s agency remains comparatively inferior (Arce 2012; James & James 2004; Mayall 2000a; Oswell 2013). The philosophical dualities in the UNCRC are symbolised by the tensions between the best interests principle and participation principle, as the next part of this chapter explains.

## **The UNCRC**

Chapter One of this thesis introduced the UNCRC as an international agreement comprised of 54 Articles about fundamental human rights for children and young people. Articles 1 to 41 are the substantive provisions of the Convention that apply to civil, political, economic, social and cultural rights. Articles 42 to 45 address implementation and monitoring requirements with which states must comply. Articles 46 to 54 are the Final Clauses, which include ratification and amendments. The UN Committee on the Rights of the Child has issued General Comments on the Convention. These are documents that explain rights and assist nation states and people who work with the Convention when defining, interpreting, and implementing specific Articles.

Internationalisation and the elevation of children's rights are successes of the UNCRC. The UNCRC entered into force faster than previous human rights treaties, and most nation states have ratified it (Doek 2009). A strength of the UNCRC comes from the mechanism requiring periodic review of signatory states (James & James 2004). Five-year reviews encourage states to incorporate the UNCRC into legislation and make specific recommendations, which is fundamental to implementing the Convention (Lundy et al. 2012; Lundy, Kilkelly & Byrne 2013). Between February 2012 and August 2012, Lundy and colleagues (2012; 2013) assessed a purposive sample of 12 countries representative of a range of legal models and non-legal measures, including Australia. Legal protections for children's rights were superior in countries with systematic incorporation of the UNCRC into domestic law. The periodic review process was recognised to be critical for "building a culture of respect for rights" and encouraging further implementation (Lundy et al. 2013, p.463).

### **How the UNCRC enshrines best interests and participation**

Article 3 is the best interests principle and Article 12 is the participation principle in the UNCRC. The UNCRC did not define 'best interests'. Instead, Article 3 is a normative statement that underpins all other rights (Freeman 2007a). The Article comprises three paragraphs:

1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.



The best interests principle is the most widely-taken-up Article of the UNCRC (Child Rights International Network 2012). It is one of four fundamental general principles of the Convention, alongside Article 2 (non-discrimination), Article 6 (child's inherent right to life and development), and Article 12 (participation) (UN Committee 2013). This means that as well as being a standalone principle, Article 3 forms a test in the interpretation and application of all other rights under the Convention (UN Committee 2003).

The UN Committee released a General Comment on Article 3 in 2013 to facilitate interpretation and application, focusing on paragraph 1 of the Article. The UN Committee (2013) acknowledged that best interests is a dynamic concept, so requires appropriate assessment according to the specific context in which it is being applied. Furthermore, any judgment about a child's best interests cannot override obligations to respect all other rights provided for under the UNCRC (UN Committee 2013). Tobin (2006 p.287) has observed that "a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention". This includes participation rights under Article 12.

Article 12 is generally referred to as 'the right to be heard' (Krappmann 2010, p.501). It contains two paragraphs:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The concept of 'participation' has come to be synonymous with Article 12, bringing together the features of paragraphs one and two, even though it is not a word used in the text (UN Committee 2009). When read together, the two paragraphs provide for participation during the process of proceedings as well as decisions. The UN General Comment explains (2009, para.13):

The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults.

In Krappmann's (2010, p.502) assessment, this makes 'participation' "a very good term for what results from expressing views, listening and giving due weight to the views, interests and goals of the child".

Like Article 3, Article 12 is a fundamental general principle of the UNCRC, meaning that participation "must be taken into account in the realisation of all other rights" (Lansdown 2011, p.31). Participation rights cannot be separated from other rights:

The UNCRC cannot be fully realised if the child is not respected as a subject with her or his own views on the rights enshrined in the respective articles and their implementation. The right of children to express views is a means through which they can realise other rights (Lansdown 2011, p.31).

There are other Articles within the Convention that encompass participation and intersect with Article 12 (Hodgkin & Newell 2007; Lansdown 2011). Article 9 is especially relevant to the participation by children in child protection legal proceedings. Participation is invoked in Article 9, because a child is an interested party in proceedings involving separation from parents, and it says, "All interested parties shall be given an opportunity to participate in proceedings and make their views known". Together these Articles highlight the rights of children and young people to have appropriate opportunities for participation in all decisions that concern their out-of-home care, contact arrangements with parents and other significant family members, and any other legal interventions in their family life.

Even though the becomings approach is dominant in the UNCRC, particularly through the best interests concept, the Convention has strongly influenced the understanding of children as rights bearers with capacity for self-expression and participation (Doek 2009; Fass 2011; Krappmann 2010). Fass (2011, p.26) argues this strength of the UNCRC can be credited significantly to Article 12:

In asserting the positive rights of participation and the view that children could and should act for themselves (in some contexts), the 1989 document acknowledged the

limitations that bedeviled earlier charters and statements on behalf of children—the limitations of dependency.

Article 12 represented a significant change in thinking—even if aspirational—about children as participants and beings in the present compared to previous passive conceptualisations of their rights that only emphasised protection.

### **Critiques of the UNCRC**

Michael Freeman (2010) argues that the UNCRC's greatest achievement has been raising the status of children beyond that of being less than adults, in that children are citizens entitled to dignity in life. This has been “a truly international vision” of childhood and children's universal humanity, to challenge oppression, poor social status, and inhumane treatment (James & James 2004, p.82). While acknowledging global debates, and that the UNCRC is not perfect, Martin Woodhead (1997, p.80) highlights how rights provide a competing discourse to the dominant psychological framing of children's passive ‘needs’:

Children's rights breaks through the web of paternalist, protectionist constructions that emphasise children as powerless dependents, separated-off from adult society and effectively excluded from participation in shaping their own destiny. This is especially true of rights that empower children to participate in the process of defining their ‘needs’, treatment and destiny...

This is not to say that children and young people do not have any needs; rather there are multiple dimensions to lived experiences of childhoods, and developmental needs are but one dimension (Burman & Stacey 2010).

Even though the dominant becoming discourse of childhood is counterbalanced to some extent in the UNCRC by the participation principle and other rights in addition to protection, it does nevertheless privilege a type of childhood associated with Western, or Global Northern (Connell 2006, 2007) developmental ideals. Describing this bias, Mayall (2000a, p.245) observes:

The Convention refers to a universal, free-standing, individual child, a child who is on a particular developmental trajectory. It implies that biologically-based relations between parents and children are more fundamental and natural than other sorts of family or community relations.

Substantial challenges remain in implementing the Convention into law and achieving real benefits in the daily lives of children. Violations of children's rights and failing to implement the UNCRC into domestic law are ongoing problems in signatory countries, including Australia. Countries continue to commit child rights offences despite repeated criticism in their periodic reviews. The UN Committee has no power to enforce implementation or remedies to address violations. As a result, the Committee's concluding observations can cause embarrassment for countries, but have little direct effect on legal and social change. Avoiding direct incorporation of the UNCRC into domestic law enables governments to avoid accountability for legislation, policy, and actions that violate the Convention. Incorporation of the UNCRC in domestic legislation remains the exception rather than the norm (Tobin 2013). This points to a contradiction in the status of children's rights. States are willing to be seen as supporting children's rights on the international stage, but children actually continue to have low status as citizens within the societies in which they live and the domestic laws to which they are subject.

### **The UNCRC in Australia**

Successive concluding observations for Australia by the UN Committee on the Rights of the Child (2012) have highlighted our failure to incorporate the Convention into domestic law. The UNCRC is not legally enforceable as a source of rights and obligations in Australian courts, but is instead an indirect source of rights (Child Rights International Network 2014; Fehlberg et al. 2014). There have been repeated calls to introduce charters addressing the rights of children and young people in Victoria for decades, and at a national level (ALRC 1997; Child Welfare Practice and Legislation Review 1982-1984).

Deficiency in political will to apply the UNCRC in Australian domestic law is demonstrated by the absence of any official response to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997) report *Seen and Heard: Priority for Children in the Legal Process* (ALRC 2011). The ALRC (2011) has reiterated its conclusion that, “Australia's legal and child protection systems were failing in their basic duty to protect children from neglect, abuse and exploitation” and:

Despite international and professional recognition of children's rights and capacities to participate in legal processes affecting them, children are often ignored, marginalised—even mistreated—by the agencies and organisations that are supposed to assist them.

In the view of the ALRC (1997), the absence of domestic implementation of the UNCRC was a hurdle to improving children’s rights in Australian child protection legal systems. There has been a patchwork of changes to children’s rights in child protection and family law systems since 1997. Nevertheless, these changes have not necessarily been consistent with the UNCRC, been universally available to Australian children in all states and territories, or resulted in a full domestic implementation of the UNCRC (Child Rights Taskforce 2011).

Reforms to the *Family Law Act 1975* (Cth) in 2011 by the previous federal Labor government were the closest Australia has come to directly implementing the UNCRC (*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth)). Those reforms introduced a provision for an additional object of Part VII of the Family Law Act to give effect to the UNCRC (*Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 Replacement Explanatory Memorandum*, paras.24, 25). The intention of referring to the UNCRC was to confirm that the Convention applies to decisions where it is consistent with the language of the *Family Law Act*. However, the Explanatory Memorandum (para.24) is clear that “this provision is not equivalent to incorporating the Convention into domestic law”. Furthermore, this reference to the UNCRC only applies to family law matters and not other areas of law, including child protection. There has not yet been case law testing this provision.

Another way the UNCRC could have been incorporated more effectively into Australian law is through addressing the UNCRC via general human rights legislation. Only Victoria and the Australian Capital Territory have legislated human rights generally (*Charter of Human Rights and Responsibilities 2006* (Vic.) and *Human Rights Act 2004* (ACT)). Lundy and colleagues (2012) identified Victoria as at the forefront for children's rights relative to other Australian jurisdictions, in part because of the Charter. However, they did acknowledge that the Charter does not incorporate the breadth of children's rights in the UNCRC. Likewise, these changes were insufficient in the UN Committee's (2012, para.11) periodic review because of "fragmentation and inconsistencies" for children and their rights across Australia. The former Victorian Child Safety Commissioner and the Department of Human Services (2007) introduced a charter for children's rights in out-of-home care, but it has no legal basis and is not enforceable.

Australia has been criticised in periodic reviews for inadequate implementation of and compliance with children's rights (United Nations Committee on the Rights of the Child 2005, 2012). Though the lives of many Australian children are safe and prosperous, there are severe inequalities and systematic failings in children's rights for some populations. The UN Committee's concluding observations (2005, 2012) and Child Rights Taskforce (2011) report emphasised the plight of children and young people who are Aboriginal and Torres Strait Islanders; in asylum-seeking, refugee, and immigration detention; and those involved in statutory child protection and living in out-of-home care. Thus the children and young people whose experiences of child protection intervention are part of this research are members of the very population for whom there have been significant concerns identified about their rights.

In summary, there continues to be limited empirical knowledge about how the participation rights associated with the UNCRC are implemented for children and young people, if at all, in Australian child protection law and legal practices. This research makes a contribution to developing this knowledge specific to child protection proceedings in Victoria. The UNCRC applies to these proceedings as an intervention of the state for the purpose of care and protection under children's best interests in Article 3, while also being a judicial proceeding in which children have the right to participate under Article 12.

## **Development of statutory child protection systems and the Victorian jurisdiction**

Statutory child protection systems developed alongside the child rights movements. As discussed above, volunteer non-government organisations led child protection responses for a large part of the twentieth century. Child rescue formed the dominant ideology of child protection intervention. Child rescue was further ingrained as child protection services and social work became professionalised in government-led statutory intervention, and as medicalisation progressed during the 1960s (Parton 2006). Medicalisation refers to the process by which “problems become defined and treated as medical issues” (Strazzari 2005, p.258).

Medicalisation of child maltreatment followed the so-called medical discovery of child abuse in families by Henry Kempe and his colleagues from Colorado in 1962. Kempe and colleagues developed the diagnosis of ‘battered baby syndrome’ or ‘battered child syndrome’ (Fogarty 2008; Parton 2006; Young-Bruehl 2012). As previously argued by Newberger and Bourne (1978, p.9), “cruelty to children has occurred since documentary evidence of mankind (*sic*) has been kept”, but advances in medical technology meant Kempe and colleagues could document untreated injuries of infants using x-rays and clinical diagnosis (Lamont & Bromfield 2010; Parton 2006). As a result, child abuse “was defined as a ‘syndrome’ or ‘disease’ experienced by children and hence something which professionals, particularly doctors, were seen as the experts in” (Parton 2006, p.290). Social workers have since had a dominant role as forensic investigators who assemble medical, psychological and other evidence as the basis for state intervention.

Medicalisation has led to a dominant “disease model” of child maltreatment (Jack 1997, p.660; Parton 2006, p.41). The disease model applies to both the child and the perpetrator, with a child suffering from medically- and forensically-diagnosable abuse, and a parent or caregiver the cause of disease as well as he or she being deficient in some moral and clinical way (Jack 1997 p.660; Parton 2006, p.41). Forensic investigation and assessment of individual children and parents “is backed by the full legal powers of the state which stands, ever ready, to sanction the removal of a child if

necessary” (Parton 2006, p.17). Medicalisation of child protection has intensified in recent years, with neuroscience being applied to justify early removal of children, despite growing criticism from within the neuroscience field (Featherstone, Morris & White 2013; Wastell & White 2012; see “Fostering Hope” by the Australian Childhood Foundation, Berry Street Victoria and Department of Human Services (2013) for an example applying child neuroscience to support foster care). Therefore two domains of state legal authority and medicalisation combine to form the strongest powers governments can have in intervening in a child’s family life.

Medicalisation and the forensic approach to child protection challenged the invisibility of child abuse and drew attention to the suffering of young children. Despite this, child protection systems have inadvertently strengthened the individualisation of child maltreatment under the disease model (Newberger & Bourne 1978; Parton 2006). Children, and their parents, may be seen more as objects of forensic assessment than subjects who have complex family experiences within a context of deep social inequalities. Individualisation of complex social problems, such as child abuse and neglect, as conditions within a specific person or family minimises the power of gendered violence and patriarchy in family relations, poverty, inadequate universal health services, intergenerational problems, and other inequalities (Jack 1997; Newberger & Bourne 1978; Humphreys & Absler 2011). Poverty and homelessness as a result of family violence have long been correlated with child protection intervention in Australia and elsewhere (Walsh & Douglas 2009). Mothers are often a focus of child maltreatment to the extent that mother-blaming has undervalued gendered inequalities in parenting, and the role of fathers, when children come to the attention of child protection professionals (Bancroft, Silverman & Ritchie 2011; Humphreys & Absler 2011; Strega et al. 2008). This phenomenon is illustrated in the rise of the failure to protect and failure to disclose abuse laws (including in Victoria), which criminalise parents, namely mothers, for not having intervened or adequately protected their child from abuse (*Crimes Amendment (Protection of Children) Bill 2014* (Vic.); Humphreys & Absler 2011). At the same time, statutory child protection systems are situated within a broader dominant gendered culture of parenting, with mothers continuing to have a majority of caregiving responsibilities for children in Australia (Craig 2007; De Vaus 2004).



## **Statutory child protection in Victoria**

The Department of Human Services (DHS) was responsible for child protection services in Victoria at the time of conducting this research. It is now known as the Department of Health and Human Services. The Department acquired full responsibility for child protection in 1994 following a long inquiry by Justice Fogarty (VLRC 2010; Lamont & Bromfield 2010). The Fogarty inquiry occurred in response to serious concerns about the quality of the Victorian child protection system, including a number of children who died while in the Department's care, and the murder of Daniel Valerio in 1989 by his stepfather (Scott 1995; VLRC 2010). Multiple reports had been made to the Department about Daniel's welfare, and police had photographed Daniel's injuries just a few days before his violent death, but protective intervention was not undertaken.

The Department initiates child protection proceedings in the Children's Court when it has reason to believe a child may have experienced, or be at risk of experiencing, maltreatment. The Department also has responsibility for early-intervention services that might be available to support a family prior to court action. Before making an application to the Children's Court, the Department may undertake a process of investigating and substantiating reports made to it concerning the safety and welfare of a child (AIHW 2013; Bromfield & Higgins 2005). However, most of the Department's child protection applications in the Children's Court begin with emergency removal of children (safe custody) rather than the process just described (Children's Court of Victoria 2011a, 2012a, 2013). Emergency removal is examined in relation to court processes later in this chapter. The Department's child protection practitioners are not required to be qualified social workers, but may have a two-year diploma of community service work or similar level of qualification.

The Department implements case planning and services for the care of children and young people who are the subjects of Children's Court orders. It provides support services, including therapeutic counselling for children and families, the care of children in residential units, and foster care services, although many services are outsourced to non-government agencies. Appeals by parents, children, or other family members

against the Department's case planning decisions and service provision are outside the powers of the Children's Court. Instead, these appeals are dealt with internally by the Department, and may be progressed to the Victorian Civil and Administrative Appeals Tribunal (VCAT). This is further examined below.

Data compiled annually by the AIHW and the Productivity Commission provide an indication of the number of children who come into contact with statutory child protection services in each state and territory. These data indicate the extent of child protection activity, but do not indicate the extent of child maltreatment in Australia (Bromfield & Horsfall 2010). Not all children who experience maltreatment come to the attention of child protection authorities. For example, children may not have contact with child protection authorities, and may therefore not be included in these data when they experience sexual abuse by perpetrators other than their parents.

Table 2.1 below presents a snapshot of Victorian statutory child protection data compared with other states and territories for 2010 to 2011. It includes rates per 1,000 children 0-17 years of age estimated in the total population of each state and territory according to substantiations, children on care and protection orders, and out-of-home care. Substantiations of a notification are instances where the government department conducted an investigation because of a notification, and concluded there was "reasonable cause to believe that the child had been, was being, or was likely to be, abused, neglected or otherwise harmed" (AIHW 2012, p.122). The rate of care and protection orders refers to the number of children who had a child protection court order as of 30<sup>th</sup> June 2011 (AIHW 2012, p.81). These are cases that reached the point of court-mandated departmental intervention to supervise the family, or for children to live in out-of-home care. The rate of children recorded as living in out-of-home care at 30<sup>th</sup> June 2011 forms the last row in the table (AIHW 2012, p.81). The 2010-2011 AIHW reporting period corresponds with the timeframe for the case file sample (discussed in Chapter Four).

Table 2.1. Statutory Child Protection Rates per 1,000 children aged 0-17yrs in 2010-2011

Child protection	Vic	NSW	Qld	WA	SA	Tas	ACT	NT	Total
Substantiation of a notification	5.9	7.0	5.4	3.4	5.1	9.5	5.8	22.8	6.1
On care and protection orders	5.4	9.4	7.7	6.0	7.3	10.0	9.0	11.6	7.6
In out-of-home care	4.6	10.2	7.0	5.7	6.6	8.1	6.7	10.2	7.3

Data source AIHW 2012, Tables 2.7, 3.6, 4.6. Limitations on comparability apply: NSW separated investigation data to raise the threshold for substantiation from 'risk of harm' to 'risk of significant harm' in January 2010 after the Wood inquiry.

Table 2.1 shows that, following an investigation by the DHS during 2010-2011, Victoria had a relatively moderate number of children who were the subjects of a substantiation compared with other states and territories. This rate was close to the national average. Victoria also had the lowest rates of children on care and protection orders and living in out-of-home care. This continued a trend since 2007, despite increases in both rates in all states and territories over time (AIHW 2012, p.38). The rate of children living in out-of-home care in Victoria was relatively stable, ranging from 4.2 to 4.6 per 1,000 children between 2007 and 2011, compared with fluctuating and increasing rates in all other jurisdictions, for example, 7.3 to 10.2 per 1,000 children in NSW during the same period (AIHW 2012, p.38).

Child protection activity has increased in Victoria at an unprecedented rate since 2011. Recent data from the Productivity Commission (2015) show that Victoria experienced the single largest out-of-home care increase in 2013-2014 since at least 2004-2005. There were 6.1 per 1,000 of all Victorian children and 62.7 per 1,000 Aboriginal children in out-of-home care at 30<sup>th</sup> June 2014, although the rate continues to be relatively lower than other jurisdictions (Productivity Commission 2015, Table 15A.18). Victorian children now comprise one-third of all Australian children who are admitted to protection orders annually according to the AIHW (2015, p.36) report. The frequencies of children on types of protection orders in Victoria changed markedly in

2013-2014 but it is not clear why or how the Department changed its data reporting method (AIHW 2015). At the same time, there were fewer children and parents receiving early intervention services (Productivity Commission 2015; Victorian Auditor General's Office 2015). A total of 5,318 children commenced intensive family support services during 2013-2014, compared with 5,941 children in 2012-2013 (Productivity Commission 2015, Table 15A.31). This means 623 fewer children commenced support services during this period, making this the largest decrease in at least seven years (Productivity Commission 2015, Table 15A.31). Together the Productivity Commission (2015) and AIHW (2015) data indicate that more children are entering the Victorian child protection system and being placed in out-of-home care, while simultaneously fewer families receive intensive support services to prevent removal of children.

The rates of children involved in statutory child protection do not indicate whether children are more or less protected from harm in society. In other words, a bigger child protection system does not equate to a better system. Critics have previously identified unsustainable growth in child protection systems as a serious concern. An overloaded and resource-stretched system cannot respond to children in real need of protection (Lonne et al. 2008; Munro 2011; Scott 2006). On the other hand, children and their families who are at the point of requiring statutory intervention may be missed if thresholds for services are set too high or services are under-resourced by governments aiming to have a smaller system and reduced budget. For example, child protection rates in Victoria may have been lower because of un-investigated and unallocated cases in some regions. The Victorian Ombudsman (2009, 2010, 2011) has repeatedly evidenced this serious problem within the Department's operations.

The substantial overrepresentation of Indigenous Australian children and young people is hidden by the total population rates of child protection activity. The Department has a poor history of compliance with the Aboriginal placement principle and with statutory obligations for the care of Aboriginal children. Almost half of all Aboriginal children in out-of-home care in Victoria do not have arrangements consistent with the placement principles (AIHW 2014, Table A32). The Secretariat of National Aboriginal and Islander Child Care (2013, p.12) has also noted that just 22% of Aboriginal children in out-of-home care are supported by an Aboriginal agency in Victoria.

Even allowing for the concerns raised here, there are some positive considerations that emerge from Victoria's child protection activity. Victoria's use of Supervision Orders, which permit oversight by the Department and Children's Court while children remain with parents, and specialist early intervention services may have had a flow-on effect in slowing growth in the rates of statutory child protection activity in previous years (KPMG 2011). Court orders and out-of-home care are interventions of last resort in accordance with national and international standards for statutory child protection practice (see UNCRC Article 9 and COAG 2009 National Framework for Protecting Australia's Children). When court orders and out-of-home care interventions are undertaken, it is ideally for the shortest possible time, and with a view to supporting children to stay in families or to eventual reunification when possible (*Charter of Human Rights and Responsibilities Act 2009* (Vic.) ss.17 & 24; *Children, Youth and Families Act 2005* (Vic.) s.10(3); United Nations 1989). These features were consistent with a child focus orientation, especially the high use of supervision to support children and parents in the home (Gilbert, Parton and Skivenes 2011). By comparison, Gilbert, Parton and Skivenes (2011) identify a child protection-oriented system as individualising problematic parents through highly investigative and legalistic means, while a family service-oriented system aims to have a therapeutic response to parents and children. However, all child protection systems tend to have large numbers of children placed in out-of-home care, irrespective of the orientation and the types are not discrete (Gilbert, Parton and Skivenes 2011).

This section has established the features of the Victorian statutory child protection system. The following section explains the legislation that forms the basis for this system.

### ***The Children, Youth and Families Act 2005 (Vic.)***

The governing legislation for child protection in Victoria is the *Children, Youth and Families Act 2005* (Vic.) (CYFA). The CYFA regulates child protection operations of the Department, as well as procedures and decisions undertaken by the Children's

Court. The CYFA received royal assent on 7<sup>th</sup> December 2005, but most provisions were not implemented until April 2007 (VLRC 2010, p.50).

Children who become the subjects of child protection legal proceedings are usually alleged to have been experiencing, or at risk of experiencing, some form of child maltreatment. Child maltreatment has commonly been legally defined according to types of abuse, even though children do not necessarily experience distinct types, and types do not capture the underlying problems experienced by families, such as poverty and parental mental illness. The lines between types of abuse are blurry, types often co-occur, and the severity of abuse may be a stronger predictor of trauma than type (Higgins 2004; Price-Robinson et al. 2013).

Nevertheless, the CYFA defines six broad types of child maltreatment. These form the legal protective grounds for when a child or young person may be experiencing or at risk of experiencing harm, and consequently are “in need of protection” (s.162). Separate provisions are made for children requiring treatment due to exhibiting or engaging in sexually-abusive behaviours (Therapeutic Treatment Order s.224). In summary, the six types of child maltreatment defined under s.162 are:

- (a) abandonment;
- (b) parents dead or incapacitated;
- (c) physical abuse;
- (d) sexual abuse;
- (e) emotional and psychological abuse; and
- (f) harm to physical development or health (neglect).

For example, a mother and her two young children could come to the attention of child protection authorities following a notification report by a maternal child health nurse. The mother is experiencing severe post-natal depression but has not accessed treatment. She does not have extended family who live nearby or friends to support her. She is recently separated from her partner who subjected her and the children to violence. She is struggling to pay the rent and bills. The maternal child health nurse notices the home

is in an extremely unhygienic state when she visits. Under these circumstances the mother is not adequately feeding, clothing, supervising, toileting or otherwise caring for her children. A child protection authority could consider the children to be a risk of experiencing neglect.

### **Best interests principles and procedural guidelines**

The CYFA introduced a legislative approach that prioritised principles for the best interests of children and young people, their rights and development (VLRC 2010). These are set out in Section 10(1) and (2):

(1) For the purposes of this Act the best interests of the child must always be paramount.

(2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

Section 10(3) contains a comprehensive list of principles to consider when making a decision or taking an action in relation to a child's 'best interests' (see Appendix B). This is the closest to a definition of 'best interests' in the Act to guide decision-making. Among the section 10(3) principles, there is an obligation to ensure that any determination of 'best interests' includes appropriate weight for the views of children and young people, or participation. This is established under section 10(3)(d):

...the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances.

The wording of this section can be interpreted as giving effect to Article 12 of the UNCRC.

Participation rights of children and young people are also addressed in the procedural guidelines of court proceedings that magistrates "must" follow "as far as practicable" (s.522(1)). The Court:

- Is obliged to “take steps to ensure the proceeding is comprehensible to the child” (s.522(1)(a)(i));
- Must “seek to satisfy itself that the child understands the nature and implications of the proceeding and of any order made in the proceeding” (s.522(1)(b));
- Must “allow the child” “to participate fully in the proceeding” (s.522(1)(c)(i));
- Must “consider any wishes expressed by the child” (s.522(1)(d)) and;
- Must respect the cultural identity and needs of the child and family and any stigma to the child and his or her family must be minimised (s.522(1)(e) and (f)).

### **Legal representation**

The CYFA contains provisions for legal representation of children and young people under a direct instructions model or a best interests model in the Children’s Court. Someone who is not a lawyer or parent may represent a child or young person with leave of the Court (s.524(8)). However, my in-depth analysis of reports from the Children’s Court, VLRC Inquiry, PVVC Inquiry and other documents did not yield any known instances of a child being represented by someone who is not a lawyer. There is no legal provision for participation with representation by an independent advocate outside of the Children’s Court process when the Department makes case plan decisions or internal reviews.

Following the procedural guidelines and sections of the Act requiring a magistrate to adjourn a hearing to enable a child to obtain separate representation, section 524(10) contains a provision for a child to be represented with a direct model with a lawyer:

A legal practitioner representing a child in any proceeding in the Court must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

Lawyers appointed to represent children under this provision are therefore obliged to act in accordance with a child’s instructions whilst accounting for maturity.



The best interests model of representation was a new feature in the CYFA that was not present in previous Acts (VLRC 2010, p.50). Within the CYFA, under “exceptional circumstances” a magistrate could adjourn proceedings to have legal representation for a child who was not considered mature enough to give instructions if the Court determined it was in the best interests of a child (s.524 (4)). In section 524(11), a lawyer representing a child in the Family Division when a child was “not mature enough to give instructions” must:

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

Information must also be provided to a child, irrespective of the model of legal representation. According to section 524(12), that information should be:

- (a) setting out the circumstances in which a child is required to be legally represented; and
- (b) stating the desirability of obtaining legal representation; and
- (c) explaining how legal representation may be obtained.

The proceedings in which a child was required to be legally represented, subject to the provisions outlined above, cover almost all types of applications for orders in the Family Division (s.525(1)).

In summary, the CYFA defines grounds for child protection intervention by the Department. The Act contains principles for the Department and Children’s Court when deciding what constitutes a child’s best interests. It also directs the Court to conduct proceedings so as to give effect to participation by children. Formal provisions for children to participate with legal representation are contained in the Act so children would have direct representation if considered mature enough and able to instruct a lawyer. Alternatively, a magistrate could appoint a best interests representative in exceptional circumstances. However, this legislation means a child would not have legal

representation if considered unable to instruct a lawyer, and if a magistrate did not find exceptional circumstances in a case to justify best interests representation.

## **The Children's Court of Victoria**

This research was conducted in the Family Division of the Children's Court. The Family Division is responsible for child protection matters, along with additional family violence Intervention Order powers. The second main Division of the Court deals with youth justice. Two smaller divisions involve a specialist Koori Court within the Criminal Division for youth justice matters involving Indigenous children and young people, and a Neighbourhood Justice Division. The Court had two metropolitan specialist courts and operated specialist sittings in 38 regional courts during my fieldwork. Metropolitan judicial officers (magistrates) are specialised in child protection and youth justice, and may conduct contested hearings in regional courts. The Children's Court also has the services of a specialised Children's Court Clinic for court-ordered independent assessments and therapeutic interventions.

The Family Division operates as a civil jurisdiction. Victoria Police deal with criminal charges against a parent or carer alleged to have abused a child. The CYFA (s.215) sets out the framework for the conduct of civil proceedings in the Family Division. The standard of proof is the balance of probabilities, rather than 'beyond reasonable doubt' as in criminal proceedings (s.215(1)(c)). Proceedings must be conducted in an informal manner, in part to be as inclusive of parents and children as possible (s.215(1)(a)). These provisions give magistrates some discretion in how they manage proceedings, but do not give scope for inquisitorial or less-adversarial approaches used in other jurisdictions.

Child protection proceedings in the Children's Court fall under the scope of the Victorian *Charter of Human Rights and Responsibilities*, because these are civil proceedings affecting fundamental human rights of families as a whole and individual family members (*Secretary to the Department of Human Services v Sanding* [2011] VSC 42, paras.204 & 206). Two functions are served by child protection being a civil jurisdiction (Eekelaar 2013). First, parents may be compelled to cooperate with the state

and engage in adequate care and safety for their children. Second, court oversight provides checks and balances in the context of intervention by the state. The Children's Court has some oversight powers under the CYFA with regard to the Department. The Court independently monitors the Department's engagement with children and parents and evaluates the quality of and justification for intervention. The Court should be satisfied the state has justification for intervention of a very serious nature in children's lives, assess the appropriateness and timeliness of services provided, and evaluate actions taken or not taken by the Department when deciding to make an order (Bessant, Emslie & Watts 2012).

The Children's Court of Victoria functions as an open court (s.523(1)), unless a magistrate decides to order the Court to be closed for a specific matter (ss.523(2) & 527A). Conducting open court hearings is consistent with democratic governance, independence, and accountability to society for implementing the rule of law (Children's Court of Victoria 2011b). To some extent, this compensates for the Children's Court not being a court of record. Judgments are not publically published as a record of decisions and case law, although a small selection of de-identified judgments are available from the Court's website.

A range of different types of orders and progressive levels of intervention are available to the Children's Court under the CYFA to distribute care of a child between parents and the Department (see list of orders Appendix A). These orders range from endorsing agreements and supervision of parental care while children remain home (lower-level orders), orders for out-of-home care with parents retaining guardianship (intermediate level orders), and both care and guardianship transferring to the state or carer (higher-level orders).

The *Child Welfare Practice and Legislation Review (1982-1984)* was the basis for these graded levels of intervention. The abuse and chronic neglect of children and young people living under long-term guardianship to the Department, without regular Court oversight, and their unregulated contact, if any, with parents and family members, were core reasons for introducing this range of orders with regular judicial reviews. The range of orders also reflected the need to formulate state intervention according to the individual circumstances of each family and each child's best interests (ALRC 1997).

## **Decision-making processes**

Only parties to the proceedings have a formal right to participate in decision-making processes in the Court. The Department's own Child Protection Litigation Office represents it in all matters. Parents may be legally represented via Victoria Legal Aid or a private legal practitioner, although are increasingly self-represented due to legal aid funding cuts (Law Council of Australia 2004; Productivity Commission 2014). Carers, grandparents, or other interested persons may also be involved in decision-making if joined as a party. Although all children and young people are not automatically formal parties to proceedings, they may have standing as a party to participate in decision-making processes if legally represented (VLRC 2010 p.115, 317; PVVC Inquiry 2012 p.375). The CYFA (s.3) does not define a party in the Family Division.

Three decision-making processes are commonly used to resolve child protection cases in the Children's Court: informal negotiations, formal mediation, and courtroom decision-making. Judicial Resolution Conferences are a fourth alternative, but are very rare, and no rules have ever been developed for them (Power 2013; VLRC 2010). The following sections provide an overview of the three main types of decision-making processes, and how children and young people might participate, if at all. Appeals are also discussed.

### *Informal negotiations*

There is a strong culture of negotiated settlements at the Children's Court in the context of these sensitive, complex, and emotionally-tense child protection proceedings. This is reflected in the large majority of cases reaching a decision without requiring a contested hearing. Even though the Children's Court handles approximately 1,000 orders per week, fewer than 3% of applications reach the point of requiring a final contested hearing (Children's Court of Victoria 2011a, p.17-19; VLRC 2010, p.214).

Consequently, most cases "resolve by negotiation between the parties, with the court

reviewing the file to ensure the proposed orders are in the best interests of the child” (Children’s Court of Victoria 2011a, p.17).

Informal negotiations occur between parties to a child protection application. Lawyers representing the Department, parents, or children and self-represented parents assist the Court by managing these negotiations. Lawyers representing parents and children can provide advice and support parties to reach settlements whilst also performing an independent assessment of the legitimacy of Department intervention and utility of agreements as an informal responsibility. The Children’s Court (2011b, p.21) has acknowledged the importance of lawyers for reaching outcomes:

In the court’s experience, the majority of lawyers allocated to parents/guardians and children after the case arrives at court assist the process by commencing negotiations with DHS on an appropriate resolution of the case. This explains why many apprehensions [emergency removals] are resolved on an interim basis without recourse to a submissions hearing.

An implication of this is that the daily functioning of the Children’s Court, with such a large volume of cases, is sustained by the work lawyers do when representing parents and children. The Court relies on informal negotiation as a mode of resolution to avoid delays and reach agreements about orders without escalating to contests. There simply would not be judicial resources available to hear every case listed on any given day in its entirety.

In conjunction with formal alternative dispute resolution and judicially-facilitated resolutions, it is believed that outcomes reached through a fair process of legally-assisted negotiation are more likely to circumvent further conflict and applications to courts. Such processes may produce effective and long-lasting agreements that can still meet safety requirements for children and young people, as seen in parental separation cases in family law (Children’s Court of Victoria 2010, 2011a; Kaspiew et al. 2009). At the same time, caution needs to be exercised about the risks of pressuring vulnerable participants, including children and young people, into settlements that set them up for failure, worsen power imbalances, reduce judicial scrutiny of evidence, and privatise justice outside of the courtroom (Field 2006; Scutt 1998; Victoria Legal Aid 2011a). Informal negotiations with lawyers representing parents have been documented in the

UK child protection system, and their findings reflect the strengths and limitations I have identified here (Eekelaar 2013; Eekelaar & Maclean 2013; Maclean & Eekelaar 2009; Pearce, Masson & Bader 2011). However there is no empirical understanding of these practices in Australia where children are legally represented, and of the extent to which negotiations might address participation.

### *Formal alternative dispute resolution*

The Victorian Children's Court was an early adopter of formal alternative dispute resolution (Sheehan 2001). At the time of my research, there was legally-assisted mediation in the form of Dispute Resolution Conferences (DRC) and a recent type of New Model Conference (NMC, now called Conciliation Conferences). An independent trained convenor employed by the Children's Court conducts conferences. Formal alternative dispute resolution may not be appropriate in every case. For example, the extent of power imbalances between a victim and perpetrator of family violence can make dispute resolution an unsafe and unfair process. Nor is it appropriate for making findings of fact about evidence, such as when sexual abuse is alleged (Law Institute of Victoria 2010).

A DRC involved negotiation through lawyers representing each party, whereas the parties negotiate directly in an NMC/Conciliation Conference. If parents and children are legally represented at the time of an NMC/Conciliation Conference, then their lawyer engages in preparation processes and is allowed to be present to give advice and ensure clients understand options, consequences and outcomes (VLA 2011).

While the NMC/Conciliation Conference approach has been found to encourage cooperation and full or partial agreement between parents and the Department, the direct negotiation between adult parties means children can be excluded from participating. For example, the Clear Horizon (2012, p.15) evaluation found that a child or young person was present at only 29% of all NMCs. Just 41% of these children were present as participants, with only a further 5% giving instructions to their lawyer. More than half were young children present because parents could not find childcare (53%), not for participation (Clear Horizon 2012). Formal alternative dispute resolution may

not necessarily be a type of decision-making process that accommodates opportunities for direct participation of children and young people without a legal representative.

### *Courtroom decision-making*

There are three stages in courtroom proceedings that can result in a case requiring the magistrate to make a decision when there has not been resolution between parties. The first stage is submissions at a mention hearing if a full outcome has not been resolved via informal negotiations or formal alternative dispute resolution. The second stage is a directions hearing. The third stage is a final contested hearing if the case has not resolved during the directions hearing.

The magistrate hears submissions at a mention hearing if a primary or secondary protection application does not resolve between parties by negotiation. Submissions are made through the lawyer representing the Department, one or both parents, a child, or by a self-represented parent. Cases that continue to progress without reaching an agreement will then reach a directions hearing. Directions hearings with a magistrate involve reviewing the issues to seek further resolution. If no resolution is reached with the assistance and adjudication of the magistrate, then the magistrate engages in case management with the parties to prepare for a contest hearing, such as determining witnesses to be called (Power 2013).

A contested hearing before a magistrate, either for interim orders or final orders, involves hearing evidence from witnesses, including child protection practitioners and sometimes parents as well. Written evidence is tendered, such as Department reports, independent professional reports, or Children's Court Clinic assessments. The magistrate makes findings and orders, or can dismiss applications (strike out). Contested hearings have been rare events in the Children's Court as a whole (VLRC 2010). Cases that require a final contested hearing may involve a matter of law to be tested; no agreement or partial agreement reached between the Department and all family members about a specific issue; or findings of fact required by a magistrate, such as a finding of evidence of sexual abuse.

Children and young people are rarely present inside the courtroom, despite the Court being required to ensure they are allowed to participate fully in the proceedings (s.522(1)). This may not have always been so in the past. In the last study of child protection legal proceedings in Victoria, conducted from 1993 to 1994, Sheehan (2001) was concerned that lawyers representing children, parents, or the Department rigorously questioned children about evidence, and children witnessed evidence about their own abuse during the proceedings. Sheehan (2001) was critical of some lawyers taking instructions from children in the courtroom, although acknowledged this was not the standard practice of most lawyers experienced in the jurisdiction.

Sheehan's fieldwork was conducted almost 20 years ago, and preceded the CYFA. Modern technology enables Video and Audio Recorded Evidence (known as VATE forensic interviews), remote witness facilities, and there is a specialist Child Witness Service for those cases where children do need to give evidence. Since Sheehan's research was conducted, there has been a general consensus between the Children's Court and other institutions about avoiding children and young people being present in the courtroom so as to protect them from the often-distressing content of proceedings (Children's Court of Victoria 2011a; PVVC Inquiry 2012). It is therefore uncommon for children to be present inside the courtroom, give evidence in a contested hearing, or speak directly to a magistrate (VLRC 2010).

### *Appeals*

Appeals can be made to the Victoria Supreme Court from the Children's Court relating to an Interim Accommodation Order or point of law decision by a magistrate or Children's Court President. Protection or Permanent Care Orders can be appealed in the County Court if made by a magistrate, or Supreme Court if made by the President. The Department, parents, or children and young people rarely appeal decisions made in the Children's Court. For example, the Children's Court (2010, p.53) reported there had been an average of just two appeals in the Supreme Court per year over five years with only one appeal successful.



Although these are highly-complex decisions that have been described as conflicted, tense processes from the perspective of Department practitioners (Borowski & Sheehan 2013), the low rate of contest and appeals suggests that oversight and scrutiny by the Children's Court has produced careful and prudent application of the CYFA in most circumstances. On the other hand, even though the Department rarely appeals decisions, despite having the resources to do so, parents and children are unlikely to have sufficient resources to bring appeals against the Children's Court, and strict time limits apply to lodge an appeal.

### **Child protection cases in the Family Division of the Children's Court**

The Department has two legal options for initiating child protection applications before the Children's Court. One is by immediately taking a child into safe custody, also known as emergency removal (ss.241 & 242). The other option is by notice (s.243). Emergency removal requires the Department to present their case to the Court within 24 hours. This may be necessary in situations where a child is experiencing harm or is at immediate risk of harm. By contrast, a notice is issued by a registrar of the Children's Court in response to an application by the Department, similar to a legal letter. The notice sets out the grounds for protective intervention, and is served on the child's parent and the child (if the child is 12 years old or over) for them to attend the Court for a hearing at a specified date. Initiation by notice usually enables parents and children to prepare for proceedings and seek advice from professionals, including legal and medical advice. This approach also provides for the Department to conduct investigations and prepare evidence in a timely way.

The Children's Court annual reports and assessments undertaken by the VLRC and PVVC inquiries indicate that the Department uses emergency removal as its normal approach to applications. This includes new applications and secondary applications to breach a current protective order for a child. Over a number of years, approximately three-quarters of the Department's applications in the metropolitan locations of the Court have occurred by emergency removal (Children's Court of Victoria 2012a, p.20, 2013, p.20). The Children's Court has estimated that children were immediately

returned to the care of a parent, family member or friend of the family in approximately 50% of cases following emergency removal (Children's Court of Victoria 2010, p.53, 2011a, p.22). Cases initiated by emergency removal require more court hearings and are almost twice as likely to reach the contested stage than applications by notice (Children's Court of Victoria 2011a, p.16, 2011b, p.21). Therefore, emergency removal is likely to exacerbate adversarialism as well as distress for children and their families.

The Children's Court Family Division is a busy institution across Victoria. The annual number of orders made in response to applications has grown from 26,077 to 46,844 orders between 2003-2004 and 2010-2011, excluding family violence Intervention Orders and applications withdrawn (Children's Court of Victoria 2012, p.3). This increased to 51,381 orders by 2011-2012 (Children's Court of Victoria 2013, p.18). However, this total number of orders for 2011-2012 includes adjournments (n= 9,312) and free-text records (e.g., the release of a Children's Court Clinic report; n= 11,700), in addition to substantive protection orders for children. The Victorian population has also increased over this period of time.

Magistrates grant the large majority of orders after applications have resolved through negotiations or formal alternative dispute resolution (Children's Court of Victoria 2012a, p.20). Approximately 30% of the cases referred to alternative dispute resolution resolve at that point (Children's Court of Victoria 2012a, p.3). Less than 3% of applications reach a final contested hearing inside the courtroom in which a magistrate may be required to make a written judgment (Children's Court of Victoria 2010). This is considerably lower than some other jurisdictions. For example, Masson, Pearce, and Bader's (2008, p.50, 55) UK Care Profiling Study identified that a quarter of cases were contested at a final hearing, although there was wide variation across court locations in the proportion of cases that reached a final hearing without a prior contest. Despite the relatively low proportion of contested hearings in Victoria, the volume of applications and limited resources of the Children's Court means cases can take some months to get a final contested hearing (Children's Court of Victoria 2011b). Overall, magistrates are working in a highly-constrained environment in which complex decisions must be made within the law, time, evidence, and resources available.

## **Limitations on the powers of the Children’s Court in child protection cases**

The child protection legal system in Victoria suffers from fragmentation because statutory powers are divided between the Children’s Court, the Department and the Victorian Civil and Administrative Appeals Tribunal (VCAT). The Children’s Court does not have power to intervene in administrative and case-planning decisions made by the Department, including the type of out-of-home care placement, whether siblings live together or not, or contact arrangements between parents and children when the Department has guardianship (*DOHS v B Siblings; H Siblings* [2009] VChC 4). While the Court can attach conditions for contact between children and parents on most types of orders (also called access arrangements), it has no authority to do so on orders when the Secretary of the Department has guardianship for a child.

VCAT deals with administrative appeals made by parents, or children and young people against the Department’s case planning decisions. VCAT is not a specialised institution for child protection decisions, and its officers have no expertise in child maltreatment or child protection law. VCAT does not have access to the Children’s Court file to assist the making of an informed decision. Legal representation is not usually available to parents and children because of legal aid funding rules, despite the Department always having legal representation. These inequalities and a range of conditions limit parents and children accessing an appeal with VCAT, including if the Department has granted an internal case planning review, and lack of access to legal assistance to prepare and conduct an appeal (VLRC 2010). Fragmentation in the child protection legal system constitutes an access to justice problem for parents and children, because remedies for a particular issue may be splintered across multiple statutory settings (Productivity Commission 2014).

## **Victoria Legal Aid**

Victoria Legal Aid (VLA) is the statutory service that funds, administers, and provides legal representation in child protection proceedings at the Children’s Court, including for children and young people. In the event of conflict, VLA refers a child or other

family member to a specialist private practitioner when it is unable to represent them in a child protection proceeding. Private practitioners in the Children's Court are specialist lawyers in child protection, and usually youth justice as well, operating as a panel under section 29A of the *Legal Aid Act 1978* (Vic.). VLA administers the Children's Court Panel (now called the Child Protection Panel) and pay grants of legal aid funding to private practitioners who provide a representation service.

Lawyers usually act as either a solicitor or barrister at the Children's Court. A solicitor performs the customary functions of a legal practitioner. They are regulated by the Law Institute of Victoria (LIV), and may have particular focus in their practice on child protection and youth justice. The LIV has a Family Law Section with a Children and Youth Issues Committee. Barristers have further specialisation in court-based advocacy, and may have expertise in particular areas of law such as child protection. They are usually engaged by a solicitor for complex types of hearings, such as a contested hearing (*Legal Profession Act 2004* (Vic.)). Barristers are members of the Victorian Bar Council, within which there is a specialist Children's Court Bar Association. Complaints can be made against lawyers to the Victorian Legal Services Commissioner and Victorian Legal Services Board, as well as the LIV and VLA.

Specialist representation for children and young people within VLA was previously delivered through the Youth Legal Service. The Youth Legal Service was a specialised Children's Court service in both the Family and Criminal Divisions. Integrated child protection and youth justice services reflected the crossover between the Divisions, particularly for young people, as well as the legislation and structure of the Children's Court (Cashmore 2011). The Youth Legal Service had been a dedicated Children's Court service since the 1990's. It originated out of the specialised Children's Court Section founded by Mr Joe Gorman between 1974 and 1975. During my fieldwork, Victoria Legal Aid disbanded the Youth Legal Service as part of budgetary cuts and restructuring. Nevertheless, private practitioners continue to work across both child protection and youth justice Divisions as an integrated Children's Court legal service.

Legal representation in child protection proceedings consumes a considerable portion of the legal aid budget. Total child protection legal services, including representing parents, cost VLA \$17.0 million to deliver in 2011-12, up from \$14.5 million in 2010-

2011 (Victoria Legal Aid 2011b, p.44; 2012, p.44). These costs reflect the growth in the number of Department applications (VLA 2012, p.44).

## **Conclusion**

The purpose of this chapter was to provide an introduction to the UNCRC at an international level, and to explain how the local Victorian statutory child protection system is structured. The functions and powers of the Children's Court through the Family Division have been established, along with introducing Victoria Legal Aid as the primary funder of lawyers who represent children and young people in these proceedings. This has set the scene for a theoretical discussion of Nancy Fraser's integrated theory of justice and critique of literature in relation to children's participation rights forthcoming in Chapter Three.

## **Chapter Three**

### **An integrated theory of justice and participation rights of children and young people**

Quennerstedt (2013) identified three challenges for contemporary child rights research: advancing critique of children's rights, especially of the United Nations Convention on the Rights of the Child; increasing theorisation; and contextualising research. It is a difficult undertaking to embark on theorising justice in relation to children's participation, because participation can be a varying construct, carrying different meanings in different contexts (Percy-Smith & Thomas 2010a). Nonetheless, new theoretical thinking is needed about participation and children's rights to keep pace with the local and global developments affecting childhood experiences, and to address ongoing barriers to implementing children's rights (Ferguson 2013; McGillivray 2013; Percy-Smith & Thomas 2010a, 2010b; Stoecklin 2013). To meet this challenge, I have engaged principally with the work of American feminist and critical theorist Nancy Fraser. My interpretation of Fraser's theoretical framework helps to explain empirical evidence about the legal construction and implementation of participation rights as experienced by children and young people in child protection proceedings.

There are five parts to this chapter. Part one introduces Nancy Fraser, her integrated theory of justice and concepts applied to the findings in this research. Participatory parity and the dimensions of recognition, redistribution, and representation are applied to child protection legal proceedings. Part two discusses the legal construction of children's best interests, and considers a number of limitations identified in the literature. Part three moves on to debates about participation rights of children and young people, and how participation can be understood from the UNCRC. Concerns about the capacity of children to participate in legal proceedings are examined in more detail. Part four looks at children's participation in legal proceedings via representation by a lawyer. Advantages and limitations of the two models of direct representation and best interests legal representation are discussed. Finally, part five describes the

legislation and policy provisions for magistrates and lawyers implementing participation rights of children and young people in the Children's Court of Victoria, including access to direct or best interests representation.

## **Nancy Fraser and an integrated theory of justice**

A theory of justice aims to explain and argue for a set of principles that can structure institutions, guide political practices, and inform policies beyond describing and explaining its subject (Thompson 2006). Recognition theories as an approach to justice aim “to show how a society should be organised so that everyone enjoys the recognition which is due to them” (Thompson 2006, p.9). Recognition theories have roots in the work of Hegel, whereby his ‘struggle for recognition’ in identity and human intersubjectivity have been “resuscitated” in contemporary struggles about identity, difference, and political claims (Fraser & Honneth 2003, p.1).

Fraser's integrated theory of justice is a particular subspecies of recognition theories, because her work criticises recognition politics as inadequate on their own for the task of addressing inequalities (Lovell 2007a; Thompson 2006). At the same time, Fraser holds a place for recognition as one of three dimensions for justice. Fraser's integrated theory carries hope that “if widely accepted principles of justice—and in particular the principle of moral equality—are interpreted in the right way, this will help to affect a profound transformation of contemporary societies” (Thompson 2006, p.12). This position is compatible with my framing of justice, which means to bring the current strengths, limitations, and future possibilities to light for advancing moral equality of children's participation rights. In simple terms, this means assessing empirical evidence about status and implementation of participation in child protection proceedings for children and young people.

Fraser's (2009, pp.6 & 58-59) most recent theorisation of ‘what’ is justice has become “a three-dimensional account”, comprising recognition, redistribution and representation. Fraser has positioned the dimension of *recognition* to be about cultural justice, involving struggles of the status order and hierarchy at an institutional level. Injustice in this dimension is misrecognition, including cultural domination, disrespect,

and diminished status (Lovell 2007b). Questions of socio-economic justice about *redistribution* form the second dimension concerned about how the real, material world and resources are distributed amongst people. Injustice in this dimension is maldistribution, and concerns systematic socio-economic inequalities when the resources necessary for participation as a member of society are unjustly distributed (Fraser 2000, p.113, 2009, p.58; Lovell 2007a, p.4).

A third political dimension of justice is a more recent addition to Fraser's theory, and is about *representation*, referring to democratisation struggles. Representation has two qualities (Fraser 2009, p.19). One is membership in the form of social belonging or exclusion from the community of those who are permitted to make justice claims. The other quality is decision-making, which concerns the rules and procedures for resolving conflicts and injustices. Misrepresentation and misframing of individuals and social groups, rendering them invisible, powerless, or unheard in decision-making, are injustices associated with this dimension. Recognition, redistribution and representation can intersect and compound each other as well as being distinct dimensions of justice (Fraser 2009, p.145-147). The three dimensions each function on a continuum of vulnerability, for example some groups may be more vulnerable to extreme maldistribution because of their economic position in society.

These three dimensions of 'what' constitutes justice co-exist with Fraser's concept of parity of participation as the basis for how justice and injustice are produced (Fraser 1996, p.30, 2009, p.145). 'Participatory parity' is a term that Fraser first coined in 1990, and has applied to recognition, redistribution and representation (Fraser 2003, p.101). To Fraser (2009, p.16), "the most general meaning of justice is parity of participation". Referring to her early work, she explains (2003, p.101, emphasis in text):

[P]arity means the condition of being a *peer*, of being on *par* with others, of standing on equal footing. I leave the question open exactly what degree or level of equality is necessary to ensure such parity. In my formulation, moreover, the moral requirement is that members of society be ensured the *possibility* of parity, if and when they choose to participate in a given activity or interaction. There is no requirement that everyone actually participate in any such activity.



Fraser's three dimensions of recognition, redistribution and representation form a powerful lens to understand parity of participation and the injustices produced when parity is not possible on global or local scales. At the same time, Fraser offers a framework to develop potential solutions for a fairer society in which parity of participation is a possibility.

The utility of Fraser's integrated theory of justice is demonstrated by the growing diversity of subjects to which it has been applied, including transgender women (Connell 2012) and mental health (Lewis 2009). Larkins (2012) uses Fraser's theory in the context of young people's citizenship. Keddie (2012a, 2012b, 2012c, 2012d) likewise applies Fraser's work to advocate for social justice in educational settings for children and young people with Indigenous, migrant, and refugee backgrounds in Australia.

Children and young people have not featured strongly in Fraser's own work to date. For example, in her discussion of participatory parity, Fraser (1996, p.30) says "justice requires social arrangements that permit all (adult) members of society to interact with one another as peers". Lister (2007a, p.173) also points out the gap in attention to children, observing, "[t]he reference to adult members of society is indicative of the silence around children in Fraser's work." My application of Fraser's work to participation rights of children and young people in child protection proceedings contributes to the growing body of knowledge filling this gap (Keddie 2012a, 2012b, 2012c, 2012d; Larkins 2012; Lister 2007a).

### **Framing the 'who' of justice**

Fraser's (2009, p.15) pivotal text, *Scales of Justice*, opens discussion about the debates concerning 'who' is, or is not, "entitled" to justice with recognition, redistribution, and representation. The 'who' of justice encompasses understanding who it is that counts in the critical framing of the justice agenda: in other words, the subjects of justice (Fraser 2009, p.5). This can be a matter of defining particular groups of people for advocating recognition, as well as critiquing the boundaries (i.e. frame) of inclusion and exclusion

for representation and redistribution imposed upon those for whom justice claims are constructed (Fraser 2009, p.7).

As an example of applying this question, Fraser argues that traditional rights claims within geographic territories, domestic or national laws, also referred to as “Westphalian framing” (2009, p.2), exclude and restrict justice resulting from globalised problems. She asks (2009, p.15):

Who are the relevant subjects entitled to a just distribution or reciprocal recognition in the given case? Thus it is not only the substance of justice, but also the frame, which is in dispute.

Reflecting on globalisation and ‘who’ is a subject of justice, Lara and Fine (2007, p.44) describe Fraser’s “all-affected principle”. The principle means “all those affected by a given social structure or institution have moral standing as subjects of justice in relation to it” (Lara & Fine 2007, p.44). This raises a further predicament of what might constitute being ‘affected’ and the “butterfly effect” in which the claim can be made that “everyone is affected by everything” (Fraser 2009, p.64). Fraser (2009, pp.66 & 95) subsequently modified and came to prefer the “all-subjected” principle. “All those who are subject to a given governance structure have moral standing as subjects in relation to it” (Fraser 2009, p.65).

Fraser (2009, p.65) further explains subjection to a governance structure as:

... encompassing relations to powers of various types. Not restricted to states, governance structures also comprise non-state agencies that generate enforceable rules that structure important swaths of social interaction.

This includes the administration of civil and criminal law. An advantage of the all-subjected principle is that it frames an issue inclusively rather than using established rules of membership as the starting point: “One need not already be an officially accredited member of the structure in question; one need only be subjected to it” (Fraser 2009, p.65). Existing boundaries of inclusion and exclusion can thereby be challenged and reframed in a more just way. Another advantage comes from flexibility in framing justice (2009, p.65-66):

In today's world, all of us are subject to a plurality of different governance structures, some local, some national, some regional, and some global. The need, accordingly, is to delimit a variety of different frames for different issues. Able to mark out a plurality of "who's" for different purposes, the all-subjected principle tells us when and where to apply which frame—and, thus, who is entitled to parity of participation with whom in a given case.

Therefore, a clear delineation of the frame applied to a particular matter of justice is necessary so as to understand whom the subjected persons may be. I have framed the 'who' of justice in my research to be all children and young people involved in the statutory child protection system. There are multiple governance structures that make children and young people subjects of justice in relation to the child protection system. These are the civil laws (as opposed to criminal laws) that regulate this system; the Children's Court, which implements the civil laws; and the Department of Human Services, which governs the lives of children and young people under administrative decision-making powers.

My framing of all children and young people as subjects of justice is not reliant on children being of a specific age, having a 'voice', or demonstrating a normative standard of capacity to have status as a participant. Instead the basis of this framing is their position as subjects to the powers of these governance structures. The frame applies to their entitlement to parity of participation in this system with regard to recognition, redistribution and representation. The advantage of my frame is that all children and young people can be entitled to some form of independent legal representation to implement their status as participants, regardless of their age. Their participation rights as individuals can be recognised as both independent of and interdependent with other parties to child protection proceedings—neither the State, represented by the Department, nor parents are assumed to be wholly representative of the child.

## Recognition

The dimension of recognition in Fraser's theory comes under the broad umbrella of culture. Struggles for justice that characterise the recognition dimension are associated with the status order and institutional hierarchies, whether these are framed within societies, are global, or both. Establishing formal legal equality is a fundamental aspect of recognition, along with access to the objective resources necessary for parity of participation (Fraser 1996). Intersubjective cultural value is another fundamental aspect of recognition, particularly in the form of equal respect for participants, so as to question:

... institutionalized value schemata that deny some people the status of full partners in interaction—whether by burdening them with excessive ascribed 'difference' from others or by failing to acknowledge their distinctiveness (Fraser 1996, p.31).

Status orders and institutional hierarchies can produce recognition or misrecognition of individuals and groups (Fraser 2003, p.29). Misrecognition has multiple applications depending upon "the nature of the misrecognition" in each context (Lister 2007a, p.164). Misrecognition of individuals and groups applies as "a systematic status subordination that constitutes a form of oppression" (Dahl 2004, p.326). Linking back to parity of participation, this means justice in the dimension of recognition corrects the social status of individuals and groups as full members of society, "capable of participating on par with other members", rather than "positing *group* identity as the object of recognition" by itself (Fraser 2001, p.24).

The concept of recognition includes addressing inequalities in status for "groups in society who are devalued and despised on the basis of, for example, their sexuality, ethnicity, religion, and sex" (Hughes & Blaxter 2007, p.115). At a broad societal level, children and young people exist within a generational order defining their inferior status in relation to adults (Mayall 2000a). Children and young people comprise a membership group constructed within the generational order by having social status as other than adult (Alanen 2001). Generational status order in society sets the context for the subsequent status order of children and young people as participants in child protection proceedings.

An intellectual relationship and dialogue between Nancy Fraser and Axel Honneth has been mutually influential and advanced debate about the purpose of recognition for justice (Fraser & Honneth 2003). In general terms, Honneth's work has emphasised psychological, phenomenological qualities of recognition (Wynne 2000). For Honneth, access to justice rests upon a "positive relationship between subject and society", more aligned with the difference-centred tradition of recognition politics (Warming 2012, p.37). A reliance on individual experiences of recognition and relations between individuals as the means to addressing injustice have been identified as limitations of Honneth's approach. This is because powerful social structures and institutions can govern relations between people despite any willingness of an individual to recognise another. In contrast, Fraser seeks to advance the agenda of social justice and rights by addressing those problematic social structures and institutions that produce misrecognition (Wynne 2000).

Fraser (2003, p.29, emphasis in text) explains the difference between recognition and misrecognition in terms of the effects of institutionalised patterns of value on status:

If and when such patterns constitute actors as *peers*, capable of participating on par with one another in social life, then we can speak of *reciprocal recognition* and *status equality*. When, in contrast, institutionalised patterns of cultural value constitute some actors as inferior, excluded, wholly other, or simply invisible, hence as less than full partners in social interaction, then we should speak of *misrecognition* and *status subordination*.

From this perspective, recognition can be questioned according to the relative status conferred upon those who are subjected to a particular governance structure. In other words, recognition must be effective, not just symbolic. Given the established position of children in the generational order relative to adults, the next step is to question the extent and effectiveness of any status conferred in the governance structure of the child protection context.

An advantage of Fraser's approach to recognition compared with that of Honneth is in shifting from "needs talk" of marginalised or subordinated individuals and groups to their rights as participants in society (Lister 2007a, p.161). 'Needs talk' has been a powerful theme in the becomings discourse of a natural and developmental childhood,

to the extent that social and cultural contexts have typically been underestimated (Lawler 1999). The lens of recognition questions how rights come to be conferred on or denied to particular persons so as to challenge presumptions about status being a product of any natural social order, including the social order between adults and children (Lawler 1999). Implementing recognition could be a means to accept and respond to vulnerabilities of children in relation to adults and institutions, instead of justifying children's marginalised status as a reflection of the natural order and 'becomings' state relative to adults.

The debate about recognition between Fraser and Honneth raises a question about how to reconcile an individual's experiences of recognition (both in terms of experiencing recognition and giving recognition to others within social interactions) with the institutional powers that confer or deny recognition to particular people. Both agency and structure are at play, in a classic sociological sense. To reconcile this problem, I propose that Fraser and Honneth are each articulating qualities of what can be considered a *system of recognition*. This accommodates recognition at an interpersonal level with Honneth (*recognition ethics*) and status order recognition at the institutional level with Fraser (*recognition justice*). Lovell (2007b, p.70) provides insight about this difference as a cultural problem of justice in her description of Fraser's aim for a flexible but robust theory of justice:

[Fraser's] concern is to keep her model of justice general enough, 'thin' enough, to avoid sectarianism and thereby navigate the rapids of cultural relativism, yet 'thick' enough to offer substantive guidelines at a pragmatic level. This concern motivates her distinction between the binding moral imperatives of *justice*, and culturally relative *ethical* imperatives that bind only those that adhere to them.

Recognition ethics can be drawn from Honneth's approach through recognition as having a subjective and interpersonal understanding. This form of recognition is produced in mutual dialogue between people (Fitzgerald et al. 2009). It encompasses recognition in an emotional sense within intimate relationships, perceiving one's self and others as having rights and being worthy of respect, and subjective feelings of being recognised by "being valued for one's abilities and contribution to a community" (Warming 2012, p.39). This can, in part, account for agency of individuals operating within the governance structures of institutions. The interactions between lawyers and

children and the decisions made by magistrates constitute an opportunity through which recognition may or may not emerge. These may happen at the level of recognition ethics when the lawyer or magistrate conducts their practices and professional duties.

Nevertheless, such interactions and relationships between children and legal professionals occur within governance structure institutions of the law, the Children's Court, the state, and the broader child protection system.

Recognition justice functions at the structural level of governance institutions. The law establishes the boundaries of recognition for inclusion and exclusion of children and young people as participants. The law also functions as a legal structure for the practices of lawyers and magistrates. Within the legal structure of the CYFA, lawyers and magistrates might support parity in how they implement participation with children to give effect to recognition justice. Conversely, lawyers and magistrates might perpetuate misrecognition of children's participation rights within the governance provided by child protection law.

Recognition is not the finale though, but a stage in the ongoing project of justice for children and young people in this context. Redistribution is the next dimension.

## **Redistribution**

Redistribution has been a core dimension of Fraser's work since she developed her early formulation of a theory of justice and critique of recognition politics in 1995 (Lovell 2007a). The dimension of redistribution has generally been economic in character by relating to matters of material inequalities and social class, such as "income, property, access to paid work, education, health care and leisure time" (Dahl 2004, p.327). When applied to participatory parity, "people can be impeded from full participation by economic structures that deny them resources they need in order to interact with other peers; in that case they suffer from distributive injustice or maldistribution" (Fraser 2009, p.16).

Lara and Fine (2007, p.42) provide a distinction between Fraser's distribution dimension and class in the Marxist tradition. Instead of class based on ownership of

capital, Fraser considers how resources, including economic arrangements, are accessed or denied to groups or individual actors. Distribution extends to socio-economics when appreciating the consequences for injustice under this dimension, including burdens of exploitation, access to care, unpaid labour, economic marginalisation and deprivation of resources (Dahl 2004, p.327).

For example, Dahl (2004) has documented the distributive injustice of burdens experienced by home-helpers who provide publically-funded care to the elderly under the Nordic welfare state. In addition to a low-income, socio-economic maldistribution is experienced for home-helpers in comparison with other care professions. This occurs in the form of workplace accidents within private homes and rejected claims for compensation that affect access to sick leave and cause early retirement. As such, this dimension of justice questions how resources, burdens, and privileges are distributed across society, not just economic power.

Child protection is essentially a system of governance in which the distribution of care for children and young people is determined between the family and the state. Thinking of care in this way builds on Martha Fineman's (2000) critique of the division of caretaking and dependency between the private family and public institutions, as well as of the state and economic markets. The state intervenes with social and economic redistribution when the private family fails, rather than seeing the market as the failure:

The market is unresponsive and uninvolved, and the state is perceived as a last resort for financial resources, the refuge of the failed family. A caretaker who must resort to governmental assistance may do so only if she can demonstrate that she is needy in a highly stigmatized process (Fineman 2000, p.22).

Statutory child protection is an extreme form of intervention by the state in the 'failed family'. Families struggling with poverty are more likely to have contact with child protection services than wealthy families. Australian children on the lowest and second-lowest scales of the Index of Relative Socio-Economic Advantage and Disadvantage make up more than 50% of the substantiations by all child protection departments in response to receiving a notification of child maltreatment (AIHW 2015, p.76). Even though socio-economic structures are an underlying characteristic of statutory child protection intervention, this intervention is framed as an individualised response



justified by the best interests of a child. Therefore, the best interests of a child becomes the gauge by which care is redistributed between families and the state when there are serious concerns about the quality of care within family life, and the harm, or risk of harm, experienced.

To some degree, the outcome of each child protection decision within the Children's Court produces a redistribution of care between the family and state for a child or young person who is the subject of that decision. The Court has authority to shift the power over children between the private sphere of parents and the public sphere of the state. The range of protection orders available to the Children's Court can be understood as forming progressive levels of intervention in the distribution of care.

Conceiving these legal regulations as a redistribution of care is consistent with Braithwaite's (2002, p.29) concept of 'responsive regulation' whereby "governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed". Lower levels of intervention equate to a distribution of care where an order permits a child to continue to reside with a parent under supervision of the state (e.g., a Supervision Order). This constitutes a redistribution of care where a parent retains day-to-day care and guardianship. At the highest level of intervention, a parent has no care distributed, and the state or permanent carer acquires both day-to-day care and guardianship responsibility for a child. A child and parent might not have a legal condition for contact at the highest level of intervention. Therefore, the child becomes positioned along this spectrum of private and public power as a consequence of responsive regulation authorised by the Children's Court.

Parity of participation in this dimension concerns two qualities. One is parity of participation in the process through which redistribution is decided. The other is what views children and young people might have about how and why their care should be distributed between parents and the Department. Reflecting the intertwining of recognition and redistribution, children require access to status as participants and implementation of participation in order to have an opportunity to put their views independently to the Children's Court. In turn, the Children's Court might recognise the child as a participant and decide how to redistribute their care with appropriate regard,

or due weight, to the child's views about their day-to-day care, guardianship, and contact with parents or other family members.

## **Representation**

The final dimension of Fraser's integrated theory of justice is the political system of representation. This refers to "the scope of the state's jurisdiction and the decision rules by which it structures contestation", and is where "struggles over distribution and recognition are played out" (Fraser 2009, p.17). It means asking who is entitled to representation? Does the process of decision-making confer a standard of representation that is fair to all participants? And are the processes sufficiently democratic through which these decisions occur? Fraser (2009, p.18) explains how misrepresentation:

... occurs when political boundaries and/or decision rules function wrongly to deny some people the possibility of participating on par with others in social interaction—including, but not only, in political arenas. Far from being reducible to maldistribution or misrecognition, misrepresentation can occur even in the absence of the latter injustices, although it is usually intertwined with them.

Hence, representation has a unique contribution to justice or injustice, even though both recognition and redistribution can be involved.

Fraser's account of representation problematises governance structures and decision-making procedures in democracies (Dahl, Stoltz & Willig 2004). Political representation is generally equated to a right to vote, and in turn, democratically-elected officials represent the population of voters in government decision-making. As opposed to the group representation in Fraser's account, I argue for representation to be understood at an individual level of lawyers representing children in the statutory child protection system. The statutory child protection system is an arm of governance over the family in which the legal proceedings constitute the procedure for authorising state intervention. Legal representation may become the mode of participation in decision-making within statutory child protection when the lawyer represents the child's views, or vote, in the Court's decision-making.

Fraser identifies two main qualities of injustice that can occur under the representation dimension: ordinary misrepresentation and misframed representation. ‘Ordinary-political’ misrepresentation is when the rules for representation do not afford parity for all participants in the decision-making. Larkins (2012, p.8) gives the example of educational settings that appear to afford children representation through school councils and youth forums, but which are not actually offering participatory parity. This happens when teachers choose class representatives rather than facilitate student-elected representation. Ordinary misrepresentation can apply to children and young people in child protection legal proceedings if the model of representation and implementation of that representation does not give the opportunity for participatory parity relative to other participants.

‘Misframed’ representation is a type of injustice “where distinctions between members and non-members are drawn” (Fraser 2009, p.22). It results in excluding people who otherwise should have been “entitled to consideration within the community in matters of distribution, recognition, and ordinary-political representation” (Fraser 2009, p.19). Fraser (2009, p.19) says that misframed representation in its most extreme form is “akin to the loss of what Hannah Arendt called ‘the right to have rights’”. Misframed representation denies people the right to make claims about injustices because they become “non-persons with respect to justice” (Fraser 2009, p.20). Misframed representation can also raise the problem of whether the boundaries of a particular community are framed correctly or not. The means to addressing an injustice moves beyond the existing boundaries of the affected community in these instances.

Freeman (2007b, p.8) points out that rights might well be on paper in the law, but representation is necessary for children to access those rights in reality:

Rights are also an important advocacy tool, a weapon which can be employed in the battle to secure recognition. Giving people rights without access to those who can present those rights, and expertly, without the right to representation, is thus of little value.

Applying this argument to Fraser’s concept of representation raises questions about which children are included or excluded as participants in child protection proceedings (‘given’ rights or not)? And what is their representation if ‘given’ these rights? Does

children's representation contribute to fair processes of decision-making and outcomes? Are the boundaries of participation fairly drawn so that all children have access to representation in all the child protection decisions to which they are subject? In theory, legal representation would aspire to bring about parity of participation for children and correct inequalities in their status to some extent, relative to the state and parents. Furthermore, in theory, magistrates do not make autocratic decisions about a child's best interests when applying the law. Instead they assess the evidence before them and the views contributed by each participant in the case to apply due weight. This gives effect to having a fair hearing when a decision for statutory intervention by the state is imposed upon children and parents—a principle of democratic justice (O'Donnell 2004).

In summary, I have proposed that participatory parity in the redistribution of their care is an indicator of justice for children and young people in child protection proceedings. The dimensions of recognition, redistribution and representation are each implicated in the extent to which participatory parity may or may not be possible for children in child protection decisions. The legal concept of best interests can function as a means to evaluate the redistribution of children's care between parents and the state in the Court's decision-making. Whether a redistribution of care towards parents or the Department is ordered will depend upon the magistrate's assessment of which outcome is in the child's best interests. Access to status as a participant and practical ways to fulfil parity of participation are prerequisites for children and young people to be included in decisions about their best interests. The law functions as a boundary of participation by defining whether or not a child is recognised as a participant and has a right to representation. In turn, lawyers and magistrates have ethical power to recognise a child as a participant and to implement legal representation in ways that can strengthen or weaken recognition.

### **Legal construction of best interests**

This part of the chapter considers the construction and limitations of best interests as a legal concept. The problem of indeterminacy of best interests is examined in the context

of adult subjectivity, political ideologies, and marginalisation of children and young people as participants.

The literature conveys best interests as a highly complex concept. As explained in Chapters One and Two, the best interests concept features on a global scale in the UNCRC, and in the CYFA at a local level for child protection proceedings in Victoria. Defining the concept of children's best interests has been the subject of lengthy debate internationally and in Australia (Archard & Skivenes 2010; Bates 2005; Freeman 1997, 2007a; Hansen & Ainsworth 2009; Thomas 2002; Thomas & O'Kane 1998a; Wolf 1992; Wolfson 1992).

The best interests concept can be a powerful tool to advocate positively for children and encourage prioritising children in decisions affecting them (Freeman 2007a, 2007b, 2010). The flexibility of meaning can be an advantage for case-by-case advocacy and decision-making rather than assuming all children's interests are the same (Alston 1994; Archard & Skivenes 2010). Alston (1994, p.15-16) identifies three positive functions for the best interests concept in legal decision-making. First, it can be used to justify a decision in conjunction with the other Articles of the UNCRC. Second, it can serve as a mediating principle when there is conflict between different rights, whether this conflict is between different rights of the child or between the child and other parties in decisions. Third, the broadness of the best interests principle means it encompasses all matters and other rights not covered presently by the Convention.

Nevertheless, the effectiveness of 'best interests' as a legal concept has been heavily disputed. Mnookin (1975) first identified the problem of indeterminacy in relation to child custody disputes. Since the 1970's, the problem of indeterminacy and subjective meanings attached to best interests has been cited as a core failing that has continued to the present day (Dolgin 1996; Mnookin 1975; Skivenes 2010; Thomas 2002). Dolgin (1996) argues that the pure vagueness of the concept is what has enabled it to persist for over a century despite substantial societal and family change. Vagueness can mean adaptability to the moral, social, and legal values of the times to support children's rights. But vagueness also makes the concept susceptible to subjective personal value judgments of individual decision makers, and to uncertainty in how it will be interpreted on each occasion (Skivenes 2010). Consequently, interests may be constructed in ways

that do not actually support rights. This also applies to overruling children's participation rights in the name of their best interests.

According to Thomas (2002, p.63), the problem of indeterminacy means, "we cannot know incontrovertibly what is in a child's best interests, nor always agree on what values are important". In his UK research with child protection social workers, Thomas found that experts make different decisions with the same information, or come to the same decision as to what is in a child's best interests, but for different reasons.

Indeterminacy and the potential subjectivity resulting from best interests leave decision makers with little guidance in complex and highly-sensitive child protection matters.

The VLRC's (2010, p.16) final report into child protection applications concludes:

While there appears to be widespread support for the paramountcy of the 'best interests' principle, key participants in child protection matters do not always appear to have a shared view of how the principle should be applied in individual cases. This results in significant tension between the various participants in the system.

The potential for conflicts to arise from contrasting interpretations of a child's 'best interests' in the child protection system demonstrates how the principle is not as neutral as it is assumed to be (James 2008).

The problems of indeterminacy and adult subjectivity with best interests have been documented in the Australian family law system. Dempsey (2004) shows how different interpretations of a child's best interests could be used to service positions of particular parties in parenting disputes. Lesbian mothers of two-year-old Patrick had sought to reduce contact between Patrick and his donor biological father. The mothers' position framed Patrick's best interests according to the integrity of their family unit. In their view, it was in Patrick's best interests to maintain a relationship with his donor father, and the donor could be referred to as his father, but not act as a parent in Patrick's day-to-day care. In contrast, the donor father framed Patrick's best interests in terms of Patrick having a close, parenting relationship with him. Justice Guest of the Family Court of Australia determined it was in his best interests to have a close father relationship, rather than the more minimal role sought by his lesbian parents.

Another problem is how best interests can be shaped according to differing political beliefs and agendas at a societal level in ways that do not reflect children's rights (Burman 2003; Schiratzki 2000; Tobin 2009). The decision in the individual case of Patrick described above was situated in the context of a powerful fathers' rights movement with neoliberal conservative family values in Australia. That movement had invoked the best interests of children in fathers' rights to equal care and time with children in family law (Rhoades 2006). Shea Hart (2010) shows how the construction of best interests in Australian family law has tended to value continuing relationships between children and fathers who have a history of family violence over the priority of safety for children.

Further evidence for the influence of politics and ideology producing injustice with best interests comes from the historical application of best interests to the Stolen Generation of Aboriginal peoples and Forced Adoptions human rights violations in Australia (Cuthbert 2010; HREOC 1997; Long & Sephton 2011; van Krieken 2010). In the Stolen Generation, being identified as Aboriginal constituted justification for a child's best interests to be forcibly removed from their families (Long & Sephton 2011; van Krieken 2010). Long and Sephton (2011, p.97) observe:

The belief that it was in the best interests of Aboriginal children to be removed from their families and assimilated into "white" society is a clear indication of the way the principle can be interpreted by the values of a decision maker or society at any given time.

The legal and social construction of best interests resulting in the Stolen Generations and Forced Adoptions reflects how children can be treated as objects of concern instead of subjects with rights (Cuthbert 2010).

The final problem with best interests concerns its application to justify marginalisation of children and young people, including denying their participation rights in legal proceedings. Eekelaar (1994) identifies an intractable tension in Western culture between the paternalistic position of adult decision-makers who are required to determine a child's best interests and recognising children as having human rights and views of their own. Eekelaar argues that this means 'best interests' may be used to justify decisions for children that are for their own good, whether or not they might be consistent with their rights and views. This points to the easy exclusion of children and

young people from decision-making by using justifications of participation itself, or their views, conflicting with their best interests. Eekelaar proposes ‘dynamic self-determinism’ as an approach to reconcile the tension between adult positions about a child’s best interests and participation rights. ‘Dynamic self-determinism’ would mean offering a flexible framework for children to participate in legal decisions, while providing a supportive environment in which participation could occur, including representation (Eekelaar 1994). Although parental custody disputes were Eekelaar’s main focus, this concept could apply to child protection by structuring representation and decision-making in such a way to support children who might have views about their care.

A strategy to manage the problems of indeterminacy, subjectivity, political ideology, and marginalisation of children is to have principles or considerations legislated to guide the application of the best interests standard. After conducting an analysis of legislation in Norway and the UK, Archard and Skivenes (2010) recommend a non-exhaustive list of considerations in legislation as an effective way to guide decisions about best interests. This approach has potential to minimise interference from the biases and subjective preferences of those who make law and make decisions about a child’s best interests (Archard & Skivenes 2010). It also could reduce uncertainty for professionals and families in a particular legal system as they navigate each decision being made. In this way, Section 10 of the Victorian CYFA goes some way to address the problems of culture and indeterminacy (see Appendix B). Its comprehensive list of best interests principles contains the language of rights for children as individuals and interrelated rights of families together. However, there is a gap in knowledge as to how these principles translate from law into practice.

The problems associated with the best interests concept outlined here provide some caution in assessing the legal construction of best interests applied in Victorian child protection proceedings. In particular, the individual positions and evidence put forward by the Department and parents cannot be presumed to be neutral versions of children’s best interests, or to represent children’s own perspectives and experiences of care. A central tenet of this research, therefore, is to question the legal construction of best interests in these proceedings. This includes how the concept might be shaped by subjective positions of various parties, lawyers, and magistrates, and the influence, if



any, children and young people might have as participants in these decisions that redistribute their care.

## **Debates about participation rights of children and young people in legal proceedings**

I have previously identified status and implementation as two aspects in my definition of participation. This part of the chapter considers three issues in participation of children and young people. First, intersections between best interests and participation rights are discussed with regard to the UNCRC. Second, the concept of due weight is considered. Third, debates about capacity of children and young people being granted and exercising participation rights are examined.

### **Intersections between best interests and participation rights in the UNCRC**

As my earlier discussion in Chapter Two about Article 3 and Article 12 foreshadowed, a strength of participation rights being present in the UNCRC is that any determination of best interests should take into account the child's opportunity to express views and give weight to their views (UN Committee 2009). The UN Committee's (2013, para.43) General Comment on Article 3 explains that best interests "cannot be correctly applied if the requirements of Article 12 are not met". If applied this way, the pairing of Articles 3 and 12 could be profound for moving on from seeing children as objects of adults' decisions and having inferior knowledge to adults, to understanding children as agentic beings with their own perspectives and experiences.

Participation is a potential remedy to redress the ability of adults to make determinations about best interests in ways that further oppress children and young people's perspectives about their own lives. Mathew et al. (2009, p.123) surmise, "to counteract notions of the adult knows best, participation by the child is central to ensuring their best interests". Protecting their welfare (best interests) and participation

rights are each reliant on the other in legal decisions. This means “adults may not know children's best interests without consulting them” (Alderson 2001, p.149).

Participation in best interests decisions involving allegations of abuse, the separation of a child from parents and alternative care are directly addressed in the UN General Comment on Article 12. There is no ambiguity: “the view of the child must be taken into account in order to determine the best interests of the child” who has experienced, or is alleged to have experienced, abuse or neglect (UN Committee 2009, para.53). This extends to children living in out-of-home care, for whom “the Committee’s experience is that the child’s right to be heard is not always taken into account by States parties” (para.54). The Committee recommends this problem be corrected (para.54):

States parties ensure, through legislation, regulation and policy directives, that the child’s views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.

These are some of the types of decisions that occur everyday in the Children’s Court.

### **Participation and ‘due weight’**

Article 12 refers to the application of due weight to children’s views in decisions affecting them. The UN General Comment (2009, para.28) states that due weight means to listen and communicate the way in which a child’s views have been seriously considered and have influenced the outcome of a decision-making process. Due weight reflects the interdependence of children’s participation and decision-making processes about their best interests.

Due weight can accommodate a spectrum of circumstances where a child or young person’s views should be wholly determinative of the outcome, through to a lower level of influence. Lee (2005 p.18) underlines how this is a “moderating” feature of Article 12 to distribute power and responsibility when participating in decision-making. Likewise, Hodgkin & Newell (2007) emphasise due weight is about involvement and influence in decision-making, not self-determination. The concept of due weight can

therefore be a remedy for concerns raised about children having too much power and responsibility. In the context of child protection proceedings, due weight ensures that final responsibility for the decision lies with the magistrate or collective participants if decision-making occurs by mediation or non-court processes.

However, Article 12 and its formulation of ‘due weight’ lean towards a hierarchical line of reasoning. Hierarchical reasoning applies in that as a child becomes older and more mature, less adult intervention is needed for a child to exercise their rights and decisions (Hart 1992; Lundy 2007; Wyness 2013a, 2013b). The caveat in this reasoning is that the adult decision maker permits participation so long as he or she is of the opinion that any consequence of a child exercising participation rights does not affect their development or adult future. This reasoning is characteristic of the ‘becomings’ conceptualisation of childhood in that it assumes rationality and autonomy are developmentally linear (James 2011; Lundy 2007). The flaw in the hierarchical approach is that the views of children can be unfairly excluded from being afforded due weight based on assumptions about age, autonomy and developmental capacity. Reinforcing this problem, Article 12 misframes participation rights for all children when taking a literal reading of its wording. As Archard and Skivenes (2009, p.17) point out, “the right to express [a view] is accorded only to the child who is capable of forming his or her own views”. The conditions of age and maturity for due weight can in turn be applied to rationalise exclusion or disagreement with the child’s views in decision-making. Children might have had something meaningful to offer in the decision but are denied that opportunity, leading to their negative experience of child protection intervention, to other adults not hearing their views, and to a compromise in the quality of decisions about their best interests.

### **Participation rights and capacity**

An intractable debate about whether children do or do not possess the requisite capacity for participation rights has occurred since the inception of the UNCRC (Lansdown 2005; Lopatka 2007). Despite the limitations of wording in Article 12 regarding a child forming his or her own views, the UN Committee (2009) was careful to point out that

access to participation rights should not exclude babies, young children or children who are unable or unwilling to express views from participation rights in decisions about their best interests. There should instead be “appropriate arrangements, including representation” in such circumstances (UN Committee 2009, para.44). This reflects recognition of a child or young person as having parity of status as a participant, regardless of the extent to which they actively take up participation. Irrespective of whether children can be assumed to have or not have particular capacities, “the incapacity to exercise a right is not necessarily a barrier to the recognition of the right itself” (Malempati 2014, p.212). Federle (1994) provides a critical analysis of autonomy and capacity as barriers to children’s rights. Tracing the history of human rights philosophy, Federle (1994) argues that constructing rights, including participation, as the purview of those who are rational, capable, and autonomous enables existing hierarchies between adults and children to be reinforced.

Despite being enshrined in the UNCRC and many domestic laws, participation rights in legal settings continue to be overridden by protective arguments that are coupled with scepticism about children’s competence (James & James 2004; Masson 2000; Robinson & Henaghan 2011). Protective arguments against participation typically invoke claims that participation gives children too much power and responsibility in decisions; participation undermines authority of adults, particularly parents; and children are not capable or autonomous enough to know what is best for them, so granting participation rights puts them at risk (Jones & Welch 2010; Krappmann 2010; Lundy 2007). Equivalent criticisms have been applied to children’s rights more broadly (Federle 1994; Guggenheim 2005; Purdy 1992).

The dominant developmental ‘becomings’ approach to capacity has created a narrow, hierarchical understanding of children’s capacity for participation, influenced by cognitive and Piagetian psychology, which emphasise standardised ages and stages of development (Burman 2008; Smith 2002). This places children and young people in a particular “conundrum”, because accessing their participation rights becomes “partly contingent on children demonstrating their capacity to be participatory citizens” (Lister 2007b, p.701). This problem is evident from the well-known House of Lords *Gillick* case (*Gillick v Wisbench and West Norfolk Area Health Authority* [1986] AC 112). Although the *Gillick* judgment endorsed children’s capacity to make risky medical

decisions without parental consent when younger than 16 years old, a high standard of autonomy and competence was established (Fortin 2009; Freeman 2001; James & James 2004). The *Gillick* standard refers to demonstrating sufficient understanding, knowledge and intelligence to make a decision in one's own best interests. A burden to demonstrate their own competence to participate can continue to be placed upon children at a standard that many adults would struggle to meet, even when they have qualified for participation because of a specific age threshold (Freeman 2001; James & James 2004; Lansdown 2005).

Reflecting the problems of becoming understandings in participation, research has demonstrated that children who experience disadvantage, abuse, disabilities or who are very young can be excluded because of being seen as not having capacity (Alderson 2010; Alderson, Hawthorne & Killen 2005; Franklin & Sloper 2005; Mitchell & Sloper 2011). This might be a weakness arising from the language of Article 12, in part because the broad qualifiers of "capable of forming his or her own view" and "age and maturity" for due weight can rationalise excluding children from participation. The possibility of exclusion is especially heightened when adults do not have a strong commitment to participation rights, or when adults have their own vested interests in denying children's participation as being for their own best interests (Lundy 2007).

Judicial officers and lawyers have been shown to make assumptions about capacity that undermine applying due weight to children's views. In New Zealand, for example, Robinson and Henaghan's (2011) analysis of 120 family law cases found that judges sometimes gave little regard to children's participation or applied weight to children's views, especially when 13 years old and younger. However, the overall frequency of almost three-quarters of judgments referring to a child's views was considerably high. Lawyers in the UK, Australia, and USA appointed to represent children have also been found to assume they do not have capacity for participation rights, especially when appointed to represent a child's best interests instead of a child's views (Federle & Gadomski 2011; Kaspiew et al. 2013; Masson 2000). These approaches to capacity are reflective of the becoming perspective, by seeing children as "less than adult" rather than considering how participation might be constructed together between adults and children (Haydon 2012, p.34).

Biological age limits have been applied in many jurisdictions as a strategy to manage assessments about each child's capacity to participate in legal proceedings. Lansdown (2005) identifies some advantages to using age limits as a presumption for capacity. It can offer a clear interpretation of legislation applied to types of representation for children of certain ages. It is cost effective for financially-limited legal aid services, so individual assessments do not need to be done for each child. Age presumptions may minimise adults' subjective judgements about capacity that could otherwise exclude children from participation. However, biological age limits are still subjective. This disadvantage is illustrated in the variability of age thresholds for children accessing legal representation in child protection proceedings in different countries, and between Australian states and territories (Duquette 2005; McNamee, James & James 2005; Monahan 2008; Ross 2008).

The relationship between building capacity and having opportunities for participation is overlooked in these types of concerns raised against participation (Alderson 2013; Lundy 2007). It is possible to bring participation and protection together rather than seeing them as separate and competing rights. This is evidenced from research showing that children and young people who experience particular vulnerabilities of disabilities, mental health and child abuse may have a corresponding potential for resilience and a sense of being valued when supporting their capacity with participation (Cavet & Sloper 2004; Oliver et al. 2006; Weisz et al. 2011). These studies suggest that the benefits of participating extend to the process of inclusion and support experienced by a child rather than only focussing on their views in a decision.

The importance of adults supporting children's participation is recorded in the results of Weisz et al.'s (2011) study. They found statistically-significant effects correlated with judicial behaviour and presence of a child at court. When judges asked questions about the case during the hearing, encouraged children, and engaged in conversations with children, this corresponded with many positive benefits for children. Children in these cases felt less upset in court and about sharing their preferences for their care, felt it was less difficult to talk to the judge in front of other people, and increased their legal knowledge and understanding of their case. Most children in the study reported that all children should be able to attend their hearings, including children who had not attended their hearing. These findings contest assumptions about participation being inherently

harmful for children in legal proceedings, but also emphasise the power of adults in constructing participation in positive ways so the experience is beneficial.

In the context of child protection proceedings, therefore, varying capacities and vulnerability do not necessarily exclude children and young people from exercising participation rights. However, attention needs to be given to how participation is legally constructed, and how adults engage in participation with children and young people. Responsibility lies firmly with adults, including through law, lawyers, and courts, to provide a safe, respectful, inclusive, and supportive context for participation.

### **Implementing participation rights in legal proceedings**

This part of the chapter examines literature about the types of representation available to children and young people in legal proceedings. The two most common models of direct representation and best interests representation are contrasted according to advantages and disadvantages for children. To reiterate, direct representation is distinguished by duties upon the lawyer to advocate for a child or young person's views. Best interests representation requires the lawyer to form an opinion about a child's best interests, but there is no obligation to advocate for a child's views. Research on family law proceedings about parental separation is included in this part given the limited research on participation with legal representation in child protection proceedings. Direct representation is discussed in the first section, followed by best interests representation in the second section.

#### **Direct representation**

Direct legal representation of children may assist courts to decide what the best interests of the child are through independent advocacy for children's expressed views (Elrod 2007; Khoury 2010; Ross 2008). For children and young people, direct representation may also account for their civil and legal rights in a context of power imbalance between children and parents and between children and the state (Khoury 2010, 2011).

Power imbalances can be magnified because children's rights are not necessarily covered by the opinions held by either the state or parents about their best interests, regardless of whether their rights interrelate or conflict with other parties in a particular matter (Federle 2009; Mandelbaum 2000; Taylor 2009).

It is argued that the direct representation model provides a stronger basis for children's participation rights than the best interests model, because of the obligation upon a lawyer to represent the child's views (Bilson & White 2005). This may better satisfy expectations children and young people have that any lawyer appointed for them will represent their views (Birnbaum & Bala 2009; Cashmore & Bussey 1994). Supporters of direct representation in child protection point out that it is the responsibility of adults to have a view about each child's best interests, especially social workers acting as the state, and judicial officers making decisions have this responsibility (Bilson & White 2005; Elrod 2007; Federle 1995, 2000). Consequently it should not be a requirement for a child to know their best interests in order to access direct representation. Instead, having a direct representative means that a child or young person's views may inform what constitutes their best interests according to the due weight and determination made by the judicial officer.

Concerns about direct representation have been raised, and these echo concerns raised about children's participation rights more broadly. Having access to a direct representative means children can manipulate or be manipulated by parents or others; gives children inappropriate power; puts children's rights in conflict with parents' rights; increases pressure on children; requires lawyers to advocate against children's best interests; and 'damaged' children are not capable of instructing a lawyer (ALRC 1997; Elrod 2007; Ross 2013; Victorian Law Reform Commission 2010). For example, the Victorian Child Safety Commissioner (2011, Bernie Geary, former Commissioner for Children) opposed direct representation for all children and young people because, in his opinion, they are unlikely to understand proceedings. While these concerns continue to be raised, there is a lack of local and international empirical work that has investigated the strengths and limitations of direct representation for children's participation rights (Bilson & White 2005).



The only large-scale review of legal representation of children and young people conducted in Australia across all areas of law raises concerns about the variability in quality of participation and representation (ALRC 1997). The ALRC conducted a national inquiry into children and the legal process under terms of reference referred by the Australian Attorney General in 1995. The Commission (1997, para.17.69) recommended “Where children are able to participate in the court process involved in care and protection matters, they may be able to understand better what is happening and why”. The ALRC (1997, para.1.30) also found:

- There is a consistent failure across institutions and legal processes to consult with children and young people and listen to them;
- Children and young people are marginalised in legal processes at all levels, including by social workers, lawyers, and judges; and
- State and territory child protection systems were in an “appalling” state and these systems perpetuate abuse of children.

The ALRC (1997, para.13.88) favoured direct representation whenever possible, with the threshold set by a child being able to communicate and express any views. A lawyer would act as a best interests representative in the absence of any views expressed by a child. In the Commission’s view, this dual approach would address the role confusion between models of representation, and circumvent the limitations of best interests representation on participation. As the ALRC points out, all lawyers still have a duty to the court, and their duty applies regardless of the model of representation.

### **Best interests representation**

Australian and English case law acknowledges that best interests representation can be a diminished form of participation, particularly when children’s views may be overridden or not actively supported by the representative (see for example *A and B v Children’s Court & Ors.* [2012] VSC 589; *Mabon v Mabon* [2005] 3 WLR 460). Empirical evidence indicates that some Australian lawyers representing children on a best interests basis in child protection and family law proceedings do not necessarily implement their

role in a way that accounts for children's views. In particular, lawyers do not routinely talk to children or, when they have spoken with children, they sometimes make submissions about best interests that are inconsistent with children's views (Kaspiew et al. 2013; Ross 2012, 2013). These problems have been identified in other jurisdictions too, and the reasons are multifaceted. Reasons include lawyers experiencing confusion about the roles of advocacy and best interests, lack of accountability upon lawyers to support participation, and perceiving children as incompetent (Federle 1995, 2008, 2011; Griffiths & Kandel 2000a, 2000b; Kaspiew et al. 2013; Masson 2000; Masson & Winn Oakley 1999; Ross 2012). A lawyer's supportive or negative attitude towards the participation rights of children has also been linked to issues with implementing best interests representation and direct representation (Cashmore & Bussey 1994; Kaspiew et al. 2013; Ross 2012).

A large-scale Australian study by Kaspiew and colleagues (2013) about Independent Children's Lawyers, who act as best interests representatives in the family law jurisdiction, identified three dimensions of practice: facilitating participation of the child; forensic investigation and evidence gathering; and litigation management, including being an honest broker to facilitate settlements. Kaspiew et al. (2013) found that Independent Children's Lawyers tended to place less significance on the participation dimension compared to the other dimensions, as did judicial officers and other professionals, although to a somewhat lesser extent. Family consultants or social science experts, who prepare a report, were instead seen as having primary responsibility for eliciting children's views. Lawyers' reluctance to meet with children, even for purposes other than children's views, stemmed from concerns about: children disclosing child abuse to them; that children already see multiple professionals during proceedings; protecting children from pressure and parental conflict; and their own skills in engaging with children (Kaspiew et al. 2013). However, as Kaspiew et al. (2013) point out, it is unclear whether parents and children themselves experience a one-off report with a non-legal professional as meaningful participation in this context. Qualitative research about mandatory family law mediation where parents received a report about their child's perspective, suggests this approach may not substantially improve the process or outcomes from the perspective of parents, although parental conflict or cooperation were likely intermediary factors (Bell et al. 2013).

The only previous research in Australia to examine both the views of children and lawyers about representation in child protection proceedings in New South Wales shows that lawyers undervalued children's participation rights (Cashmore & Bussey 1994). Cashmore and Bussey's research involved interviews or surveys with 20 lawyers and 30 children (seven to 14 years old). Lawyers tended not to act like a traditional lawyer when representing children, including not explaining court processes or confidentiality to children, and not advocating children's views. In contrast to variation in how lawyers perform their role, children in Cashmore and Bussey's study expected lawyers to act as their advocate and present their views. The lack of legislative clarity about the model of representation in NSW at the time likely added to role confusion for lawyers (ALRC 1997). Such disparity between expectations and reality would have undermined children's participation rights, instead of leading them to feel respected and fairly treated in the process and outcome (Taylor 2009).

A more recent Australian study with lawyers, also in NSW, by Ross (2010, 2012, 2013) reflects why a clear distinction between performing direct representation and best interests representation is needed to guide practice and contain negative personal attitudes towards children's participation. Using a comparison of 35 lawyers who were practising in child protection, family law, or youth justice, Ross found that the minority of lawyers supported participation and focused on the child and their family relationships (a relational approach). Those lawyers were more likely to be performing direct representation in the child protection or youth justice jurisdictions. By contrast, best interests representation was associated with a reduction in rapport between lawyers and children. Lawyers who were practising predominantly in the best interests model expressed less support for participation. Ross's findings suggest that a lawyer's attitude to participation might intersect with the model of representation to facilitate or constrain how they go about representing children.

Evidence for the marginalisation of children's participation when representatives are not required to be direct advocates comes from Masson and Winn Oakley's (1999) seminal study of children's participation with the dual model of a Guardian Ad Litem (GAL) and solicitor (instructed by the GAL) in England. A GAL was usually a qualified social worker who had authority to represent a child on a best interests basis and advise a child, investigate the case, advise the court, and give a report to the court. During 1996

and 1997, Masson and Winn Oakley conducted observations and interviews with 20 children and young people, along with GALs and solicitors.

Masson & Winn Oakley (1999) observe that GALs tended to gatekeep participation, including not supporting children's attendance at court when children wanted to be present, limiting access to information and reports, and not providing appropriate opportunities for children to share their views. Solicitors were often distant figures overall, having had limited communication with children and usually only with GALs present. Despite GALs and solicitors saying they placed importance on children's views in principle, in reality "the system delivers less than it promises" for participation rights (Masson & Winn Oakley 1999, p.146).

The problems identified by Masson and Winn Oakley (1999) when representatives represent children's best interests instead of instructions are reflected in Griffiths and Kandel's (2000a, 2000b, 2004) ethnography with lawyers and children in the Scottish lay panel system and New York State Family Court. New York lawyers mainly implemented their role with a welfare-orientated, best interests approach, even when children had given instructions. Children rarely had any representation in the Scottish system, requiring them to speak for themselves during the hearing. Lawyers or social workers acting as 'safeguarders' could be appointed to prepare a report about a child's best interests in Scotland, but these were uncommon. As well as indicating that the model of representation can dilute opportunities for participation, the findings of Masson and Winn Oakley's study and that of Griffiths and Kandel emphasise the importance of research recording how any representation is actually implemented.

Australian children in a small number of qualitative studies have reported positive and difficult experiences from being represented on a best interests basis by a lawyer in the private family law jurisdiction. According to Parkinson and Cashmore (2008), approximately half of the 13 children in their study gave positive reports about their lawyer when they experienced being listened to and had their safety concerns taken seriously. Other children have raised dissatisfaction with the quality of their best interests legal representation (Kaspiew et al. 2013; Parkinson & Cashmore 2008). In particular, some children reported experiencing best interests lawyers not respectfully listening to their views, not respecting confidentiality and not responding to their safety

concerns and abuse (Kaspiew et al. 2013; Parkinson & Cashmore 2008). For children and young people in the study by Kaspiew and colleagues, traumatic experiences and unsafe outcomes resulted from their best interests lawyer not having responded to their concerns about family violence, child abuse and safety with parents.

The problems identified in the body of research discussed in this part of the chapter lend support to Ross's (2013) and Douglas et al.'s (2006) conclusions that attitudes towards children and a professional's skills and sensitivity when carrying out their practice are important for supporting participation rights, not just the model of representation.

## **Implementing participation rights in Victorian child protection proceedings**

This final part of the chapter explains how children's participation rights can be implemented according to the CYFA and policies. The first section addresses the powers afforded to magistrates. The second section explains specific provisions for direct representation.

### **How magistrates might implement participation**

The CYFA obliges magistrates to safeguard participation of children and young people in the Children's Court decisions and to consider their views, despite not all children having formal status as a party to the proceedings. In theory, the Court should implement this three ways: via the best interests principles, the procedural guidelines, and providing access to legal representation.

The CYFA best interests principles reported in Chapter Two include giving "appropriate" weight to children's "views and wishes" if their views can be reasonably ascertained (s.10(3)(d), Appendix B). The obligation to apply due weight to children's views is a way for magistrates to account for children's participation rights. At the same time, judicial discretion is provided in the extent of any weight applied because other

best interests principles may affect the decisions. This research fills a gap in knowledge about the extent to which magistrates might apply discretion to children's participation rights in statutory child protection.

The procedural guidelines to be followed by the court allow for the broader qualities of children's participation rights. The procedural guidelines, introduced in Chapter Two, place obligations upon magistrates to inform children about proceedings and outcomes, and to allow their participation in decision-making processes. It is not known if or how magistrates do this for all children, especially given the gap in legal representation between younger and older children, and the policy limitations on children's participation in the courtroom. My study aims to fill this gap.

Finally, magistrates have power to make sure children and young people have access to legal representation. Access to legal representation for children and young people is not enshrined in the CYFA. Rather, the Children's Court is required to adjourn proceedings and not resume if a child, who is mature enough, is not represented (ss.524(1) & (2)). The Court can otherwise resume if a reasonable opportunity to obtain representation has not been utilised (s.524(3)). This part of the Act applies to magistrates ensuring children and young people have opportunities for direct representation.

Only magistrates have power to appoint a lawyer to represent a child or young person under the best interests model. Criteria in the CYFA (s.524(4)) permit best interests representation if the magistrate determines a child is not mature enough to instruct a lawyer and if there are exceptional circumstances. This situation contrasts with Australian family law where appointments for best interests representation are guided by a range of non-exhaustive criteria (*Re K* [1994] 17 Fam LR 537). In its submission to the VLRC Inquiry, the Children's Court (2010, p.61) acknowledged that the appointment of best interests representation was uncommon, reporting approximately 33 cases in three years since 2007. Victoria Legal Aid (2011a) has indicated that the frequency of best interests appointments for children has not changed significantly since then and there are no public up-to-date records of current numbers.

## **Access to direct representation**

The policies for direct representation come into effect following the obligations outlined above regarding how magistrates can ensure opportunities for children and young people to have a lawyer. An age threshold for direct representation was in place at the Children's Court at the time of fieldwork for this research. Direct representation was available for children and young people seven years of age and older in child protection proceedings, with a qualifier of plus or minus one year of age depending on maturity as assessed by the lawyer and Court.

This policy had a long history in Victoria. Lawyers have represented children and young people under the direct model since Mr Joe Gorman established the specialist service for children in the mid-1970s, with confirmation about a child's capacity provided by the Children's Court Clinic when necessary. Legislation supporting direct representation was formalised in the *Children and Young Persons Act 1989* (Vic.) (s.20(2)), for "a child, who in the opinion of the Court is mature enough to give instructions".

A policy specifying an age range for direct representation of children was introduced after the 1989 Act. By 1992 a protocol was in place between the Department and Legal Aid Commission (now VLA) supporting direct representation for most children (VLRC 2010, p.93). The policy required children to be provided with separate representation "if a child is mature enough to give instructions (usually age seven or more)" (Fogarty 1999, p.[1]). This became "if the child is over the age of seven and mature enough to give instructions" from June 1997 (Fogarty 1999, p.[1]). The age threshold of seven years, plus or minus one year, was also supported by updated clinical advice provided by the Children's Court Clinic to the Court when the CYFA became operational in 2007 (Children's Court of Victoria 2010, p.60). However, the majority of children who are younger than seven years do not have any legal representation because of the combined effect of the age threshold for direct representation and exceptional circumstances required for a magistrate to authorise best interests representation.

In theory, direct representation and the obligation to act on instructions mean that a lawyer can be a conduit for the views of a child or young person in child protection proceedings. The additional qualifier of “so far as it is practicable” in the CYFA (s.524(10)) creates some discretion and flexibility in how lawyers might perform that role in conjunction with each child’s situation. Likewise, the extent to which a best interests lawyer accommodates the strength of any views of a child is discretionary, but they are obliged to communicate a child’s views to the Children’s Court “where practicable” (s.524(11)) under the Act. There is no empirical evidence about how this occurs in practice from research observing lawyers performing representation with children and young people, or the consequences of lawyers’ practices for judicial decisions in child protection proceedings. Reflecting on the right for children to participate in child protection proceedings under the various legislation across Australian states and territories, and the need for separate legal representation, the Child Rights Taskforce (2011, p.8) said, “there has not been any evaluation, however, of the extent to which children do actually participate as provided for under these provisions”. This research makes a contribution to addressing these gaps in knowledge about legal practices with children and young people.

## **Conclusion**

The challenge posed by Fraser (2009, p.58) is “What sort of theorising could simultaneously valorise expanded contestation and strengthen diminished capacities of adjudication and redress” of injustice? I aim to do this by questioning the application of law in children’s participation rights; challenging the boundaries of law to reveal strengths and limitations; and looking for possibilities of redress in the practices of recognition, redistribution, and representation through lawyers and magistrates within the governing structures of the child protection system. Justice for children’s participation rights was by no means resolved with the UNCRC, and child protection law continues to be a site for contestation. However, the law and its implementation by professionals also holds potential for addressing injustices for children.



This chapter has shown that knowledge about participation rights of children and young people in many social settings has progressed over time, especially as the UNCRC continues to be influential. Despite these advances, there is a gap in knowledge about how children's participation rights are applied in contemporary child protection legal systems, particularly with empirical evidence that is sensitive to children's experiences and to how adults shape participation. In Australia there has not been any published research observing how children's participation actually occurs in child protection legal proceedings and the ways in which legal professionals—lawyers and magistrates—respond to children's participation rights.

The literature reviewed in this chapter and development of my theoretical framework have established a foundation for the three research questions:

1. How are participation rights of children and young people legally constructed in the Victorian Children's Court statutory child protection proceedings?
2. In particular, what influences, if any, does legal representation have on a child or young person's participation?
3. How do magistrates respond to participation rights of a child or young person when determining his or her best interests in these proceedings?

The next chapter discusses how the research was designed and conducted and presents a description of the samples achieved.

## **Chapter Four**

### **Research methods and samples achieved**

The research utilised a mixed-qualitative approach comprised of two studies. The first is an ethnography, principally using participant observation with lawyers and children. The second study is a content analysis of Children's Court case files and written judgments. Mixed-methods research is advantageous for understanding patterns in social phenomena, while also qualitatively exploring the meanings behind those patterns (Bryman 2008; Darbyshire, MacDougall & Schiller 2005). A single method could not achieve the same result. In this research, multiple sources of data provide a unique, rich, in-depth picture of the Victorian child protection legal system and how participation rights are implemented with children and young people from the beginning of a case through to the highest level of judicial decision-making.

This chapter explains the research methods, how they were conducted and the achieved samples. The first part provides an explanation of the research methods. The second part explains how the research commenced, followed by a detailed description of the ethnography in part three and case file study in part four. De-identification is reported in part five. Part six provides an overview of the samples achieved from each study, including legal representation of children, protective concerns, types of maltreatment alleged and children's care arrangements. More detailed tables describing the samples are provided in Appendix G.

#### **The research methods**

Ethnography and content analysis of documents each have a long history in sociological studies of law and legal institutions (Banakar & Travers 2005a, 2005b; Cotterrell 1998; Flood 2005; Smart 1989). Ethnography in legal institutions complements content analysis of legal documents because it offers an insider's perspective about the context in which those very documents were produced and used. For my research, this

combination of methods enabled insights to flow reciprocally from one study to the other. Although I describe my ethnography and case file studies separately, these were conducted concurrently, and I experienced them as a holistic piece of research.

Creswell's (2013) characteristics of qualitative research methods are evident in my research. Creswell (2013, p.45) describes the "researcher as a key instrument" in the setting of qualitative research. My research was conducted in a 'natural setting', being the Children's Court, and sometimes other environments where lawyers met with children. This means the site of the research and my long-term presence within it was also where participants experienced the social problem being studied. Inductive reasoning is another characteristic of qualitative research identified by Creswell (2013) and others (Murchison 2010; Neuman 2006) that also applies to my research.

Knowledge generated through this research emerged gradually by building patterns and themes from the ground up as fieldwork unfolded over time. Using inductive reasoning and being a "key instrument" in my own research demanded a high degree of reflexivity (Creswell 2013, p.45). This was compatible with the emergent character of my fieldwork, which required me to adapt my research methods and focus of inquiry as unforeseeable challenges and institutional barriers were revealed in the field.

Inductive reasoning and reflexivity were exemplified in my responses to the two major inquiries into the child protection system that occurred during my fieldwork. The VLRC Inquiry was due to report just as my fieldwork commenced in the Children's Court. Then the PVVC Inquiry began a short time after. Reflecting on my experience inside the Children's Court and the controversial inquiries, it became clear to me that debates about whether or not any legal representation was appropriate for children were occurring without empirical evidence about what might actually be going on between lawyers and children. This reflection led me to focus more closely on questioning the construction of participation for children, and to move away from my original research focus about the construction of children's best interests.

Creswell (2013) describes ethnography as both a process and an outcome of research. The process aspect refers to a researcher being immersed in the day-to-day happenings of the particular setting in which they are located. That process then becomes a written product that contains insights drawn from the researcher's own experience of having

been through the process. Flood's (2005, p.33) reflection on ethnography also articulates this intersection of the researcher's position: "Ethnography makes us simultaneously stand inside and outside the *mise en scène* as we research". This is the main strength of ethnography because it offers a means to be an insider to events in action while holding an empirical position. Ethnography produces rich data, including language, nonverbal expressions and behaviour, descriptions and documentation of the environment. Although this is an advantage over retrospective interviews, this makes ethnography time-consuming and intensive research (Creswell 2013).

### **Ethnography, consent, and participation of children**

My decision to conduct ethnography was informed and developed through referring to social science literature on the ethical conduct of ethnography and other research involving children (Carnevale et al 2008; Crang & Cook 2007; Edmond 2005; Graham & Fitzgerald 2010; Greig, Taylor & MacKay 2007; Hill 2005; Hogan 2005; Mudaly & Goddard 2009; Thomas & O'Kane 1998b). Participant observation was carefully selected as a suitable method that could be sensitive to children's status in the Children's Court context because of its significant advantages as a research method. In terms of managing participant risk, there is no experimental manipulation, therapeutic intervention or deliberate deception involved. On the other hand, management of the researcher's presence and conduct is necessary to minimise imposing on participants. While having an adult present in this way is unfamiliar, it does not require children to perform tasks or unfamiliar activities for the purpose of research as other methods can (Edmond 2005). This is also less intrusive than asking children interview questions, particularly in highly-sensitive, time-limited situations (Edmond 2005).

Participant observation offered a way to understand as closely as possible how participation with legal representation happened for children and young people, while weighing up possible participant burden. The process was also designed with regard to the views of stakeholders about minimising the risks of the research for children. As a result, I did not ask children formal interview questions during the ethnography. This limitation means I was not able to use a research design that was more directly

participatory with children (Beazley et al. 2009; Fattore, Mason & Nixon 2005; Thomas & O’Kane 1998; Wood 2005). I therefore cannot speak directly to their personal experiences of child protection proceedings and participation in ways that interviewing children might have elicited. For example, interviews would have enabled me to ask children what they thought about their lawyer, how satisfied they were with being represented, and what they thought could be done better for children’s participation. However, the research does provide insights from observing their interactions with lawyers, what children said and did with their lawyers, and perspectives from lawyers who have experience in representing children and young people over a long time. The quotes from children and young people are recorded from their conversations with lawyers, not conversations with me. I also openly shared my fieldwork notes with children and young people multiple times when they took up my offer to see what I was writing in my fieldwork diary. Although my own interactions and conversations with children are not part of this data, having got to know them over a period of time and having witnessed their experiences inevitably influenced my sociological lens.

The design and application of a consent procedure for children and young people was carefully considered with regard to previous literature discussing experiences of ethical research with children in socially-sensitive contexts (Abebe 2009; Beazley et al. 2009; Campbell 2008; Carnevale et al. 2008; Chamberlain et al. 2009; Graham & Fitzgerald 2010; Heath et al. 2007; Miller, Drotar & Kodish 2004; Morrow 2008; Mudaly & Goddard 2009). As well, I received advice from the Children’s Court, VLA, and the Department of Justice and Swinburne Human Research Ethics Committees. In particular, there are tensions between whether children are giving meaningful consent or assent to participate in research. Consent involves understanding information, opportunities to ask questions and voluntariness, with a clear moment in which the participant can agree or refuse (Alderson 2012; Miller, Drotar & Kodish 2004; Morrow 2008). By comparison, assent is a less strenuous form of agreement. Assent does not require as much information to be communicated, and has less legal standing as a valid agreement by having a child indicate their preference, though typically with a parent as the source of consent (Alderson 2012; Dockett, Einarsdottir & Perry 2009; Miller, Drotar & Kodish 2004). Assent can also be taken from the absence of refusal to participate rather than requiring a clear signifier of affirmative agreement.

This literature and the advice from the Children's Court, VLA and ethics committees resulted in verbal consent being the preferred process for two main reasons: meaningful consent and safety. My approach of explaining information about the research in a verbal form was intended to increase the likelihood of children giving their genuine consent (see information script, Appendix D). The use of verbal information and consent was also intended to make the process of consent as child friendly, comprehensible and accessible for children as possible. Clear verbal information was deemed preferable to giving children more written information to read under what were already stressful circumstances. Verbal consent also responded to the time-sensitive context for children at the Children's Court, because their needs for legal representation and the proceedings must have priority over any research. This was comparable to previous research with children in hospital settings (Chamberlain et al. 2009).

Previous research involving children and young people in sensitive circumstances, where parental consent was not required for participation, also pointed to verbal consent as a safer process for children (Hopkins 2008; Horrocks & Blyth 2003; Rew, Taylor-Seehafer & Thomas 2000; Rosenthal, Mallett & Myers 2006). In terms of children's safety and verbal consent, providing a written information form to children was assessed as likely to generate risk for them if the form were taken home. For instance, a parent or caregiver could have questioned a child about the research and what they said. Not retaining a signed consent form reduced the risk of collecting identifying information tying the child to the research, providing another measure to protect privacy, anonymity and confidentiality. For these reasons, verbal consent was also preferred as a safer method by both the Swinburne and Department of Justice ethics committees when the research was proposed.

Another safety feature of verbal consent was linked to the research being exempt from parental and Department consent for children. In most research involving children, parental consent is a requirement, except in exceptional circumstances as indicated in the National Statement on Ethical Conduct in Human Research (National Health and Medical Research Council 2007). Consideration was given to the issue of parental or Departmental consent for participant observation with children. The ethics committees for this research granted an exception. Consultations with VLA and experts in the field of child protection made it clear that parental consent was a sensitive issue, because a

parent may not have custody or guardianship of the child, or their custody and guardianship might be under investigation. Seeking parental consent under these circumstances could undermine the position of the child as an alleged victim of, or person at risk of, harm in relation to their parents. Furthermore, lawyers do not, nor are they required to, seek consent from a parent, custodian, or guardian—including the Department—to meet with a child. Lawyers do not usually permit a parent or guardian to be present, even if the parent or guardian wants to be present, because of legal conflict and pressure placed on a child. Seeking parental or Departmental consent presented a disruption to this practice for lawyers, and could have risked their lawyer-client privilege with a child. The role of lawyers being trusted as gatekeepers and assessing the suitability of participant observation is discussed further below.

### **Content analysis of legal documents**

Content analysis of legal case files and judgments provides an approach to systematically identify the presence of concepts and meanings recorded in those documents (Banakar & Travers 2005b; Sproule 2006). This is distinguished from legal doctrinal analysis in which legislation and case law are analysed for patterns in legal categories, rules and interpretation of the law (Hutchinson & Duncan 2012). In doctrinal analysis, there tends to be an emphasis on jurisprudence, whereas my sociological lens aims to question how and why a particular law comes to be implemented by the professionals within a legal system.

I have studied the case files and judgments as empirical indicators of how the law, and the magistrates who apply law, construct meanings about children as participants in child protection proceedings (Banakar & Travers 2005a). The decisions made by magistrates in the Children's Court are analysed in relation to if, how and why they respond to participation of children and young people when deciding what outcome is in their best interests. This enables an analysis of understandings and assumptions magistrates use in their judgments, not just the law.

## **Beginning the research**

The sensitivity and complexity of this research meant that an extensive process of negotiating written agreements with stakeholders and approval from ethics committees was required. This process took almost one year to complete. I approached the Children's Court of Victoria and VLA early in the development of my research proposal. This enabled both stakeholders to assess the design of the research and give feedback about the suitability of the method, operational issues, resourcing and ethical requirements. Written support was granted from both stakeholders prior to applying for approval from Swinburne University and the Victorian Department of Justice Human Research Ethics Committees.

Swinburne University conditional ethics clearance was granted on 6<sup>th</sup> January 2011 (SUHREC Project 2010/294). Clearance from the Department of Justice was subsequently granted on the 16<sup>th</sup> February 2011 (Reference CF/11/1047) (Appendix C). The Swinburne University Human Research Ethics Committee then finalised approval for the research after Department of Justice clearance. The final design and completion of the research was consistent with both stakeholder agreements and both ethics committee approvals. This research must also comply with the CYFA (s534(1)). In addition to the usual ethical responsibilities, I have a legal responsibility to protect the identity of a child who is, or has been, the subject of statutory child protection proceedings. This includes the particular venue of the Court, a child or any party to the proceedings, and any witnesses to proceedings. Penalties apply for failing to adhere to this law.

I commenced fieldwork at the Children's Court in March 2011 after ethics approval was granted, and concluded my time there at the end of March 2012. Some months were spent learning the court system, beginning the case file study, forming relationships with lawyers and court staff and preliminary observations. The first participant observation with a lawyer and child occurred in August 2011. During my time at the Court, I was given access to a desk and computer for two to three days per week, depending on the availability of resources. Being physically based inside the Children's Court was necessary for both the ethnography and case file study. For the ethnography, I needed to be present at the Court for participant observation with lawyers and



children. Being at the Court meant I could negotiate observations when new cases commenced and when cases I had previously observed returned for further hearings, either because of a scheduled mention or unexpected breach application by the Department using emergency removal. For the case file study, it was necessary to work inside the Children's Court Registry because the computer records and files were located there.

My presence at the Children's Court meant I became an insider member of this institution instead of a distant observer (Crang & Cook 2007). Being an insider member involved witnessing events and the daily life of the Court while also participating in that daily life as a researcher. Observer status in organisational settings has in the past required an emotionally-distant, neutral researcher for legitimate data collection (Ramsey 1996). However, conducting research for an extended period of time within a complex environment and in close relation with people inevitably meant that emotion was part of the fieldwork. "Critical sociological empathy" goes some way to describe my experience of navigating my position as a researcher, as well as personal emotional labour (Warming 2011, p.45). Warming developed this concept in relation to her experience of ethnography with children. She described being reflexive about her emotional experiences with children and her reactions to the childcare setting in which her ethnography was situated. For Warming, this provided a way to have analytical insight into the events.

In the context of my own research, I experienced critical sociological empathy as being reflexive about my experiences and emotional reactions, holding a sense of empathy for those I engaged with, and attempting to keep a critical researcher lens over events and information. Being an active participant in the Children's Court meant that compassion and vulnerability were shared at times, along with the challenges of working together in an emotionally-stressful, human, resource-limited environment. There were tears shed, frustrations expressed, and joys experienced—alone and with lawyers and court staff. It was understandable that emotions could overflow with such high stakes happening day after day for staff, lawyers, children and their families, and I also experienced this first hand.

A dilemma I experienced during my fieldwork illustrates my experience of critical sociological empathy. Sometimes a lawyer was called urgently into the courtroom on another matter while they were meeting with a child. There were also occasions when a child did not have a family member or Department practitioner available to wait with them for a period of time at court, especially when their case was being heard in the courtroom, but he or she was not permitted inside. Under these circumstances, a decision was made between the lawyer and child that I would sit with the child to keep them company. The lawyers and I decided the risks of harm for a child being alone at court were worse than the risk to the research of having me volunteer to sit with the child for a period of time. Furthermore, I felt it would have been immoral for me to walk away and leave the child alone while I continued observing their hearing.

I initially felt anxious about waiting with children, and was anticipating that they might be distressed. In contrast, this experience gave me insight into the boredom some children experienced because there was a lack of child-friendly spaces available to them. Most children wanted to play outside somewhere, have access to a gaming device (Game-Boy or my iPhone) to entertain them, or were content to talk about sport, television shows and other interests. Critical sociological empathy encouraged me to rethink my adult-centred anxiety and protectiveness, and instead see the practical problems of excluding children from court spaces and inadequate design of the court environment according to a child's perspective. The actual conversations I had with children in these instances did not form a part of my data, which was consistent with ethical approvals, but they clearly influenced my sociological lens.

## **Doing the ethnography**

Conducting a quality ethnographic study requires support from gatekeepers and key informants (Creswell 2013; Murchison 2009). Negotiating institutional support for the research from the Children's Court and VLA was one way I cooperated with gatekeepers. Building honest, transparent, and trusting relationships with gatekeepers inside the court environment formed another stage of the study. I gradually got to know the administrative staff, who allocated cases to lawyers at the Court. I also formed

relationships with key informants within the professional body of lawyers who worked in the Children's Court. These relationships were vital for me in understanding the field and to access participants, but were also important in providing the opportunity for gatekeepers and key informants to get to know me. Birch's (1998, p.172) stage of 'being there' in ethnography applies to this aspect of my experience. Being there occurs as relationships build in the 'other world' being researched, while one also forms an identity of being the researcher participating in the field.

### **Consent: Lawyers and children**

Lawyers were trusted to be the gatekeepers, both in terms of their own consent for participation and using professional judgement to decide whether participant observation was appropriate with children. The process of negotiating participant observation with lawyers and children involved a number of stages. This process was developed in consultation with VLA representatives to account for the court environment and the constrained timeframe available to lawyers and children to meet at the Court, even though some observations took place off site at a lawyer's office or cafe.

I used two strategies to recruit lawyers and cases with children. First, I spoke with the VLA paralegal on duty at court in the morning if there were any new Department applications or returning cases with children or young people of an age likely to mean they would have legal representation. If so, I waited to see which lawyer was allocated the case. I then negotiated with the lawyer for initial consent to observe. The second strategy involved a lawyer approaching me when they had a case they thought might be suitable for my research, either as a case study or participant observation with a child. This second strategy evolved as the fieldwork progressed and lawyers got to know me. A written information statement was provided to lawyers as well (Appendix D).

Verbal consent for lawyers was appropriate in this research for the purposes of minimising risk to their anonymity and confidentiality. This reasoning was also applied by Gillingham (2009), who used only verbal consent with child protection social workers in his research located in Queensland. Lawyers who work in child protection

proceedings at the Children's Court form a small and identifiable sample pool. Using verbal consent rather than retaining a written record of the lawyer's name and signature reduces the identifiable documentation that would connect them to the project.

The process of consent was procedural rather than a one-off event, because there were multiple points at which the appropriateness of participation and consent could be renegotiated or withdrawn with lawyers and children (Carnevale et al. 2008). The gatekeeping performed by lawyers meant that an assessment of the suitability of participation observation with a child was undertaken before going through the verbal consent process. Gatekeeping this first stage of consent invariably meant that some children never had the opportunity to participate, even if they may have been interested, because their lawyer did not feel it was suitable. However, a positive aspect of this gatekeeping was that the risks of participation were shared to some extent with the lawyer, by trusting their expertise and experience in assessing the circumstances of each case.

The next phase after a lawyer agreed to participate was to go through a verbal consent process with the child, if the lawyer considered participant observation was possible as opposed to doing a case study just with the lawyer. A lawyer first spoke with the child alone to see if participant observation was suitable, sometimes before or after introducing me. During that conversation, the lawyer explained the following:

There is a university student working with us at the moment who would like to sit in on our meeting. Her name is Briony. She is interested in finding out about what happens between children and lawyers in these situations by seeing us talking together. You don't have to say yes. This will not have any effect on your case. You can tell her to leave at any time. Would it be ok with you for Briony to come in and tell you more about what she is doing?

Participant observation would not proceed at this point if a child or young person declined or expressed any uncertainty. If the child agreed, the lawyer brought me into the meeting room or otherwise indicated to me to approach. I then introduced myself and explained my "project" in more detail based on the information script (Appendix D).

The process for recruitment and verbal consent often happened many times for each observation that was completed. In one case a foster mother was present and also gave her consent (case 294). Observations were terminated and all data deleted if a child or lawyer withdrew consent. For example, this happened when one sibling consented and the other sibling did not, and the same lawyer was representing the siblings together. I also ceased participant observation on two occasions when new disclosures of sexual abuse occurred during observations. This process for withdrawal of consent was in line with ethics approval. It was intended to be respectful to lawyers and children and responsive to my risk of being subpoenaed as a witness. It also meant that children and young people had the final say and exercised their power to verbally consent or refuse participant observation at any time.

A potential for sample bias with lawyers was a limitation of the ethnography. It was possible that only more competent, experienced lawyers volunteered for the research. This is reflected in the fact that almost all of the lawyers who participated had five years or more experience practising in the Children's Court. However, I did achieve a cross-section of lawyers in gender, age, private practice, legal aid employees, solicitors and barristers. Another compensation for potential sample bias is that it would have been difficult for lawyers to consciously maintain only positive impressions with me given I was present for a year at the Children's Court.

Another limitation of the ethnography is that I was unable to observe formal alternative dispute resolution in the form of Dispute Resolution Conferences and New Model Conferences (Conciliation Conferences). Such observations would have required consent from the mediator, parents, the Department, legal representatives and any other participants. I deemed this to be out-of-scope from my ethics approvals.

### **Ethnography data: Recording, analysis and writing**

Ethnography data were collected using a fieldwork diary and a 'case form' to track each case observed (Appendix E). On the whole, participant observation involved shadowing lawyers as they were allocated a case; prepared the case; met with the children at Court or off-site; conducted negotiations with the Department, parents or other parties; and

presented inside the courtroom. I was also able to observe some contest hearings with cross-examination of witnesses. During participant observations, I recorded what the lawyer said and did. I was able to ask them interview questions on the go and at the end of the fieldwork. I made notes about their language, behaviour, and how lawyers acted on children's views during negotiations and in court. I also carefully made observational notes to record children's verbal and nonverbal expressions while with lawyers. However, sometimes fieldwork notes were written immediately after an observation with a child so as to enable more informal and relaxed interactions, and to avoid the child feeling I was scrutinising them. Note-taking was a fine art, with the need to record vital information while simultaneously responding to my position as a participant integrated into social interactions (Creswell 2013). Finally, I collected data on the progress of the case where this information was available (e.g., types of orders, conditions attached to orders, changes in a child's residence, and protective concerns).

Most of the lawyers who participated in the research took up my offer for them to review their individual data prior to analysis. This process had a positive effect on the fieldwork, as well as providing a type of data checking (Murchison 2009). Lawyers used the opportunity to correct some of my fieldwork notes and elaborate about their work on particular cases. Sharing fieldwork transcripts also provided me with an opportunity to discuss cases with the lawyer, who could answer further questions I had. For example, sometimes a lawyer would add information about a case and give a longer written response to a question I had asked on-the-go. This process of 'member checking' improved the validity and reliability of my data (Creswell 2013, p.252). It also supported my credibility as a researcher in the eyes of lawyers and the credibility of the research produced. This practice reflected my ethical aim as a researcher to represent participants honestly, fairly and inclusively.

Reviewing my data during the fieldwork resulted in lawyers gaining some benefit from participation. Many lawyers gave me positive feedback about having reflected on their own practices and having insights, particularly by seeing their conversations with children recorded on the page and the language they use. This approach also enabled some problems to be identified and solutions sought in a timely way. For example, partway through my fieldwork I identified a problem with some children meeting with more than one lawyer over a period of time, which I refer to in the findings as

discontinuity of legal representation. Feedback to VLA representatives and private practitioners resulted in changes to court rostering practices and information sharing, so that continuity could be improved for children. This reflects how research could act as a positive intervention to the extent that improvements were facilitated for lawyers' practices and children's participation.

Lawyers were given an opportunity to provide written feedback about the study and their experience of participation. Their comments were wholly positive, as exemplified by Vanessa:

Briony, you have been great. It has been a breath of fresh air having someone independent hopping in a fishbowl that is often misunderstood. I know the few of my clients who have had contact with you to assist your research have felt heard and not simply seen and that is so important in this jurisdiction.

The length of time for my ethnography fieldwork responded to events at the Children's Court. I found that many of the cases that I had been observing for the ethnography during 2011 began to return for further proceedings over the Christmas period, and into 2012. Extending the fieldwork time ultimately benefited my research, because I was able to follow changes in these cases, and observe changes in children's participation. Disbanding the VLA Youth Legal Service was another event that affected my fieldwork timing. Some of the lawyers who were participating in the ethnography moved to a different division of VLA. This disrupted my recruitment and observation of lawyers. In addition to the pressures surrounding the PVVC Inquiry, the loss of the specialised Youth Legal Service negatively affected lawyers' morale, and that of the court community, who held concerns for the impact upon services to children and parents at the Children's Court.

### *Writing and Ethnography*

Writing up ethnographic studies is complex because of the volume of highly-detailed data, combined with having a position of being present in the data as a participant (Birch 1998; Creswell 2013). I used a combination of Excel spreadsheets and Word documents to transform my fieldwork diary and case forms into data for analysis and

writing. Spreadsheets recorded an overview of each lawyer who participated and each case I collected data about, including demographic information, dates of events, numbers of observations, location, types of decision-making processes, and court orders. I also developed a Word document for each case and the lawyers involved in the case, as a type of individual case study story.

My writing style for the individual case studies reflected a combination of the “plain” and “enhanced” approaches (Humphreys & Watson 2009). The plain approach means to write as close as possible to a straight witness statement, whereas the enhanced approach allows for recording narratives of ‘this is more or less what happened’ (Humphreys & Watson 2009, p.43). My approach meant there was minimal manipulation of data from my fieldwork diary, while also recognising that I was present in the narrative as a participant observer whose own perceptions and attention inevitably filtered what was recorded. I wrote the case studies so as to capture short quotes from lawyers and children, longer quotes written by lawyers in response to my questions, chronological events, my descriptions of observations, and reflections. This enabled me to analyse my data during and after fieldwork for emergent themes across lawyers, and to compare cases with children and young people for similarities, differences and pertinent themes.

### **Doing the case file study**

Conducting fieldwork within a resource-constrained institution usually presents many unanticipated challenges for researchers. Collecting data for the case file study was a slow and complex process. The process of identifying and locating cases with a written judgment for my sample was a significant challenge. During consultations with the Children’s Court, I learnt that cases that reach a final contested hearing with a partial or full decision made by a magistrate are the only cases to have a written judgement. Upon commencement of fieldwork at the Court, I immediately met with senior Registry staff to develop a way to collect data from the contested cases.

An unexpected hurdle upon beginning fieldwork was the discovery that there was no facility in the Court’s computer record system to identify cases that reached a final



contested hearing and written decision. The Children's Court has a basic computer program (designed by one of the tech-savvy magistrates during the late 1990's), but it has never been funded to update to a modern system. The main record keeping for every case occurs through a hard-copy file where orders, department reports, and Children's Court clinic assessments are supposed to be held.

In consultation with senior court staff, it was decided that the only way to identify a case file sample would be to manually read through the daily lists for the last three years. The daily list is a piece of paper produced each day of cases listed for a contest hearing—similar to a diary. I then trawled through the computer records using the child's surname from the daily list to eventually match the name with the date of the final contest hearing from the daily list. Next, I searched for the file in the Registry compactus. I learnt how to locate and re-file cases to reduce the research burden on Registry staff.

Unfortunately, I discovered that some decisions were missing from files, and some files were not available from the Registry at all. These problems were caused by a number of human error issues, including a copy of the original judgment not having been put in the file; lost files being replaced with a duplicate of orders, though original documents were irreplaceable; files held at a different court location; files incorrectly filed in storage; and magistrates not having returned files to the Registry after use. Problems with missing information and files were brought to the attention of the Court, and some changes to filing practices of Registry staff occurred as a result. Again this reflects the potential for positive intervention by researchers in the field. With support from the Children's Court President, the court staff and I negotiated with some magistrates to obtain a copy of their written judgments where possible.

Given the limited number of cases reaching a final contest hearing, and limited availability of written judgments per year, I adjusted my target sample to collect three years of case files rather than a single year. In total I examined 152 case files representing July 1<sup>st</sup> to June 30<sup>th</sup> for 2008-2009, 2009-2010 and 2010-2011 (the most recent reporting year at the time of commencing fieldwork). I entered cases into an Excel spreadsheet during the fieldwork as a strategy to collect and de-identify the data simultaneously. It took many months longer than anticipated to satisfactorily collect

data. The case files and judgments varied widely in length and number of documents as well as containing highly identifiable information about families and professionals involved in each case.

### **Analysis of cases files and judgments**

I found the Excel spreadsheets developed during data collection to be inadequate for extracting themes, frequencies and cross-tabulations for analysis. I also needed a way to move between ‘child’ and ‘case’ as units of analysis when looking at patterns of legal representation in cases involving siblings. I developed an IBM SPSS Statistics file to correct this problem and used the software as a tool in a similar way to Nvivo (a qualitative data software tool). I converted the content of the Excel spreadsheet, and created additional categorical variables to capture themes from my readings of the judgments. This resulted in 143 variables covering child and family demographics, matters applied and decided in the contest, case history, children’s care and contact arrangements before and after the decision, the Department’s and parents’ claims, court orders, protective concerns, protective grounds, children’s views, and magistrates’ references to the CYFA (s.10) best interests principles.

Wide variation in the length and format quality of magistrates’ judgments presented another challenge to data collection and thematic analysis. Judgements ranged from less than two pages up to 137 pages. Magistrates could write up their unpublished judgments in any way they chose. There were no conventions regarding how judgments should be structured or formatted. The content of written judgments thus represents a mediated document containing what magistrates have chosen to record from parties, evidence and witnesses during the hearing, and what they attended to in forming their decision.

The challenges outlined above eventually led me to again focus exclusively on the most recent 2010-2011 case file sample for the purpose of writing up this research.

Narrowing the sample enabled me to retain my SPSS work while conducting a deeper thematic analysis of each written judgment. The total data nevertheless constitutes the whole population of cases with a finalised contested hearing from 1<sup>st</sup> July 2010 to 30<sup>th</sup> June 2011.

## **De-identification of samples**

I used two strategies in the process of de-identifying the ethnography and case file data. First, I used a random number generator with a range between 100 and 500 to assign a case identification number to each ethnography case (n=50) and each case file (n=50). Second, I used pseudonyms to replace the first names of lawyers and children. I then randomly assigned names, regardless of the gender of the participant, to the extent that it did not change the meaning of findings. An exception to this process was made for a case in the ethnography sample that was appealed in the Supreme Court of Victoria. Given that the Supreme Court already de-identified the children in the case as 'A' and 'B', I kept the first letter to avoid confusion when referring to the case in my data as 'Aisha' and 'Bree'. Appendix F contains tables reporting the pseudonyms used for lawyers and each sample of children and random case identification numbers.

The remainder of this chapter will provide an overview of the final ethnography and case file samples upon which the findings chapters are based.

## **Achieved samples and frequencies**

The ethnography and case file samples represent a large number of children and young people over almost a two-year period of the Children's Court. The case file study focuses on all cases that reached a final contested hearing with a magistrate from 1<sup>st</sup> July 2010 to 30<sup>th</sup> June 2011. The ethnography cases come from a range of proceedings between August 2011 and March 2012. This meant there was only a small crossover in cases between the two samples: a case involving one child with best interests representation (Connor, 5 years & younger, case 245), and a case with one young person who had direct representation (Josie, 14 years & older, case 317).

Lawyers also form different samples in the ethnography and case file studies. Though I was not able to identify the lawyers who represented children in the contested hearings that gave rise to case file study, due to lack of access to that information, these would

have been barristers rather than solicitors. Solicitors engage barristers for contested hearings in the Children's Court. By comparison, most lawyers who participated in the ethnography study were solicitors. Together the studies represent the work of a broad spectrum of lawyers who work in the Children's Court.

The first section below outlines the final ethnography sample of lawyers, children and cases. The case file sample of cases and children is reported in the second section. The third section provides detail about the frequency of legal representation in both studies. A summary of protective grounds, Children's Court orders, and care arrangements in both studies is given in the fourth section. More detailed tables are available in Appendix G.

### **Ethnography sample**

#### *Lawyers*

A total of 37 lawyers were part of the ethnography. I observed 26 lawyers with at least one child. On average, each lawyer was observed 2.3 times with a child. These repeated observations over a period of time improved the reliability of the data (Creswell 2013). The remaining nine out of 37 lawyers participated in the study without being observed with a child, but were observed for case studies, observed at the Children's Court, and/or answered my questions. Most lawyers had worked in the Children's Court for five years or more (27/37).

Most lawyers in this study worked exclusively as solicitors (n=29), while eight were barristers. Just over half of all lawyers were private practitioners (n=21), although the number of barristers in the sample influences this total because most barristers were private practitioners. The remaining 16 lawyers worked for Victoria Legal Aid. They are distinguished in the results chapters as either a solicitor or barrister to account for the specialised role of barristers in contested hearings and to maintain anonymity.

### *Children and Cases*

Data were collected for a total of 50 cases as part of the ethnography. Each case represents a family. At least one lawyer and child or young person was observed together in 40 of the 50 cases. The remaining 10 cases were case studies with lawyers only or some other form of observation at the Children's Court. Seventeen out of 50 cases became part of my sample on the first occasion at court for the Department's application.

There were 110 children and young people involved across the 50 cases. Of these, 56 (51%) were observed with their lawyer on one or more occasions. For the 56 children observed with a lawyer, 53 had direct representation, and one child had best interests representation. Two children just under seven years old met with a lawyer, but their representation did not proceed, because the lawyer determined the child was not mature enough to give instructions, but a best interests representative was not appointed. The remaining children who were involved in the cases, but not observed with a lawyer, included siblings with separate representation, younger siblings without legal representation, young children represented on a best interests basis, and children who were part of case studies with lawyers or other observations at the Children's Court.

Table 4.1 presents the frequency of children and young people according to their age range across all 50 cases and those observed with their lawyer. I selected the age ranges to reflect the policy of direct representation for children seven years old, plus or minus one year, at the time of fieldwork and the spread of ages in the sample. All children who were part of my participant observation were six years of age or older. Each individual child referred to in my findings has a pseudonym and age range to protect their identity.

Table 4.1. Ages of children in ethnography sample and observed with a lawyer

	Total ethnography sample		Observed with lawyer	
	N	%	N	% of total N
5yrs & younger	26	23.6	-	-
6-9yrs	31	28.2	19	61.3
10-13yrs	29	26.4	16	55.2
14yrs & older	24	21.8	21	87.5
Total	110	100.0	56	50.9

### Case file study

The case file sample has a total of 50 cases with finalised contested proceedings between July 1<sup>st</sup> 2010 and June 30<sup>th</sup> 2011. Initially I identified 54 finalised contested decisions from the daily list records. The final sample became 50 family cases after accounting for cases with part-heard decisions and more than one decision for the same child.

A total of 84 children and young people are involved in these 50 cases. I obtained a written judgment for 39 of the 50 cases, covering 64 children (76%). The written judgments involved a total of 36 children and young people who had direct representation, and three children with best interests representation. Additional information was sometimes available from the court computer system or file in the absence of a written judgment. Information about children's instructions was not usually available from the case file, because only the solicitor or barrister representing the child, not the court, retains those records.

Table 4.2 presents a breakdown of children according to their age group in the final case file sample and a written judgment available. The written judgments represent at least two-thirds or more children in each age group.

Table 4.2. Ages of children in case file sample and with a written judgement

Age group	Total case file sample		Judgements sub-sample	
	N	%	N	% of total N
5yrs & younger	31	36.9	24	77.4
6-9yrs	16	19.0	13	81.2
10-13yrs	22	26.2	17	77.3
14yrs & older	15	17.9	10	66.7
Total	84	100.0	64	76.2

### Frequency of legal representation

The frequencies of children with and without legal representation were cross-tabulated according to their age groups across both the contest and ethnography samples in Table 4.3 below. The categories of children's age groups were defined to account for the age-based policy of seven plus or minus one year of age for instructions representation at the time of conducting the research, and the subsequent legislation of 10 years and older since the fieldwork was completed. The age groups also give an indication of the spread in numbers of children represented across the samples.

Table 4.3. Frequency of legal representation of children by age group

Legal representation	5yrs & younger	6-9yrs	10-13yrs	14yrs & older	Total N children
<i>Ethnography sample</i>					
No representation	24	5	0	0	29
Best interests representation	2	1	1	0	4*
Direct representation	0	25	29	23	77
Total ethnography sample	26	31	30	23	110
<i>Case file sample</i>					
No representation	30	4	0	0	34
Best interests representation	1	2	0	0	3
Direct representation	0	10	22	15	47
Total contest sample	31	16	22	15	84

\*Total excludes one case involving two children only counted under direct representation because the magistrate's decision to remove their direct representation was successfully appealed.

This table shows that over half of all children in my study had some form of legal representation. In terms of relative frequencies, 60% of children in the case file sample and 74% of children in the ethnography sample were legally represented. Almost all children aged five years old and younger did not have any form of legal representation.

Most children who had legal representation experienced the direct model, which was consistent with the policy of children seven years and older being permitted access to that form of participation at the time of my fieldwork. When converted to proportions, 70% of 110 children in the ethnography sample had direct representation (69% of those were observed with at least one lawyer on one or more occasions). Just over half of the 84 children (56%) in the case file sample had direct representation.

Best interests representation was rare across both samples. Just four children in the ethnography sample and three children in the case file sample had best interest representation. These low numbers point to the difficulty in children accessing best interests representation under the exceptional circumstances criteria. Best interests



representation was no more likely to occur for children in the case file sample than in the ethnography sample, despite the contest cases involving more complex and conflicted matters.

Almost all children five years old and younger and most six-year-old children did not have any type of legal representation. In total, 29 out of 110 children in the ethnography sample and 34 out of 84 children in the case file sample had no legal representation. This equated to 26% of the ethnography sample and 40% of the case file sample.

The reliability of the 2010-2011 case file sample is strengthened when compared with the frequencies of children with legal representation in contested cases during the previous years of 2008-2009 and 2009-2010. For 2008-2009, I identified 44 cases involving 100 children, of which 40% had direct representation, 3 children had best interests representation and 57 were unrepresented. For 2009-2010, I identified 54 cases involving 80 children, of which 45% had direct representation, five had best interests representation and 39 were unrepresented. Therefore in any given year, most children have direct representation when represented by a lawyer, best interests representation is rare, and a substantial proportion of children have no representation.

The characteristics of cases where children are granted best interests representation have not ever been documented in this jurisdiction. An absence of legislative criteria for exceptional circumstances when magistrates make these appointments, and the rarity of best interests representation, make it difficult to establish how children come to receive this form of representation. To fill this gap, I examined cases where best interests representation was appointed for a child, in order to detect what might indicate exceptional circumstances. This analysis involved two children from the case file sample, three children from the ethnography sample, and one child whose case was included in both samples. I excluded the ethnography case where direct representation was reinstated on appeal for two children, because they had direct representation during the observation period.

Overall I identified four issues where a child had best interests representation. Each case had one or more of the following:

- Three children older than seven years of age who experienced a disability or developmental condition that affected their communication skills to some extent, though not severely, when they would otherwise have had direct representation;
- Two children younger than five years old where there were complex medical issues;
- Three children whose fathers had violent criminal histories, including murder convictions;
- Disputes about Permanent Care Orders and the Department's permanent care plan for two children, including one case where the Department was planning to remove an infant from their long-term foster carer and reduce contact with their mother to prepare for a new adoption placement.

These issues indicate that appointments for best interests representation can occur in a variety of ways but are exceptional.

### **Characteristics of cases**

This section provides a summary of characteristics across the ethnography and case file samples. More detailed tables about the following characteristics of the samples are available in Appendix G.

The Department used emergency removal of children (safe custody) as the routine approach to commence child protection proceedings, rather than initiating by notice. Emergency removal occurred for a high majority of children in the case file sample (n=71/84, 84.5%), and around three-quarters of ethnography cases where information about the method of the initiating application was available (37/48, 77.1%). These proportions are relatively consistent with figures reported for all cases in the Melbourne region by the Children's Court (2012a, 2013): 73% in 2010-2011 and 79% in 2011-2012.

Data about protective concerns were available for a maximum of 74 children from the case file sample and 48 ethnography cases. The most frequent alleged protective concerns were:

- Family violence (78% children case file sample, 65% ethnography cases);
- Mental health of a parent (70% children case file sample, 38% ethnography cases); and
- Alcohol and other substance use of a parent or carer (60% children case file sample, 42% ethnography cases).

Allegations of sexual abuse, risk of sexual abuse, or sexualised behaviour concerns were similar (24% children case file sample, 23% ethnography cases). This indicates that the ethnography sample included these types of complex cases to a similar extent as the case file sample.

Most of the Department's applications involved more than one type of child maltreatment alleged as the protective ground for intervention. Almost all applications included emotional/psychological abuse (both 98% of 84 children in the case file sample and 48 ethnography cases). Physical abuse was the second-most frequent type (87% children case file sample, 75% ethnography cases). Allegations of emotional/psychological abuse appear to have become a catch-all maltreatment type to respond to the multiple protective concerns identified in families. Furthermore, lower proportions of sexual abuse protective grounds were made in applications across both samples compared to allegations of sexual abuse, or risk of sexual abuse, as a protective concern.

In terms of children's care arrangements, children in the ethnography sample more frequently resided with one or both parents than children in the case file sample. Fifty-three per cent of all 110 children in the ethnography sample resided with one or both parents at the beginning of the observation period, and 62% after, whereas 21% of children in the case file sample resided with a parent before and after the contested hearing decision. Mothers were primary carers for approximately two-thirds of those children in both samples, with the proportion of primary-care mothers increasing initially from 38% in the ethnography sample, as a result of family violence intervention orders against fathers. More than half of all children in both samples who were placed in out-of-home care were living in foster care, and approximately one-quarter of children were in kinship care.

Observing children over an extended period of time in the ethnography enabled me to record changes in their care arrangements. Almost half of all children experienced one or more changes in their residence (n=54/110) during the fieldwork. This included multiple-placement moves for children living in out-of-home care under the administration of the Department (n=27 children), children entering out-of-home care for one night or longer, including emergency removal (n=27), and returning to the care of one or both parents (n=24). By comparison, only 15 out of 84 children in the case file sample experienced a change in their care arrangement following the single decision. These were decisions permitting reunification with one or both parents, or moving from the primary care of one parent to the other.

Eighty-percent of all eldest children in the case file sample and just over one-third of all eldest children in the ethnography sample were separated from one or more siblings. For this group of children and young people, substantial separation was experienced from siblings as well as parents and extended family members.

## **Conclusion**

This chapter has explained the ethnography and case file studies used as part of a mixed-methods qualitative research study. The resulting distribution of legal representation across age groups in both the ethnography and case file samples is indicative of the age policy applied in the Children's Court, and the rarity of best interests appointments. Overall, the ethnography and case file samples share many similar characteristics, despite being largely different samples in time, and from different stages of hearings within the Children's Court.

The presence of multiple protective concerns and types of maltreatment alleged by the Department are indicative of the highly complex character of child protection cases more broadly, and the increasing complexity of those cases reaching contested proceedings. These patterns support previous literature describing families involved with child protection services as experiencing multiple and complex problems, particularly family violence, and parents experiencing problems with mental health and alcohol or other drug use (Bromfield et al. 2010). However, there was also more

information available from the written judgment and case file study than with the ethnography cases, where access to the file was limited, and more cases were in the early stages of proceedings. A greater proportion of children living in out-of-home care in the case file study than the ethnography forms another difference in the samples.

The next four chapters present the findings resulting from these studies, beginning in Chapter Five with the ethnography findings about lawyers and their relationships with children.

## **Chapter Five**

### **“A lawyer is an angel with wings and fists for fighting”: Lawyers scaffolding children and young people’s participation**

“A lawyer is an angel with wings and fists for fighting”, is a quote from Luke (10-13 years, case 134). Luke made this comment when his lawyer, Natalie, a solicitor, asked him if he knew what it meant to have a lawyer at the Children’s Court. Natalie had been Luke’s lawyer on a direct representation model since he was seven years old. This chapter presents my findings of how lawyers like Natalie implemented direct and best interests representation in their relationships with children and young people during the course of child protection proceedings.

After introducing the concept of scaffolding, the first part of the chapter examines the processes through which children and young people may come to have a lawyer appointed. Part one also includes the benefits and limitations of the direct and best interests models as identified by lawyers. The second part of the chapter presents my analysis of strategies used by lawyers to form relationships and communicate with children. In the third part, I discuss how lawyers constructed flexibility in the ways children participated when forming their views into instructions. The conclusion brings these findings together to argue that, on the whole, lawyers in this study recognised children and young people as participants. The scaffolding practices most lawyers used to form relationships and implement participation with children were indicative of recognition ethics.

#### **Scaffolding**

“Analyses of children’s participatory roles need to take account of the form and nature of children’s relationships with adults” (Wyness 2013b p.429). I apply the ‘scaffolding’

concept to capture how lawyers may support children and young people to participate in child protection legal proceedings.

The metaphor of ‘scaffolding’ originated from Wood, Bruner and Ross’ (1976) socio-cultural approach to social learning theory. Building upon earlier work of Vygotsky, Wood and colleagues define scaffolding as a type of adult-child interaction that “enables a child or novice to solve a problem, carry out a task or achieve a goal which would be beyond [their] unassisted efforts" (p.90). Learning a particular task is supported through the interaction, and competence is also fostered for future experiences of increasingly-difficult tasks that the child can then engage with alone or with continued scaffolding support.

Scaffolding requires the adult professional to respond sensitively and ethically to children in order to produce a dynamic cycle of dialogue, mutual reciprocity, learning and negotiation during participation. This is compatible with what Percy-Smith (2012, p.24) describes as “democratising the encounter space between adults and young people” to give effect to participation rights. Rights may be recognised during interpersonal interactions when people respond to the presence of vulnerability and differences in power, instead of requiring an individual to be autonomous and rational in order to claim their rights (Fineman 2008). Adult ideal standards of autonomy and rationality have long been impediments to children’s status as rights bearers (Alderson 1994; Alderson 2010; Federle 1994; Minow 1990). As with the debate about children’s intrinsic capacity for participation, this impediment is linked to their generational status as becomings (Coady 2008; Mayall 2000a, 2000b). Rethinking relationships and interactions between children and adults as opportunities to scaffold participation allows an analysis of adults’ behaviour, attitudes towards children, and the socio-cultural context (Alanen 2005; Alanen & Mayall 2001; Smith 2002). In applying those qualities here, ‘scaffolding’ is understood to be what lawyers can *do* to facilitate children’s participation with representation, and support their recognition during child protection intervention.

This concept has been applied previously to adult-child interactions that aim to support children’s agency in participation, including post-separation family law (Cherry 1999; Henaghan 2012; Taylor 2006), education (Pea 2004) and child rights theory (Smith

2002). Jessica Cherry (1999) applies the scaffolding concept in her article arguing for legal representation of children in divorce cases. According to Cherry, participation in divorce proceedings could be learned through lawyers bridging the gap between the wealth of knowledge children have about their own family life and the decisions happening in legal proceedings.

Rather than debating whether or not children are intrinsically capable of participation, the concept of scaffolding speaks to the responsibilities upon adults, in this case the lawyer, to ensure participation can be a real possibility. The following findings provide insight into how lawyer-child relationships form and function, and the ways in which lawyers could conduct these relations to scaffold participation with children. But first, a lawyer must be appointed for a child, so the process of accessing representation is the subject of the next part of this chapter.

## **Children accessing legal representation**

This section provides a behind-the-scenes picture of how the CYFA and policy are applied when lawyers are appointed for children and young people. Appointments happening at the Children's Court are described first. Direct representation appointment is described in the second section, showing the work of paralegals and lawyers to establish representation. The third section is about appointment of best interests representatives. Each of the sections about direct and best interests representation also reveals how lawyers perceived the risks and benefits of these types of representation.

## **Meeting children and young people for the first time**

The typical sequence of events when a solicitor was being appointed for children began at the metropolitan court locations with a paralegal, rather than at the VLA office. This was because in my ethnography sample, the Department initiated more than three-quarters of cases by emergency removal rather than by using a legal notice. Emergency removal aroused significant anxiety for children experiencing sudden separation from a



parent, consistent with a report by the CREATE Foundation (2010). Anxiety appeared to be heightened when it seemed that prior to seeing a lawyer, children had not received an adequate explanation for what had happened and why. For example, the Department had removed Carly (6-9 years) and her three siblings following an incident of family violence in a public place between Carly's separated parents (case 494). Carly's facial expression was tense as she told Catherine, her lawyer, that she was frightened about being in "care" "at somebody else's house" again, and not living with her family. Her distress at having been suddenly separated from both parents was clear.

Paralegals who worked in the legal aid office onsite at each metropolitan Children's Court were tasked with coordinating the intake of children and their parents for legal representation each day. A paralegal is a person who provides administrative legal support but is not a lawyer. To minimise their waiting time to see a lawyer, paralegals at the Children's Court gave priority to children being appointed legal representation over other family members. Children within the age threshold of seven years old (plus or minus one year) were allocated a duty lawyer to meet with them to assess whether legal representation was appropriate. This was consistent with the policy for direct representation in place at that time. Next, the paralegal briefed the allocated lawyer, using information from the Department's application form, and any other information garnered from the DHS representative and family or carers, so that the lawyer had some idea about the alleged protective concerns.

The paralegal performed an educative role for children and family members or carers who were often puzzled as to why a child needed their own lawyer. The paralegal was often first to explain that children had a right to legal representation. This occurred either when greeting children and their parent or carer when they first arrived at the court, or after calling them to the legal aid window upon assigning them a lawyer. I noted how Marielle, a paralegal who regularly worked at the Children's Court, consistently had a gentle tone of voice during these introductions. Like other paralegals I observed, Marielle was informal, friendly, and spoke without condescension towards children or the adults with them. The paralegals politely introduced themselves by first names to the child and the adult accompanying them. He or she then explained how a lawyer would be meeting with the child today, giving a typical explanation that

“because this is the kids’ court, kids get to have a say about what happens too”  
(Marielle, paralegal).

As well as the educative aspect, the paralegal worked to protect the integrity of the child’s participation. Sometimes parents or other family members would ask to sit in with the child when meeting a lawyer. I repeatedly observed paralegals being careful to explain that such a request would have to be discussed with the lawyer. Lawyers rarely allow parents to sit in, due to conflicts of interest, pressure from parents on children, and potential interference in what children say. Marielle clarified for me that the practice of not immediately telling adults they would not be permitted to accompany children with a lawyer was a strategy used to reduce opportunities for parents or family members to pressure children beforehand about what to say.

The following case study outlines the first meeting between Peter (a solicitor), Amy (6-9 years) and her younger sister Brody (6-9 years), and the sequence of events when Marielle allocated Peter to represent Amy (case 429). The case study exemplifies the typical process for children after experiencing emergency removal from their family and being allocated a duty lawyer at court, which I observed in 17 ethnography cases. Amy and Brody had been placed temporarily in the care of their grandmother over the weekend after their mother had a non-fatal drug overdose at home.

Both Marielle and Peter were sensitive to facilitating Amy and Brody’s participation within a complex court environment. The Court was chaotic and overflowing with families, as happens most mornings. Amy and Brody were two of 10 children who had experienced emergency removal in the region serviced by the Children’s Court, along with the list of scheduled cases for the day. This meant there was a large number of families waiting for legal representation and hearings to start. The Court was running late that day because the Department had not allocated their own lawyers on time, and a duty magistrate was sick. Peter and Marielle had been unable to get a copy of the Department’s application form for the protective intervention after two hours of asking, so Marielle decided to brief Peter based on the information she had already obtained. Peter explained to me that he would have preferred to see the application form first, but weighed this up against keeping Amy and Brody waiting—unfair for them in his view.

Peter was aware how hard it can sometimes be, as well as “mostly boring”, for children at court.

When Amy and Brody arrived at the legal aid counter with their grandmother, Marielle indicated who Peter was, and Peter casually introduced himself to each of them and also introduced me. Peter used his first name and identified himself as a lawyer. Amy and Brody were both smiling during this introduction. Brody seemed particularly energetic and restless, but cheerful despite waiting over an hour in the crowded court area where there was nothing to entertain her. Amy appeared calm and confident, making eye contact with Peter as he explained that next they would go have a chat together.

The approach Marielle and Peter used to meet Amy and Brody was characteristic of the other introductions I observed. Meeting children and young people in an informal manner and addressing them directly on a first-name basis demonstrated respect. Children were treated as individuals from the beginning, as opposed to speaking to them through an adult family member or carer. Allocating them a lawyer first, and meeting children as early as possible in the day, also prioritised children’s participation. To some extent, this was responding to the difficult situation in which children find themselves after being removed from a parent, as well as an attempt to moderate the negative effects of the court environment and Departmental practices.

How lawyers then implement the legislation and policy for children to qualify for direct representation is analysed in the next section.

### **Applying the criteria for direct representation**

This section presents my observations of lawyers putting into practice the legislative criteria regarding the maturity and capacity of a child to instruct a lawyer, as well as the policy of children seven years of age—plus or minus one year—being considered for direct representation. The two case studies presented below show one child who did not get direct representation and one who did. They illustrate how lawyers considered readiness for representation based on children’s behaviour and responsiveness, along with sources of information, other than age, about their capacity. The observations also

show that the Court usually trusted lawyers to apply the policy with children, with the exception of one ethnographic case that went on to be the first-ever test case of legal representation for children in Victoria.

Even though almost all children seven years of age and older had direct representation during my research, their maturity to instruct a lawyer was not presumed. Instead, lawyers would have an informal meeting to gain some understanding about a child or young person, and gather information from multiple sources to assess whether direct representation was suitable. To return to the case of Amy and Brody with Peter, Peter framed their first meeting to me as intending to familiarise each other and check the suitability of direct representation. If he assessed representation to be appropriate, they would meet together again for a deeper discussion about their instructions as the negotiations unfolded and more information became available from the Department.

Peter concluded that direct representation was not appropriate for Brody at this time based on the following information. Peter spoke with Amy and their grandmother, who independently confirmed that Brody was not present when their mother had the drug overdose. After speaking with Brody, Peter concluded that asking her about her safety would cause Brody distress, and he did not want to take that risk. Brody's grandmother agreed with Peter that Brody did not seem to understand what was happening with child protection and his mother's drug use. Peter then took some time to explain to Brody that she would not be having a lawyer today.

Like Brody, Alex was within the age threshold for direct representation, but Kelly, a solicitor, decided direct representation was suitable for Alex (6-9 years, case 495). My observations with Kelly, Alex, and Alex's older brother, Ashleigh (14 years & older) showed different circumstances that supported representation for Alex compared with Brody's situation. I asked Kelly how she was determining Alex's capacity, given his threshold age. Kelly explained that the main test was whether children knew "why they were there" at the Court. She elaborated this in terms of children understanding recent events in the family, and why there were concerns for their safety. In Kelly's opinion, Alex had some insight about family violence perpetrated by his father. For instance, I had noted that Alex said home could be "scary" because of their Dad. Alex and Ashleigh both talked about a recent incident of family violence by their father in which

Ashleigh had intervened when he assaulted their mother, and Alex was present. Alex told Kelly that he was more comfortable living with his mum than dad, indicating some understanding of his safety with each parent. Cumulatively this satisfied Kelly that she could engage with Alex for instructions. Kelly explained to me that it was rare for a lawyer's assessment to be questioned, and further discussion usually only happened if the lawyer's view contradicted that of the Department regarding a child with an intellectual or developmental disability.

Across all the ethnographic cases, lawyers' assessments of children's capacity to participate were accepted by the Children's Court with the exception of one case that went on to be successfully appealed in the Supreme Court (*A & B v Children's Court of Victoria & Others* [2012] VSC 589). This case was significant because it was the first time in the Children's Court in which a magistrate sought to order that a child stop having direct representation, and instead have best interests representation. It was also the first time children had ever made an appeal to the Supreme Court to assert their right to direct representation. For over five months, Aisha and Bree had direct representation (6-9 years and 10-13 years, case 275). The Department initiated proceedings because of physical abuse by their mother and her drug use. Their lawyers at the time, Joshua, a solicitor, and Daniel, a barrister, had no doubts about Aisha and Bree's maturity or capacity to instruct. Both children expressed strong and consistent instructions against returning to their mother's care, were afraid of having contact with her, and wanted to remain in kinship care together.

However, a magistrate ordered Aisha and Bree to have best interests representation. The magistrate raised concerns about Aisha and Bree's refusal to have contact with their mother, and their capacity to give instructions about sexual abuse allegations made by their mother against an extended family member. They were not living with that relative, and the allegations did not concern them, but were instead made by their mother in relation to their infant sibling. Joshua, their solicitor, described Aisha and Bree to me as "switched-on kids" and that they were clear about wanting to continue direct representation; therefore they decided to lodge an appeal against the Children's Court decision.

The Department became a party by opposing Aisha and Bree's appeal, indicating the Department's broader position against direct representation for children. The Department's submissions, as cited by the Supreme Court Judge, supported the Children's Court magistrate for removing direct representation. Furthermore, the Department's position was that Aisha and Bree were not mature enough for direct representation, that the Victorian *Charter of Human Rights and Responsibilities* did not apply to children's participation rights under the CYFA or their procedural fairness, and that direct representation was not valid unless children provided instructions about all the issues being considered by the Court. This narrow view of children's capacity marginalised Aisha and Bree's instructions about remaining in kinship care. The position of the Court and Department treated the children's views as secondary to the Court's agenda and the Department's investigation of allegations about their mother's drug use, and their mother's allegations against the extended family member.

When reinstating direct representation, the Supreme Court endorsed the assessments made by Aisha and Bree's lawyers about their capacity for participation. The magistrate's removal of their right to direct representation without supporting evidence was deemed to have denied Aisha and Bree procedural fairness. Unlike their lawyers, the Children's Court (and the Department as a party) had erred by having:

... confined its inquiry to the chronological age of the [children] and misconceived its function as confined to a conclusion as to the maturity of the [children] based on chronological age alone... The test was of a different character and involved consideration of each child's development and capacity to give instructions including consideration of the evidence as to each child's general maturity, capacity, insight and ability with language... The Court made a finding of insufficient maturity to give instructions in the absence of any evidence permitting that finding to be made (Garde J 2012, paras.120-122).

Not only did the Supreme Court decision state that the Children's Court magistrate made an erroneous assumption based on age about Aisha and Bree's capacity to participate, the Supreme Court also determined there was no evidence to suggest that Aisha and Bree could not instruct their lawyer.

Consistent with Justice Garde's conclusion, the lawyers in my ethnographic study utilised a combination of a child's age and individual circumstances in their family and the child protection case when deciding the suitability of direct representation. This implements a broad recognition of children and young people by seeing them as having participation rights while being alert to their individual contexts, rather than narrowly defining participant status to a specific biological age set by the policy. Lawyers could thereby appreciate both the risks and benefits of participation, as the next section shows.

### **Benefits and limitations of direct representation**

Lawyers identified the benefits and potential limitations of direct representation for children. The main risks concerned how children experienced direct representation as a result of adults not supporting their participation appropriately. These risks pertained to doubts about the quality of lawyers' skills, as well as the conduct of parents and the Department practitioners, who could undermine children's participation. Patrick, a solicitor, said, "if a lawyer doesn't properly assess the child's needs, the child may feel more confused or upset by the process". Patrick was concerned about some lawyers' skills deficits in effectively engaging with children.

Pressure could also come from parents or other family members that might disrupt participation rights. As Stacey, a solicitor, explained to me:

Children who have legal representatives may have pressure put upon them by the family members that they live with as a result of their instructions having been put forth. This pressure can then alienate the child from rapport with their lawyer, and compromise the honesty of the instruction.

Emma, a solicitor, had similar concerns to Stacey about the "potential for children to be coached by a parent". But Emma qualified this by saying that the "Court should be able to take [this] into account", meaning that it should not preclude direct representation, because such representation "allows children a direct input into [the] process".

Another potential limitation of direct representation for children related to how the family or the Department responded to children's disclosures of abuse and neglect. I

observed cases where parents and other family members exerted pressure on children to withdraw disclosures. I also observed pressure on children and young people to withdraw their disclosures when the Department relied on disclosures as evidence against parents, but did not adequately support the child or young person, including not providing counselling within a reasonable timeframe when the Court had ordered the Department to do so. This echoed previous research with victims of crime, such as rape and domestic violence. Retracting disclosures is a common response among adult victims of crime to such pressures (Daly & Bouhours 2010; Ellison 2002; Marx 2000; Taylor & Norma 2013). According to Lauren, lawyers need to be more proactive in applying their skills to support and buffer children and young people from these sorts of pressures, and to safeguard participation when disclosures had been made: “Children rely on lawyers to protect them from harassment or intimidation by family members at court, [but] lawyers don’t often seek solutions to this”. Lauren said lawyers should use remote facilities and request closed rather than open courts “while the court environment continues to be under resourced in this way”.

The lawyers I observed took it as given that children’s retractions about abuse did not diminish children’s credibility and status as a participant. This group of lawyers was sensitive to the broader context from parents and family members and the deep need for children and young people to seek repair of their family relationships. Under these circumstances, lawyers saw the Department and parents as responsible for evidence to substantiate or refute protection applications, rather than relying on children’s disclosures and instructions about allegations.

The risks associated with relying on children and young people’s disclosures in child protection cases, and the consequent pressure upon them from parents and the Department, were exemplified by one of the cases I observed. Linda, a barrister, represented Tina, while Natalie, a solicitor, and another barrister separately represented her older sibling, Melissa (case 176). Tina and Melissa were both in the 14 years and older age group. After six months of proceedings, Melissa retracted allegations of sexual abuse by her father on the day the contest hearing commenced. During that morning, I observed Melissa’s father and another male family member sitting either side of Melissa in the waiting area and talking to her using aggressive body language, including leaning in close to her face. Melissa was visibly stressed. Natalie intervened



but was unable to circumvent the pressure on Melissa. Both Linda and Natalie had tried to protect Melissa and Tina from the proceedings by assuring them they did not need to come to the court hearing, but their parents brought them along. Reflecting on the case, Linda was surprised Melissa's retraction had not happened earlier, which was the "usual pattern" given the "enormous pressure to retract". Linda also compared this situation to experiences of rape victims withdrawing from criminal proceedings, as the pressure to testify and scrutiny of their believability becomes overwhelming.

Linda expressed disappointment with the Department, police and Children's Court for their handling of the case, and pointed out weaknesses in how the institutions had responded to Melissa and Tina. The Department failed to apply for a Children's Court Clinic psychological risk assessment of the father before the contest hearing, and according to Linda, that assessment could have alleviated some of the reliance on Melissa's disclosure. The police had reacted to the withdrawal of Melissa's disclosure by dropping criminal charges against the father. The police did this despite having forensic interview recordings with supporting evidence from Melissa and Tina. (A forensic interview is a type of investigative interview that aims to gather evidence in cases where children may have experienced maltreatment, and is usually audio and visually recorded.) Police also had an admissible statement by the father in which he made vague claims about the alleged sexual abuse. Linda was also concerned about the Department and Children's Court failing to ensure that independent, professional counselling was provided for the siblings over the six months of proceedings, despite a condition for counselling on the protective order. Linda speculated that a lack of professional support had probably further undermined Melissa and Tina within the family, and their relationship with each other. Overall, Linda's assessment of the case showed how the conduct of adults—the Department, police, parents, the Children's Court and court environment—could undermine justice for children and young people, rather than the problem being a child or young person's capacity for direct representation.

The power imbalances that children can experience with parents and the Department, especially when there are disputes about allegations of abuse, is a consideration in access to direct representation. Lawyers identified that having an advocate who is independent of both parents and the Department was the main benefit of direct

representation. Without direct representation, children and young people do not have a qualified adult who can explain what is happening to them and why, the options available, and who will advocate for their views. The direct representative's role is devoted to supporting the child or young person. Neither the Department nor parents could fulfil this role, because each has their own interests at issue in these complex cases. These benefits are conveyed in the following quotes:

Specific wants and needs of the child are made known to the magistrate that would not otherwise be disclosed by any of the other parties (Eric, barrister).

Children have a voice; it can often be dangerous to be seen [or] decided about and not heard. Children feel valued that they have someone standing up for them. Even if they can't get what they want, someone is there telling the complicated part of the adult world they find themselves in (Vanessa, solicitor).

Children have an equal voice in proceedings, feel more empowered by the legal process (which is often disempowering), [and] concerns can be identified independently of parents [and] DHS (Claire, solicitor).

These quotes illustrate how lawyers were seeing children and young people as having participant status under direct representation, and the potential to correct some of the power imbalance between children and parents and the Department.

### **Best Interests representation and potential benefits and limitations**

When compared with the scenario in which lawyers are appointed to directly represent children and young people, best interests representation appointment was rare, more complex, and opaque. Being appointed best interests representation was based on magistrates exercising a discretionary determination that the legislative criteria were met with exceptional circumstances, and/or a child not being considered mature enough for instructions. Very few children younger than seven years old met the criteria, meaning that best interests appointments were rare in the ethnography and case file samples, and most young children had no representation at all. Although this resulted in

only a few opportunities to observe best interests representation in practice, 10 lawyers discussed their experiences with this type of representation.

Lawyers also played a part in children gaining access to best interests representation in two ways. The first was when lawyers met with a child seven years or older, but were concerned about their suitability for direct representation under the practice identified in the previous section. The second was when lawyers representing a parent were seriously concerned about the Department not acting in a young child's best interests, which I observed in two cases. These circumstances still relied upon a magistrate agreeing with the lawyer, and magistrates' approaches in such instances remained unclear, including the factors that influenced their determinations against or in favour of best interests representation. This was made apparent when two cases with identical features had a best interests lawyer appointed for one young child but not the other (cases 351 & 466).

Lawyers' views about the benefits of all young children receiving best interests representation when direct representation was not suitable covered two themes: first, supporting the quality of child protection decision-making; and second, satisfying young children's participation rights. First, the quality of decision-making could be improved by having "DHS decision-making subjected to greater scrutiny" by a best interest lawyer (Claire, solicitor). By conducting investigations, a best interests lawyer might also uncover evidence which the "DHS are not otherwise providing, for example the excellence of a carer" (Stacey, solicitor). Assisting the Court with "independent" decision-making (Amanda, solicitor) was another benefit. Most felt respected in this role because "the views of the best interests lawyer are usually highly regarded by the Court" (Patrick, solicitor). This reinforces accountability to the Department and Court's decision-making through best interests lawyers having a forensic function. A forensic function encompasses the investigative, evidence-gathering and inquisitorial practices generally ascribed to the best interests model of representation as established in federal family law (Kaspiew et al. 2013). Stacey's description of what she does when performing best interests representation reflected a forensic function:

The role [of the best interests lawyer] in family division cases is to go beyond the current reports and evidence before the Court, and make inquiries which inform the Court of relevant information and important matters. I therefore speak to the child

where appropriate, or at least sight him or her, the carers, medical staff, school [or] kindergarten teachers, any person who has conducted an assessment of the child.

Vanessa's description of her approach was very similar to Stacey's:

I always subpoena the Department's file. I always keep in more regular contact with the protective worker than I would in instructions cases... I always ring and vet the important family members and professionals in a child's life to get their opinions direct, and often this is not what the Department is telling the Court.

This illustrates how lawyers in the ethnography reported undertaking a forensic function to collect evidence and develop an informed view about a child's best interests, even though this aspect of practice is not prescribed in the CYFA.

The second benefit identified earlier in this section relates to best interests representation as satisfying participation rights of young children. Lawyers could still value young children as having participant status when performing best interests representation, irrespective of a child's age or capacity to express views. Lauren, a solicitor, typified this understanding when she explained why all children should have some form of legal representation: "Each party to the proceeding in the family division is allocated a lawyer, so in terms of equality of representation, a child should also be allocated a lawyer." As with direct representation, this points to the benefit of children of having an independent advocate to balance power and conflicts of interest posed by the Department's or parents' views about children's best interests.

For participation rights, best interests representation "...allows those children who are not able to provide instructions to nonetheless be heard" (Eric, barrister). When lawyers value participation rights, as almost all lawyers in the ethnography appeared to do, this speaks to best interests representation as potentially bringing parity in the status of younger children in these proceedings. However, having a young child's experiences of care, feelings and potential views heard relies upon the lawyer meeting with them, good communication, or access to appropriate information from other professionals who have contact with a child.

Lawyers with experience in best interests representation reported having encountered barriers to implementing the participation aspect of their role, particularly from the

Department. For example, Patrick, a solicitor, described his experience of best interests representation for three children in two cases (two children were siblings). Despite his efforts, the Department did not cooperate to provide him with information until late in the proceedings:

I sought information from the DHS, doctors, [and] the carer to assess the child's best interests. I had considerable difficulty obtaining information from the DHS in one case, and only received information from the subpoenaed file after the directions hearing.

Other concerns about best interests representation were raised in addition to cooperation problems with the Department and parents. Concerns about the quality of best interests representation were linked to the lack of legislative guidance for the role, and to the skills and experience of lawyers. Malcolm (solicitor) pointed out that lawyers do not have the power to obtain independent expert assessments, and this limits their ability to gather evidence about a child's best interests. He also pointed to poor remuneration from legal aid compared to the time and expertise required to act effectively as a best interests lawyer. Both Eric (barrister) and Patrick (solicitor) felt that the lack of guidelines and training in this model for lawyers in the child protection jurisdiction reduced the quality of best interests representation.

The strongest limitation lawyers identified about best interests representation compared with direct representation was actually child centred—this was that the best interests model reduced obligations on lawyers to advocate for young children's views. The following quotes illustrate a dominant view that best interests representation could undermine a child's participation if the lawyer's opinion conflicted with a child's views:

[There are] unclear guidelines about when the child has views that ethically or morally challenge the lawyer. There is a risk of lawyers failing to address the child's views when forming an opinion about the child's best interests. Children are not always given an opportunity to participate in the proceedings with a best interests lawyer (Patrick, solicitor);

[It is] paternalistic, inappropriate for often disempowered children (Stacey, solicitor);

Children's direct feelings may never be heard, as it is subjective to the lawyer to pass on the strength of their wishes (Vanessa, solicitor); and

[There is] a risk of lawyers taking a moral stance and overriding the wishes of the child (Lauren, solicitor).

These concerns are indicative of the potential reduction in status as a participant if a lawyer does not hold children's participation in high regard, and when representation shifts away from rights-based advocacy towards protective best interests approaches.

This section has reported evidence about how lawyers come to be appointed to represent children on a direct basis or best interests basis. Strengths and limitations of each model identified by lawyers who participated in the ethnographic study also emphasise potential problems with how parents, the Department and the Children's Court respond to participation rights. The importance of how a lawyer performs representation, as well as their attitude towards recognising participation of children, were also raised. The next section looks more closely at the interactions between lawyers and children to document how they can form relationships.

### **Lawyers developing relationships with children**

Once the processes for appointment and introductions have occurred, it is time for the lawyer to meet with the child or young person. This part of the chapter begins by describing the foundations of a relationship between a lawyer and child that in turn contribute to scaffolding participation. In the second section, I discuss lawyers being 'passage agents' with children and young people. The third section considers the importance of confidentiality between lawyers and children. This part of the chapter draws primarily on participant observations with lawyers performing direct representation, except where specified, because there were so few best interests appointments.

## **Democratic communication, legal education and a shared understanding about child protection**

While children's views and instructions are integral to their participation, the findings described in this section also show how the practices lawyers use to engage with children and young people can scaffold participation more broadly through experiences of child protection intervention. Lawyers engaged in democratic communication, legal education, and a shared understanding about child protection intervention with children and young people (Horsfall 2013). Democratic communication referred to lawyers conducting conversations with children that sought to build rapport, were sensitive to their verbal and non-verbal expressions and conversational styles, allowed mutual curiosity, and shared children's personal interests (for example, school, television shows and sport) (Horsfall 2013).

An example of democratic communication was observed with Shaun, a barrister, when he first met with David (6-9 years old, case 294). Shaun represented David on a best interests basis for a permanent care application to enable his foster mother to become a legal guardian for David and his older sister, Madison (Madison had a separate direct representative). David had a disability that affected his cognition and emotion to some extent. Shaun had not intended to meet with David, and when I asked him why, Shaun said he felt he had enough information from David's solicitor, psychologist and other sources. Shaun was also aware that David could experience social anxiety. However, on the morning of the hearing, David's foster mother told Shaun that David *asked* to speak to his lawyer.

During half an hour spent together in a room away from the main court area, David frequently displayed physical affection for his foster mother and mainly stayed near to her. She was clearly a source of comfort and reassurance. It seemed David wanted to show his lawyer how much he loved his foster mother, and this was the impression Shaun reported to me afterwards. David was shy, but enthralled by an iPhone game (involving a farting cat!) that he joyfully showed everyone in the room, including me. Shaun used the game as a way to engage with David while they played with it together. David made eye contact with Shaun just a few times and spoke only a little and quietly. Eventually, Shaun broached the topic of David seeing his biological mother, and asked

David what he thought about it. At this point David was sitting close to his foster mother. David clearly replied, “Never”, three times, shaking his head. When asked about living with his foster mother, David softly said, “Forever”, and, “Forever family”. As a result of being sensitive to David’s verbal and non-verbal expressions and his pace of communication, Shaun was able to convey their interaction and David’s own words to the Court when recommending permanent care was in David’s best interests.

Keeping a democratic approach to dialogue, particularly with open-ended questions, provided space in conversations for children and young people to share their views, rather than lawyers assuming what children might think or feel. An example of open dialogue and lawyers’ scaffolding children and young people to share their views came from part of my observation with Patrick, a solicitor, and Jaime (10-13 years, case 303). Jamie had recently spent some time at the family home with his mother for the first time since being in kinship care following family violence perpetrated by his father. I noted that Patrick asked Jaime, “How was that?” Jaime replied he “felt safe because Dad wasn’t there”. After explaining to Jaime about the police initiating an Intervention Order, Patrick enquired to Jaime, “What do you think about that?” Jaime was “happy that he [father] can’t come near the house”. This led Patrick to ask Jaime how he felt about the idea of seeing his father. Jaime did not want to see his father for now, but maybe “sometime later”. Patrick let Jaime speak from his own perspective and allowed his instructions to emerge by slowly explaining what was happening and by posing open-ended questions.

In contrast to the democratic communication observed between Patrick and Jaime, problems with closed communication occurred with a minority of lawyers when they used questions that invited ‘yes’ or ‘no’ answers. This could close down conversation when lawyers were not paying attention to children’s communication cues. The few occasions I observed this happen were when lawyers were filling in for a child’s usual lawyer (acting as agent). When acting as agent, lawyers were under significant time constraints, with their usual high caseload booked in for that day, and it was possible their rushed conversations were a reflection of that.

An example of closed communication comes from an observation with Natasha, a solicitor, and Jordan (10-13 years, case 442). Natasha was acting as an agent for



Jordan's usual lawyer who was sick that day. Natasha asked Jordan three closed questions in a row. Regarding his experience of foster care, she asked, "Do you like living there", Jordan replied, "Yes" while nodding. The next question she asked was, "Do you go to school near there?" Again, Jordan simply said, "Yes". Natasha then asked if Jordan sees his father. Jordan gave a brief reply that he sees him every fortnight. "Just during the day?" enquired Natasha. Jordan simply confirmed again, adding that he "only spends three hours". These questions were closed, in that 'yes' or 'no' responses were likely. Furthermore, the questions were leading, because Jordan would have had to challenge Natasha's implied assumptions in order to say no. If Natasha had instead phrased her questions in a way that offered Jordan open dialogue, this could have made it easier to share his perspectives about foster care, school and contact with his father.

Legal education for children occurred when lawyers used child-friendly analogies and language to scaffold children's knowledge about what a lawyer does, who a magistrate is, the Department, and the child protection system (Horsfall 2013). Legal education is necessary, given that most children and young people will not know about the Children's Court or child protection before their first experiences with these institutions (CREATE Foundation 2010). In terms of direct representation, lawyers' explanations emphasised democratic participation with children "having a say", "a vote" or giving their "message" while the "judge" has responsibility for the final decision after everyone has their say (e.g., cases 340, 281, 328, 219, 490). Framing participation as being part of a familiar democratic process, while making it clear that magistrates are ultimately responsible for any decision, may avoid participation being burdensome for a child and manage their expectations to some extent (Morrow 1999).

Some lawyers emphasised the power-sharing aspect of legal representation, in that they would only do or say what the child agreed to, because the child was the "boss" (e.g., cases 495, 134). Boundaries were acknowledged in relation to sharing power with their lawyers, as Rachel, a solicitor, explained to Amber (14 years & older): "I won't tell you what to do" but will "give advice if what you want isn't going to work" (case 332). Judicial responsibility and boundaries around lawyers and children sharing power also potentially managed children's expectations: the right to participation did not equate to getting the outcome they wanted.

Scaffolding to formulate instructions relied on children and young people having a shared understanding with their lawyer about child protection involvement in their lives (Horsfall 2013). Seventeen of my 50 ethnography cases were observed on the first occasion at court when there had not been prior involvement of child protection services, whereas proceedings were already occurring in 33 cases. I indicated earlier in this chapter how having some understanding about safety and child protection involvement formed part of the assessment lawyers undertook when deciding whether or not direct representation was appropriate. Lawyers' language reflected concerns about children's safety or their family experiences when scaffolding shared understanding about Department involvement. "The Department are worried about a few things, mostly fighting between Mum and Dad", explained Jane, a solicitor, with Tristan (10-13 years, case 340). Rebecca, a solicitor, raised a range of protective issues with Mari (6-9 years). Using open-ended questions, Rebecca asked Mari if she felt safe at home, what it was like for her when Mum and Dad were fighting, and how her mum and dad respond when she gets into trouble. This served as a way to discuss the Department's allegations about her mother's mental health, and to help Jane understand family life from Mari's perspective.

Lawyers could more openly discuss the contents of the Department's report and other documents with young people, as Catherine did with Riley (14 years & older, case 289). Riley had recently experienced a placement in secure welfare (a form of therapeutic detention, usually involuntary), which he found distressing. Catherine and Riley discussed the Department's protective concerns related to Riley's behaviour, minor criminal offences, marijuana use, his father's rejection and recent death of his mother. Riley took issue with some of the details in the Department's report, including some of his behaviours being exaggerated, and his father's alcohol and drug use were not detailed.

On the other hand, the Department and parents sometimes withheld information and that limited discussions between lawyers and children about their safety. For example, Tiffany had not been told about her father's recent conviction and incarceration for child sex offences (14 years & older, case 287). Instead, she was led to believe the child protection proceedings were solely about her misbehaviour, which had emerged during the period her father was incarcerated. Tiffany's lawyer, Rebecca, did not believe she

should be the person to explain this to her. However, the Department and Tiffany's parents had not cooperated to tell her and not provided counselling despite three magistrates directing them to do so. Therefore, information was carefully communicated with children to the extent they could be scaffolded to participate in an informed way whenever possible, and speak about their own safety and experiences with their family or out-of-home care, even if all the protective concerns were not discussed. Such conversations had to be conducted within the limitations of the case.

Lawyers' conversations with children about the Department and protective concerns were not observed to be forensic in nature. Forensic interviewing is controversial in relation to the type of interviewer techniques used, children having multiple interviews, and children being asked direct and specific questions that reinforce, influence, lead or generalise abuse disclosures (Cronch, Viljoen & Hansen 2006; Cross et al. 2007; Patterson & Pipe 2009). Avoiding forensic questions was a deliberate tactic used by lawyers I observed. For example, John, a solicitor, told me how it was widely understood by lawyers experienced in the jurisdiction that if you ask a child the same question multiple times, different answers might start to occur. He explained how such questioning could cause confusion and lead the child to believe their answers were wrong. This is backed up by the forensic interview literature (for example Krähenbühl & Blades 2006). Simple questions and topics, like Jane's approach with Madison described earlier, were usually enough to prompt conversations between lawyers and children about the Department, recent events, or ongoing problems in the family and out-of-home care from children's perspectives (Horsfall 2013). In most cases, children and young people had directly experienced the reasons precipitating proceedings and continued intervention. Being aware of children's vulnerability and difficult experiences meant lawyers could scaffold participation during what was usually a prolonged experience of intervention, as the next section further illustrates.

### **Being a 'passage agent' with children**

Lawyers were observed to conduct their relationships in ways that appreciated that they could be a 'passage agent' with a child or young person during their ongoing experience

of child protection intervention. Douglas et al. (2006, p.8) define a passage agent as a trustworthy, knowledgeable and accessible professional who can provide support and “navigate the turbulent waters” of family law litigation with children. This extends the “mentor and guide” qualities of barristers representing parents and other adult family members that Maclean and Eekelaar (2009, p.118) identified in UK family law and child protection. Lawyers in my ethnographic study were clearly capable of being sources of support for children and young people in circumstances where few were exclusively available to them. Parents or other family members may be emotionally unavailable, or perpetrators of abuse or violence.

Being a passage agent extended the scaffolding for children’s participation in matters outside the Children’s Court powers by asserting children’s concerns to the Department. The Department did not appear to be a consistent source of support to children and young people for a range of reasons (see also Victorian Ombudsman 2009, 2010, 2011). A high turnover of practitioners and cases being unallocated made it impossible to sustain a relationship with a child protection practitioner (case 330). Distrust between the Department and a child or young person may also develop early in proceedings, particularly after experiencing emergency removal from a parent (case 248), or after longer periods of Department involvement (case 228). Children and young people who experienced harm in out-of-home care had a justifiable deep distrust for the Department and its service agencies (cases 143, 172, 327).

Some lawyers performed their roles as passage agents by offering support for children and young people, as well as being advocates. For instance, Patrick told Brittany and Liam, “My job is to look after you in relation to the Department’s involvement with your family, as well as to say what you want to say to the magistrate” (14 years & older, 10-13 years, case 474). Catherine similarly explained to Carly that she has two roles as Carly’s lawyer: to be a guide for her during child protection, and to be a messenger to the judge (6-9 years, case 494). Children expressed their appreciation of lawyers’ support too. As Jessica remarked to Alison, her solicitor, “Court is scary”, but “a lawyer makes it less scary” (10-13 years, case 240). Jessica said this in the context of having discussed the changes in care she was experiencing, not simply the Court itself.

Being a passage agent characterised the emotional and practical support lawyers offered to children and young people in response to their experiences of child protection intervention. This was observed frequently when children and young people lived in out-of-home care because their placement and contact arrangements, as well as access to services, health care, education support and entitlements from the Department needed to be independently monitored, even if the only legal matter being decided may have been the type of court order. For example, Luke (10-13 years, case 134) asked his lawyer Natalie to tell the judge that he did not want his foster care placement changed again. According to Luke, the Department moved him to a new placement without notice and explanation. Luke understood that the Court could not control his placement, but he felt the Department was not listening to him.

My observations with Amanda, a solicitor, and Chloe, who had lived in out-of-home care for over 10 years, demonstrated the broader practical support of being a passage agent (14 years & older, case 204). The Department had guardianship responsibility, and the order was due to be extended. Amanda had been Chloe's solicitor over many years. Amanda and Chloe talked about her seeing a dentist and a physiotherapist for an injury, which the Department was supposed to pay for. Chloe raised concerns about the Department not helping her have contact with her older sibling and other members of her extended family. Amanda and Chloe also discussed recent changes in Chloe's out-of-home care placement. Although the change from a residential unit to foster care was positive, Chloe had lost important personal belongings because the move happened suddenly. Amanda assured Chloe she would "chase up what is happening" with her belongings, discuss Chloe's concerns with the Department, and make sure the Court knew about her problems with not having regular contact with family members.

An example of the emotional support lawyers offered as passage agents for children was seen with Natalie, a solicitor, and William (6-9 years, case 318). William's disclosures to his teacher about his father's severe physical abuse of him and his younger siblings led to Department involvement. Natalie acknowledged that William was worried about what was happening, "you don't need to keep worrying: any worries, bring them all over to here to me", especially William's worries "about Mum and Dad and police and all of that". Natalie added how it was her job to help William. Natalie told William how brave he was to have told his teacher and that he "is our hero". "Really?" William

responded, his face brightening and smiling, looking to me. I agreed also that he was “so very brave”. I noted a number of times over the course of six months how Natalie reinforced that William was “a hero”, especially as the situation became more difficult for him. William’s parents denied the allegations by calling him a liar, his grandparents criticised him for disclosing the abuse, the siblings experienced multiple kinship care placements, and the Department did not provide William with counselling as ordered. Having validated William as a “hero” and acting as a passage agent for him, Natalie formed a strong foundation for William to share his views about staying in kinship care and having limited, supervised contact with his parents. The exchanges between Natalie and William also indicate how important developing trust is for the ongoing relationships children experience with their lawyers.

### **Trust and confidentiality**

Confidentiality is a principle of trust in direct representation compared with other models, especially best interests (Blackman 2002). In contrast with direct representation, a best interests lawyer can use information obtained in confidence from a child to argue that the child’s views are not in their best interests (Federle 2008). There has been debate in the literature as to what extent children and young people should be entitled to confidentiality, ranging from no confidentiality so that the court has access to all possible information, through to children having similar legal confidentiality rights as any person (Griffiths & Kandel 2006; Margulies 2007). Children themselves can often expect confidentiality from their lawyer nonetheless. Research has found children to be distressed, distrustful, and to have their safety compromised when professionals have breached their confidentiality in private family law proceedings (Cashmore & Parkinson 2008; Douglas et al. 2006; O’Quigley 2000).

Lawyers in the ethnographic study valued confidentiality with children and young people because it was believed to enable open discussions about their safety: a “child can talk freely knowing the discussion is confidential” (Patrick, solicitor). I observed that lawyers offer children and young people confidentiality as a standard practice. It was offered in child-appropriate terms to mean the lawyer would not repeat what was

said unless the child or young person agreed. Natalie discussed confidentiality with Luke and how it meant that she “will not tell anyone what you say unless you want me to” (10-13 years, case 134). Similarly, early on in the conversation between Rachel, a solicitor, and Thomas, Rachel said that confidentiality meant, “You can tell me anything” but also “not to tell anybody else” (10-13 years, case 144). The limits of confidentiality were less clearly articulated in relation to whether the lawyer would breach confidentiality in certain circumstances. Confidentiality may need to be breached if a lawyer were told information about serious danger to a child that was not already known or investigated (Blackman 2002; Cashmore & Bussey 1994). However, I did not observe any circumstances that required confidentiality to be breached.

Another way lawyers fostered trust and confidentiality with children and young people was by reflecting back the instructions they had agreed upon and what could be said publicly to parents, the Department, and the Court during negotiations. This was vital for children’s sense of safety and ongoing relationships with family members. For example, Charlotte confided to Claire, her solicitor, that her father had been drinking alcohol, in the form of “special lemonade from the bottle shop”, during contact (6-9 years, case 159). Charlotte was concerned because “Beer makes him angry”. Claire asked Charlotte if it was “okay to talk with other lawyers or would she prefer” if Claire “didn’t tell anyone about what we’ve talked about today?” Charlotte was “not sure about telling anyone” about her father’s drinking because she did not want anyone’s feelings getting hurt. Claire told me she understood this to mean she did not have Charlotte’s permission to breach her confidentiality. Also, given that her father’s perpetration of family violence recently included threatening Charlotte, her mother and younger sibling with a weapon, Claire was aware of significant risks posed to Charlotte. Without breaching Charlotte’s confidentiality, Claire was able to find out that Charlotte’s mother was already raising her father’s noncompliance with the court order conditions regarding alcohol and drug consumption during contact with the children. Claire might otherwise have had to breach Charlotte’s confidentiality if this matter had not been brought to the Court’s attention.

Reflecting on which aspects of children’s views would be shared publically or not usually happened when a lawyer reviewed their notes together with the child. This created opportunities to correct or adjust what was to be said about children’s

instructions. Towards the end of their interaction, Natalie reflected her record of Luke's instructions about having more contact with his dad and wanting the Court to know he didn't want his foster care placement changed again. She said, "I'm reading back to you to make sure I got it all right" and asked if he had any "other jobs for me?" A few moments later Luke raised his concern that he did not have his dad's phone number and he "would like to have it". This process meant Luke knew what Natalie would be saying and doing on his behalf.

In the findings presented so far, I have argued that the quality of the relationship between a lawyer and child is the basis for implementing participation rights in child protection proceedings. Children were able to meet with their usual lawyer most of the time and have their usual lawyer represent them at court events in their absence. However, continuity in this relationship was not maintained in a minority of cases. More than one lawyer represented a child in 14 of the 50 ethnography cases, excluding barristers who were briefed for contested hearings ( $n=3$  cases). These events usually happened when a lawyer acted as agent for a child's usual lawyer after the Department initiated a secondary application, such as breaching an existing order by using emergency removal instead of using a notice procedure. A child's usual lawyer was not always available on those occasions, because they were not on duty at the Court. Sometime lawyers were away sick, on holidays, or working at a different court location and thus had to brief a lawyer to act in their place. Rostering in the VLA duty lawyer service was an issue I identified early on, and feedback to VLA resulted in positive changes. Discontinuity of representation could possibly disturb children's trust and confidentiality with their lawyer. For example, Sarah delayed disclosing physical abuse she experienced in foster care when meeting with Stacey, a solicitor, who was not Sarah's usual lawyer (14 years & older, case 327).

Lawyers and children making decisions together about how participation was implemented forms the focus of the next section.



## **Constructing flexible participation with children and young people**

‘Flexibility’ was an important feature of scaffolding participation through legal representation in child protection proceedings. Flexibility contrasts with the argument that legal representation places rigid expectations on children to participate like an adult, especially direct representation with instructions (Horsfall 2013). The following data illuminate how lawyers can represent children and young people across age groups by responding to their individual experiences and the shifting contexts of each case over time. The characteristics of flexible participation presented below are shaping the extent of participation, partial instructions, hierarchies of instructions and strong instructions.

### **Shaping the extent of participation**

Lawyers presented children and young people with choices about the extent to which they participated in each decision. They offered children an option not to express a view and just have the magistrate decide. This occurred early on when proceedings had just commenced, as well as later in cases. As Lauren (solicitor) told me, children “can opt out of answering questions or making decisions for various reasons without needing to give those reasons”. While the lawyers I observed were careful to do this, Patrick (solicitor) expressed his concern that not all lawyers “properly advise the child that they don’t have to express a view”. His comment reflects the need for lawyers to inform children and young people about options to manage the extent to which they participate in decisions.

Providing support for children and young people to have choices about the extent to which they participated was exemplified by Alison’s (solicitor) approach with Jessica (10-13 years, case 240). Jessica held clear views in favour of being in the care of her father. However, Jessica expressed uncertainty about having a view on supervision of contact with her mother. Alison offered to Jessica, “If you prefer not to say, you can say that”, and reassured her it was okay to “have adults make the decision” about supervision. Jessica decided that she wanted Alison to tell the judge she thought there should be “no sudden decisions” about supervising contact with her mum because she

was not sure about that at the moment. Alison was respectful towards Jessica's ambivalence about expressing a view about her mother, while simultaneously accepting Jessica's instruction to be with her father.

Responding to changes in the extent to which children and young people participated over time was another feature of scaffolding participation in flexible ways. Just because a child or young person had been comfortable expressing a view in the past, lawyers I observed did not assume the same degree of participation in subsequent decisions. This accounted for the reality that experiences of children and young people changed over the duration of child protection proceedings, in positive and painful ways.

An example of scaffolding participation with children in response to different situations over time occurred during one of my observations with Jane, a solicitor. Phoebe and her siblings had experienced child protection proceedings over a number of years (6-9 years, case 340). There had been a period of out-of-home care in recent months, including a particularly difficult time when the siblings were living in a residential unit. While talking with Phoebe about the possibility of living with their father or going into out-of-home care again, Jane reminded her how, "My job is to give your messages to the judge. Another option is to let the adults decide today". Phoebe looked up at the corner of the room, not making eye contact for a moment. She seemed to be thinking deeply and had a serious facial expression. "Yes, good idea". Jane agreed with Phoebe it would be okay to let the adults decide just for today about where she will stay for now. Phoebe's main concern was that she and her siblings should stay together.

Jane explained to me afterwards how Phoebe had expressed clear views about her care arrangements in the past, but she was aware that Phoebe was not feeling as clear about her current circumstances. Jane said she did not want Phoebe to feel pressured to give a view. Seeing the situation from Phoebe's perspective, Jane pointed out to me that Phoebe's participation was affected by her experience of being removed from her father late the night before, being interviewed by the Department, being held in a room by the Department, and a long day at court because the Department released the report late in the afternoon. Jane accommodated Phoebe's ambivalence and vulnerability in this context. She did not see this change in the extent of Phoebe's participation as meaning that Phoebe had diminished capacity for future occasions. This indicates that lawyers

can apply direct representation with a child in ways that scaffold the extent of a child's participation over time.

Even though I did not observe any child or young person elect not to participate entirely, having a view about certain matters and not others meant that some children gave partial instructions.

### **Partial instructions**

Partial instructions happen when a child or young person has a view about selected aspects of child protection proceedings, but not necessarily about all matters being decided. This aspect of scaffolding enabled a child's status as a participant to be upheld when they wanted their lawyer to respect their confidentiality. Respecting confidentiality meant the lawyer shared some, but not all, a child's views about their care when speaking with parents, the Department or the Children's Court.

Returning to the examples of Jane with Phoebe and Alison with Jessica in the previous section, both children continued to participate with partial instructions. Phoebe's partial instructions reflected her view about being together with her siblings, even though she did not express a view about who would be caring for them on this occasion. Her partial instructions became important when the Department later admitted they would separate the siblings should they be placed in out-of-home care. Similarly, Jessica's partial instructions conveyed her views about supporting her father's care, while leaving up to the magistrate the matter of supervision of contact with her mother. Partial instructions in these cases enabled what was important from the perspective of each child to be considered in the decision, rather than decisions focussing only on adult concerns.

Lawyers in this research saw partial instructions as a legitimate form of participation, and Justice Garde (2012 VSC 589) subsequently endorsed this in the Supreme Court appeal judgement for Aisha and Bree (6-9 years and 10-13 years, case 275). Barristers for Aisha and Bree argued that partial instructions should not preclude direct representation because of:

... a recognition that a child need not be able to give instructions on all issues relevant to a proceeding. The absence of the maturity to give instructions on some issues does not render the child generally not mature enough to give instructions. Section 524(10) of the Act recognises that a child with a direct instructions lawyer may only be able to express wishes on some topics, and that a legal representative acts on instructions or wishes “so far as it is practicable to do so having regard to the maturity of the child” (2012, para.88).

Justice Garde ultimately agreed with Aisha and Bree’s lawyers.

Reflecting the flexibility offered by participating with partial instructions, lawyers used this practice to support children and young people to maintain their participant status across biological ages, stages of development, maturity, need for confidentiality, and complex situations. The following quote from Simon (solicitor) best sums up this perspective:

Children vary in terms of understanding and being able to articulate their instructions. However, their views and voices should be heard in all their various capacities, as simplistic as their instructions may be. For example if a child wants to remain in their family or wants their father home. This might be the only instruction they are able to give. I would argue these instructions are vital for the Court to know.

Based on Simon’s perspective, a child or young person giving partial instructions should not diminish recognition of their status as a participant. This included circumstances when their partial instructions were linked to their intrinsic “capacities”, such as difficulty understanding particularly complex legal constructs.

### **Hierarchy of instructions**

Flexibility in participation also occurred where children and young people had a hierarchy of preferences within their views. Lawyers scaffolded this type of participation by recognising that having an order of preferences reflected the dynamic and uncertain outcomes for some children, rather than perceiving this as indecisiveness on their part.

A portion of the interaction between Catherine, a solicitor, and Carly illustrates how lawyers supported children and young people to give instructions with a hierarchy of preferences (6-9 years, case 494). Carly said to Catherine that her mother had already told her it was possible she might have to stay with her father for a while. Even though this prepared her for that possibility, Carly nevertheless stated firmly her views that the “worst part about it, I can’t sleep over” at Mum’s, “but I want to live with Dad and Mum”. For Carly this meant she would “live with Mum and have sleepovers at Dad’s”, reflecting the shared parenting arrangement under their existing federal family law order. Catherine outlined the options being evaluated by the Department about “living with Mum or Dad” and spending time together if she was not living with her mother.

With Catherine’s support, Carly’s preferences were ordered so that her first preference was to live with her mother as per her current care arrangement; if she couldn’t live with her mother then she wanted to see her mother after school or at weekends for a sleepover. She also wanted to stay together with her siblings, and did not want her father to make her change schools to be closer to his house, as he had said to he would do. I noted how Carly was sitting up on the chair, making eye contact, asking questions and appeared to be listening closely to what Catherine said. At the same time Carly would move in and out from drawing in her colouring book, particularly when taking her time to think about something.

The interaction between Catherine and Carly highlights how direct representation means that “children are given the opportunity to inform decisions that affect them and their families” (Lauren, solicitor). The scaffolding Catherine provided for Carly meant Carly had the opportunity to state her first preference, despite the strong likelihood that her first preference would not be possible. Carly’s preferences to remain together with her siblings and not be made to change schools also raised concerns about the consequences of these proceedings that were important to her, but not necessarily a priority for the adults.

Having a hierarchy of instructions was not possible for some children, however, because they had strong views about a particular aspect of their care.

## **Strong instructions**

I use the term ‘strong instructions’ to describe circumstances where a child or young person had a particular view to the extent that in their eyes, no other option was favourable. In these circumstances, lawyers were observed to reiterate their role in direct representation as being an advocate for the child’s views. This validated a child or young person’s status as a participant with direct representation, especially if their strong views were not consistent with what the Department or a parent was seeking.

The theme of strong instructions was demonstrated when Rachel, a solicitor, represented Thomas (10-13 years, case 248). Thomas gave strong instructions that he wanted to be in his mother’s care. The Department opposed Thomas being in his mother’s care, alleging that she failed to protect him from family violence perpetrated by an older sibling. Thomas had initially tried living with his father, as ordered by a magistrate, but found being separated from his mother extremely upsetting. During their conversation, Rachel and Thomas made a list of family members together to understand with whom Thomas felt most safe living, and the reasons why he felt less safe with particular people. Thomas told Rachel that “Mum is first priority” and that there were “no other people” he felt as safe with because the other family members were “worse”. In particular, Thomas was afraid of the kinship carer proposed by the Department. Thomas “didn’t like it” when he stayed with this relative previously, because the relative had “slapped me across the face”. Rachel asked him to “tell me a bit more” about that if he could. Thomas told Rachel “don’t tell anyone”, but “for me I got a feeling that [family member] is dangerous”. Rachel reflected to Thomas “That’s very important” and she was “glad you told me that”. As Thomas’s lawyer, Rachel told him that “what you say is what I say; what you want is what I want”. Rachel had therefore reaffirmed Thomas’s status as a participant with direct representation by accepting that she would advocate his instructions to be in his mother’s care. It later emerged that the relative nominated by the Department as kinship carer in fact had a history of family violence intervention orders against him. I saw Thomas smile for the first time in three days upon being told the magistrate decided to allow him to go home with his mum.

Children and young people, like Thomas, who gave strong instructions about their care and safety, were assured that their lawyer would faithfully act upon their views under

direct representation. The same guarantee would not apply with best interests representation though, because lawyers might form an opinion about a child's best interests that did not support the child's perspective.

## **Conclusion**

Previous research with children and young people who have been the subjects of child protection or family law proceedings, and with children living in out-of-home care, has consistently found that they want to be allowed to participate, to have choices about how they can participate, to have their views heard and taken seriously, and to have a say without responsibility for the final decision (Bessell 2011; Block et al. 2010; Cashmore 2002; Cashmore & Bussey 1994; Kaspiew et al. 2013; Leeson 2007; Masson & Winn Oakley 1999; Morrow 1999; Wolfson et al. 2010). According to the CREATE Foundation (2010, p.6), young people “always found court less daunting when they knew who their lawyer was going to be beforehand and also if they trusted this person”.

Reflecting that literature, this chapter has demonstrated how lawyers can scaffold children's participation by engaging in democratic communication, legal education, and shared understandings about child protection intervention. Lawyers can also be passage agents with children and young people during their experiences of child protection intervention in their lives. Such relationships between lawyers and children depend upon trust and confidentiality, which was possible with direct representation. Direct representation is a flexible model of participation for children and young people when lawyers construct opportunities for participation to change over time according to each child's individual circumstances, how children express their views, and forming types of instructions. This points to the importance of children and young people having access to the same lawyer over time (CREATE Foundation 2010). However, a consistent relationship with their usual lawyer was not always achieved when the Department used emergency removal instead of a notice procedure, or the same lawyer was not able to be at court on the day of a hearing. This also relied on lawyers having the skills and positive regard to support children's participation rights.

Together the qualities of representation reported in this chapter indicate that most lawyers held ethics of recognition towards children and young people as participants. Not only did these lawyers see children and young people as having participant status, but they also implemented representation in ways that could enable children and young people to actually be participants. Rather than seeing children as passive objects of care and too vulnerable to participate, most lawyers applied their skills in ways that children could learn about child protection and share their own perspectives about safety, care, contact and other concerns. Lawyers' scaffolding practices consequently provided space for what Graham et al. (2006) called the "to and fro" of participation, in a context where children and young people can move between agency and vulnerability while being supported by an experienced advocate who is sensitive to their situations. While the ethnography study does support lawyers' recognition ethics, it is important to acknowledge that this might not always be the case. Chapter Eight will cover some examples from the case file judgments of weaker representation of children.

These findings were predicated on children and young people having access to legal representation. Paralegals who administered legal services and lawyers assessing the suitability of representation were constrained by the governance boundaries framing children's eligibility for direct representation. Access to best interests representation for young children was particularly difficult, because magistrates must find that exceptional circumstances are established. The combination of legislation requiring exceptional circumstances and children being unable to instruct a lawyer for best interests representation, together with the age threshold for direct representation, resulted in almost all children younger than seven years old not having representation.

Relative to the participant status of parents and the Department, best interests representation in Victorian child protection proceedings has the potential to improve the participant status of young children and those unable to instruct a lawyer, as those children would not otherwise have any legal representation. Participant status in these child protection proceedings contrasts with previous research that has found lawyers can place lessor emphasis on this dimension of best interests representation compared to other aspects of their role, particularly in family law contexts (Kaspiew et al. 2013; Ross 2012a, 2012b).



Parity of status for children with best interests representation is possible when lawyers perform a forensic role, while still recognising children as participants. The forensic role I identified may correct power imbalances between children and their parents or the Department by providing independent investigation and assessment about children's best interests. However, lawyers pointed out that this type of representation depends on each lawyer's attitude to children's participation, how they respond to a child's views, and how they form views about the child's best interests. Best interests representation could constitute a form of misrepresentation if a lawyer formed their position about a child's best interests, but had marginalised or negated a child's participant status in the process. Therefore, how lawyers implement best interests representation is contingent upon their individual recognition ethics. As illustrated in this chapter with Shaun, who represented David on a best interests basis, lawyers are not required to meet with children when representing them under this model, but the best interests lawyer has the power to scaffold participation by being open to engaging respectfully with children who otherwise might not be able to give any instructions.

Although more comparison between cases where children and young people had best interests, direct, and no legal representation is limited by the ethnography sample, previous international research offers some insights into negative consequences for participation rights. Where children and young people had access to a law guardian in the New York system, Griffiths and Kandel (2000a, p.171) found that lawyers performed their role with a "hybrid of parentalistic advocacy". This meant that lawyers placed greater emphasis on their opinion about a child's best interests rather than necessarily advocating a child's instructions. Children subsequently had a poor experience of participation and distrusted law guardians. Griffiths and Kandel's observations (2000a, 2000b, 2004) also revealed that the Scottish lay panel system for child protection and youth crime was even more problematic than the New York system, because children and young people appear in person, do not usually have legal representation, and have no right to confidentiality. Children's coping strategies in response to power imbalances with the panel, child protection department and parents were evident. Strategies included not raising their concerns, not disagreeing with negative narratives about them, and speaking minimally or keeping silent throughout proceedings. Children's participation experiences were characterised by fear,

disaffection, not being listened to, and difficulty understanding what was happening to them. Unlike my findings, Griffiths and Kandel's findings indicate an increase in status inequalities between children and other adults in proceedings, including the law guardian, when children have a representative who does not act consistently with their views and when they have no legal representation. This renders children responsible for their own participation instead of facilitating those rights as a direct representative can.

This chapter has focused on the relationships and private interactions between lawyers and children that occur out of view of the Department, parents and magistrates. The next phase of participation is presented in the following chapter, when lawyers represent children and young people in decisions being made within and outside the courtroom.

## **Chapter Six**

### **Lawyers representing children and young people outside and inside the courtroom**

This is the Children's Court, which means you're the most important person here, not the adults or Aunty or Grandma or me.

Alison, a solicitor, made this comment to reassure Olivia, while they were discussing Olivia's concerns about kinship care for herself and her younger sister, Lisa, with either her aunt or grandmother (6-9 years, and 5 years & younger, case 496). Even though she was comfortable staying with Grandma, Olivia was worried about Grandma's dogs, which jump up a lot and frighten her and Lisa, and Olivia is allergic to dogs. Olivia was also worried about Lisa not having their cousins (the aunt's children) to play with at Grandma's house. During negotiations with the Department, grandmother and aunt, Alison reached an agreement that addressed Olivia's concerns. Olivia's grandmother agreed not to have the dogs at the house while the children stayed there, and contact arrangements were made with their aunt. The magistrate subsequently granted an order consistent with the agreement. Upon Alison explaining the outcome to Olivia, Olivia thought staying with Grandma was "good" now she didn't have to worry about the dogs, and was "happy" to see their cousins a lot.

In this chapter, I examine how lawyers like Alison could facilitate participation of children and young people in decisions being made outside and inside the courtroom. At this stage of the proceedings, children's views are intersecting with those of the Department and parents. Participatory parity in this context refers to two qualities of participation with representation. One is the extent to which children and young people have status as participants in these decisions alongside the Department and parents (or other parties). At a minimum, inequalities in status should not be exacerbated. The second quality is how participation is implemented with representation in ways that can reasonably fulfil participation rights of children and young people, especially in relation to having their views heard and given due weight in decision-making, consistent with

Article 12 of the UNCRC. In keeping with the scope of my observations, data in this chapter is limited to direct representation except where best interests representation is specified.

There are five parts to this chapter. Part one reports my observations about how lawyers conducted negotiations. Part two compares participation of children and young people in decisions when they met with their lawyer before a court event or at court, and I identify some ways that their participation could be disrupted. Strengths and limitations in representation during negotiations form part three. Part four focuses on representation strategies lawyers were observed using inside the courtroom in response to the participant status of a child or young person. Part five considers the final aspect of decision-making when outcomes are communicated to children and young people. In light of the findings, I conclude by arguing that representation can support participatory parity by independently bringing the views and concerns of children and young people into decision-making processes. However, adding to the findings from Chapter Five, barriers to participatory parity in decision-making also arise from some lawyers' practices, conduct by the Department and parents, the court environment, and the fragmented structure of the child protection legal system.

### **Multilateral negotiations outside and inside the courtroom**

A classic image of legal proceedings positions parties on separate sides of the courtroom with a judge making the final decision. While some child protection cases do reach the point of requiring a judicial decision, a large majority do not have a high level of judicial involvement because the Department, parents, and legally-represented children and young people reach agreements through negotiations.

The types of decision-making processes in the Victorian Children's Court were first described in Chapter Two. These include formal alternative dispute resolution, informal negotiations, and judicially-determined decisions in the courtroom with submissions or contest hearings. To summarise, where a decision was recorded for at least one court event for 49 out of 50 ethnographic cases, there were:

- Three cases with formal legally-assisted mediations;
- Twenty-one cases observed with at least one decision negotiated entirely outside the courtroom, in which the matters ranged in levels of severity, from settling proof of sexual abuse through to contact arrangements;
- Thirteen cases observed with submissions inside the courtroom on at least one occasion; and
- Five cases observed with a contest hearing.

The remaining cases had adjournments, directions hearings, or other events that did not result in a particular protective order being made on the day when observed.

The range of court events and types of decision-making processes observed across the ethnographic sample show that child protection proceedings usually occur as an ongoing process, not a one-off event. Child protection proceedings typically happen across many court events over time, reflecting the dynamic and complex nature of statutory intervention (Hunt 1998; Hunt, Macleod & Thomas 1999; Maclean & Eekelaar 2009; Masson 2012; Pearce, Masson & Bader 2011). The processes observed during these court events were multilateral in character. Multiple participants were involved, and secondly, the decision-making itself was dynamic by moving in and out of the courtroom.

There can be multiple family members and professionals shaping negotiations and decisions at each court event. These could include one or both parents, sometimes with a new partner, and their legal representatives providing counsel; the Department's professionals and their legal representatives; magistrates; and children and young people who have participant status with their own legal representatives. Only parties to a case have a right to decide they consent, do not oppose, or oppose an order. A child or young person with direct representation can also consent, not oppose, or oppose an order. Extended family members could also be joined as parties, and have influence as kinship carers or supporters to parents, as happened for Olivia and Lisa in the case at the beginning of this chapter. Options for orders and conditions were generated between parties in negotiations and, if mutually acceptable, were then put to the magistrate for approval. I did not observe any instances where a magistrate rejected a negotiated

outcome, although some lawyers reported having had that experience at some point during their time working at the Children's Court.

The 'lateral' character of negotiations refers to the dynamic processes observed outside and inside the courtroom of the Children's Court. Although negotiations formed the dominant decision-making process, and I am presenting observations made outside and inside the courtroom in separate parts of this chapter, the process itself typically moved fluidly between these spaces. Negotiations were observed being conducted through meetings between lawyers representing each party, or an unrepresented parent, with combinations of shuttle discussions (moving between one-to-one conversations with each representative or unrepresented parent) and all lawyers meeting in a room together. Proposals for children's care were raised, evaluated, argued for or against, and responded to. Cases would sometimes be called into court, stood down, and recalled during the day so that negotiations received monitoring or adjudication by a magistrate. Agreements were eventually presented for approval to the magistrate. Decision-making is a far more dynamic, problem-solving process than purely adversarial stereotypes of court proceedings with a judicial officer assessing evidence and applying the law to decide a dispute between two opposing parties.

Child protection decision-making as a multilateral process is consistent with the literature. Negotiations supported by lawyers have long been a means of reaching compromise and agreement in all stages of legal proceedings across all types of jurisdictions, and child protection is no exception (Hunt 1998; Maclean & Eekelaar 2009; Mnookin & Kornhauser 1979; Pearce, Masson & Bader 2011). Formative research by Hunt (1998, p.281) in England was the earliest to reveal the difference between legislative framing of child protection proceedings as "trial and adjudication", and the reality of a "dynamic" problem-solving process. Pearce, Masson and Bader (2011) endorsed the continued relevance of Hunt's findings in their study of lawyers representing parents in England. Like Hunt (1998), Pearce and colleagues (2011, p.27, 33) documented the "dynamic nature" of these proceedings, with decision-making being diverse in practice compared with how legislation and policy had structured it "on paper".

According to Pearce, Masson and Bader (2011, p.27), having children and young people “given a voice as a party” through the children’s guardian or legal representation made proceedings “tripartite” rather than binary. As well as helping to maintain children as the focus of adult attention in decision-making, they observed that children’s participation meant:

It can be argued that one effect of this is the creation of a more collaborative and problem-solving approach than would be likely in a two-party polarised adversarial process (2011, p.27).

Pearce, Masson and Bader (2011, p.46, 123) described how the representation of multiple parties and involvement of children and young people meant negotiations functioned like a committee engaged in problem solving and compromise. Tensions and conflicts inevitably arise, but children’s status as participants via representation can disrupt binary power dynamics, where one or both parents are in tension with the Department, as well as bring forth a focus on what the decision means from the perspective of each child.

The tendency for a binary power dynamic between parents and the Department was often disrupted upon hearing children’s views. For example, Mathew’s mother initially refused to cooperate in negotiations (10-13 years, case 330). As the proceedings continued, his mother changed her position contesting supervision of her care to agreeing to supervision with another adult staying in the home upon hearing Mathew’s views about what he needed to feel safe to return home from kinship care. This included agreeing to not leave Mathew to care for his younger siblings for long periods of time, making sure there was food in the home, and limits on her alcohol and other drug use. Mathew’s mother heard his views represented independently by his lawyer. The same outcome might not have been possible if only the Department and Mathew’s mother participated in the negotiations.

Despite the high frequency of decisions reached during negotiations compared with judicial determinations, multilateral decision-making nonetheless raises a number of issues. These include whether there has been due weight accorded to children’s views, sufficient access to judicial oversight, procedural fairness, testing of any evidence, and principles of transparency concerning state intervention into children’s lives and

families. Any participatory parity would be impossible for children and young people without legal representation under these conditions.

The next part of this chapter examines how lawyers conducted negotiations outside the courtroom when representing children and young people.

## **Participation in negotiations through legal representation**

In this part of the chapter I compare participation of children and young people in negotiations according to whether they met with their lawyer before a court event or at court on the day. Lastly, I show how participation in negotiations was disrupted when children were not present, and the strategies lawyers used in attempting to ameliorate children's exclusion.

### **Representation when lawyers and children met before a court event**

Maintaining participatory parity when lawyers met with children and young people before a court event relied on five conditions: children getting to an appointment, access to up-to-date case information from the Department, knowing the likely options available in the matters being decided, some indication of the position of the Department and/or parents, and having relatively stable circumstances to reduce the risk of changes in the case at the hearing. As in the previous chapter, these conditions depended on lawyers having the necessary resources to scaffold participation so that children could provide instructions about their care, relative to their current child protection circumstances. Satisfying these conditions could minimise disadvantages to children's participation via representation in negotiations or a hearing if parents or the Department changed their own positions on the day of a court event.

The Department is required to act as a model litigant and comply with guidelines of conduct when representing the State of Victoria in child protection proceedings (State Government of Victoria 2011). Being a model litigant means acting with fairness, propriety, and exercising a range of duties, including not causing unnecessary delay



(State Government of Victoria 2011). From the perspective of lawyers, the onus was on the Department as the model litigant to provide case information ahead of time, so that meetings with children and young people could occur off-site from the court. Current information from the Department was necessary for children's instructions to be accurately informed and respond to the matters that required negotiation. According to Amanda, a solicitor, an advantage of legislation limiting children's attendance at court was that the Department would have to "... be better prepared and reports prepared in time [for lawyers] to meet children" before a court event. As Malcolm (solicitor) commented, "Children should be less stressed" meeting lawyers away from court.

My observations of meetings in more informal settings compared to the Court supported Malcolm's opinion. I observed three lawyers with four children and young people off-site from the Court in their offices or public venues: Amanda (solicitor) with Chloe (14 years and older, case 204), Kate (solicitor) with Emily (10-13 years) and Harry (6-9 years, case 134), and Stacey (solicitor) with Meghan (6-9 years, case 328). Meetings went uninterrupted, lawyers were able to offer a drink to children, and comfortable chairs were available. These were all ongoing cases in which the children and lawyers knew each other. All the lawyers had up-to-date reports from the Department prior to the scheduled meetings. Most of these children and young people also had support from an adult to get to the meetings. Chloe was determined to see Amanda on her own, so Amanda helped her with public transport to and from her office.

Meeting environments between lawyers and children off-site from the court were preferable to the court environment. The United Nations (2009) General Comment on Article 12 points out that states are obliged to ensure children's participation occurs in an environment that "enables the child to exercise her or his right to be heard" (para.11) and "a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age" (para.34). Although the CREATE Foundation (2010, p.5) reported that most of the 25 children and young people consulted for the VLRC inquiry "believed it was their right to attend [court] and have a say in their lives", they all found it "scary" coming to court the first time. The court building contributed to their anxiety, including the lack of child-friendly and private spaces to see their family and lawyer.

The adult-centred design and conduct of adults made the metropolitan Children's Courts unfriendly spaces for children's participation (Horsfall 2013). Problems included inadequate private meeting rooms, the constant screech of announcements over the Court's loudspeaker, adults smoking in the small outdoor spaces where children might otherwise play, and hostile, aggressive adults. Luke told his lawyer that the city location could sometimes "be a bit scary", especially because you "have to wait around" (10-13 years, case 134). He thought there "should be better things for kids to do" and "places to wait". On one of the days I was with Natalie (solicitor) and William, he commented, "this room makes me feel sick", because he was able to read the rude words graffitied on the wall in the Department's windowless waiting room (6-9 years, case 318). It took Natalie and I together to pressure the Department and Children's Court to get the room repainted. Lawyers I spoke with were in agreement that ideally, children and young people would not have to attend court given the environment, and that the environment was unlikely to be addressed.

My observations identified a number of barriers to children's participation prior to a court event. Vital information from the Department and parents was not always available to lawyers, meaning they could not discuss essential matters with a child. I also observed occasions when meetings did not proceed as scheduled. Children did not attend the appointments because the Department, agency workers, carers or parents did not bring them as agreed. Vanessa (solicitor) reflected these barriers in the following comment:

I agree children should avoid attending court. I always arrange [to meet] kids in my office before court. Sadly DHS workers do not do their court reports on time and are often not able to bring children into the office, as it is unfair to rely on carers or parents to do this, to accommodate office interviews prior to court.

Therefore, meetings between children and their lawyer before a court event relied on cooperation between adults and essential information being available so that children's participation in decisions was not compromised.

One of the court events I observed with Jessica and her lawyer, Alison, a solicitor, illustrated how Jessica's participation was maintained in negotiations when meeting before a scheduled hearing (10-13 years, case 240). I had observed Jessica and her

lawyer interacting during three out of four hearings over many months. For the fourth hearing, Alison and Jessica spoke a few days earlier. This meant Jessica did not have to miss a day of school for the hearing. The Department's report had been released in time, there had been no new protective concerns raised, and the agreement between the Department and Jessica's father, who had only recently become her primary carer for the first time, was going smoothly. Furthermore, Jessica did not have any new concerns of her own. Her instructions about being in her father's care included that she "likes living with Dad", "feels very safe" there and "nothing needs to be done to make her safer". According to Alison, this left the length of the order and conditions for contact with her mother to be "finessed" during the negotiations. Jessica preferred a shorter court order than the Department was proposing. Although supervised contact with her mother was "okay", she now preferred unsupervised contact scheduled after school. The outcome negotiated on the day with Alison representing Jessica's views was consistent with Jessica's instructions, in part because no new protective concerns had been raised at the hearing in Jessica's absence. As well, neither the Department nor Jessica's father and mother changed their positions about the protective order and conditions on the day. Therefore, Alison could continue to advocate for Jessica's views during the negotiations because Jessica's instructions remained current relative to the circumstances of her case. Jessica's status as a participant in the decision was maintained, even though she was not present at the Court.

As I indicated in the previous chapter, the high use of emergency removal by the Department to initiate new or secondary applications meant that children and young people were often at the Children's Court for a hearing. In accordance with the CYFA (s.242), the Department were required to bring a child before the Court for an application hearing as soon as practicable or within one working day of emergency removal, with an exception made for "a child of tender years". The next section addresses children's participation in the negotiations when they were present at the Court.

## **Representation in negotiations when children were at the Children's Court**

The multilateral character of negotiations at the Children's Court meant that lawyers typically met with a child or young person more than once across the hearing day. This was necessary as more information became available, positions of the Department and parents were put forward or changed, and options for the court order and conditions transpired. In doing so, lawyers were ensuring that children and young people had a fair opportunity to be informed about what was happening, update their instructions and, in turn, could inform the negotiations via representation.

An example of this process comes from Catherine, a solicitor, representing Tara (6-9 years, case 490). In the second part of their meeting on the day of a hearing, Catherine described the options being considered during the negotiations. She said, "The grown-ups have got some good ideas and plans", and she was interested to know what Tara thought about these options. The options so far were that Tara and her siblings "...could go with Dad for a bit", or Dad had also said "...Mum could come and stay too". Even though Tara's parents were separated, they had a cooperative relationship, and the protective concerns related to her mother's alcohol use. Tara favoured staying with her dad for a few days: "That's what I want, until the end of the week. If he has to go to work I will go with him". This was because it was the school holidays, and that had been the plan already before the Department initiated a breach of the current order using emergency removal of Tara and her siblings the night before. Catherine could thereby discuss the options with Tara as they became known, and Tara could share her views so that Catherine continued to represent Tara fairly during the negotiations.

Parity of participation could be maintained with direct representation for children and young people present at the Court when the options available for their care changed, new information surfaced, or the positions of the Department or parents shifted. An example of this happened later during the day with Catherine and Tara. A full agreement had not been reached during negotiations outside the courtroom, so the case progressed to submissions with the magistrate. A new option arose while inside the courtroom for Tara and her siblings to continue living at home with their mother, but for a family member to supervise care. Because the option had arisen after the last discussion between Catherine and Tara, Tara did not know about it. Catherine supported

Tara's participation by asking the Court to allow a short time for her to discuss it with Tara. Catherine could do this because Tara was still present at the Court.

Tara's view about the new option was that she while she agreed with the idea for the long-term, and was "happy" for her extended family member to be at home, she was still expecting to spend some time with her father for the rest of the school holidays in the short-term. However, Tara wanted Catherine to "...make sure that [her youngest sibling] stays with Mum", because he was just a baby. Catherine then submitted Tara's updated instructions to the Court. An agreement was subsequently reached inside the courtroom and approved by the magistrate for Tara to spend the remainder of the week with her father, while her siblings were cared for by their relative and mother together. The proceedings continued without delay in Tara's case, and reached an agreed outcome while Tara had a fair opportunity to have her views heard.

### **Disrupted participation in decision-making**

Sometimes participation could be disrupted for children and young people who did not have a fair opportunity to update their instructions. Participation was disrupted when children's instructions become out-dated, and their lawyer did not have a reasonable way to continue representing them fairly. The first example below comes from a lawyer attempting to maintain fair participation for a child who was present for some—but not all—of the negotiations. The second example illustrates the disruption to participation when a child was not available at all for negotiations, and their lawyer could not represent them fairly.

Louise, a solicitor, represented Jason when the Department initiated a breach of a Supervision Order using emergency removal of Jason and his younger siblings (10-13 years, case 336). After having met together earlier in the day, Louise needed to speak with Jason again when his father attended court for the hearing. Louise needed to check if Jason wanted to share any views about contact with his father, whom he did not live with. Louise looked for Jason in the waiting area and paged his name over the court speaker system, but had not been able to find him. She spotted the Department practitioner in Jason's case and asked to see Jason. The practitioner reported that she

sent Jason and his sibling home because it was not convenient for her to have them at court. Louise became frustrated at this, replying, “It’s what the child wants that’s important, not what’s convenient” for the Department. Louise explained to me that the practitioner should have checked with her before sending Jason home. Louise was able to obtain the mobile phone number of Jason’s carer so she could reach him. However, it became apparent while they were talking that someone else was present, other than Jason’s carer and sibling. There was in fact another Department practitioner in the background. Louise carefully ended the phone call at that point by telling Jason she would let him know what happens with the decision.

Jason’s representation was disrupted when the Department practitioner sent him home without confirming with Louise whether the timing was suitable. There was no clear indication about whether or not Jason was ready to leave the Court; instead this occurred at the Department’s discretion. Even though Louise sought to maintain Jason’s participation in the decision about contact with his father by talking together over the phone, the lack of confidentiality and presence of a Department practitioner again disrupted Jason’s representation.

Similarly, Pearce et al. (2011, p.113) noted that parents needed to be at court to give updated instructions, otherwise “their lawyer could not play an effective part in any negotiation”. While discouraging attendance of children and young people at court may be protective given the environment, in reality their absence sometimes reduced participation in negotiations or caused adjournments when their representation could not fairly continue without updated instructions. An example of this occurred for Mathew (10-13 years) and Alice (6-9 years) while being represented by Rebecca (solicitor). Peter, a solicitor, separately represented their younger sibling Jacob (6-9 years, case 330).

When their case was adjourned part heard just two days prior, Mathew and Alice instructed they were ready to return home to their mother after a short period of kinship care. Initially they expressed some reluctance to return home. But after talking with their mother, who apologised and made promises to them about their care after having heard their views, Mathew and Alice agreed to have a nominated friend of the family stay with them to monitor their safety. The brief adjournment period was to allow time

for the Department to assess the suitability of the nominated friend. However the agreement could not proceed at the hearing because the friend changed her mind. No further agreement was reached between the Department and their mother. Also, Rebecca and Peter had been unable to speak with Mathew, Alice and Jacob for updated instructions about whether the children felt safer to stay in kinship care, or return to their mother under some other arrangement. The magistrate adjourned the case again following advocacy by Rebecca and Peter on behalf of the children. Rebecca and Peter argued that Mathew, Alice and Jacob had a right to participate in the decision about the circumstances of reunification at this point in time, especially given that Mathew and Alice had expressed safety concerns. Their representation in the negotiations and the hearing could have continued had Mathew, Alice and Jacob been present or able to speak with their lawyers in some way.

### **Strengths and limitations in representation during negotiations**

The findings presented in this part illustrate how negotiations could support children's concerns about their safety and family relationships, but limitations also arose from the conduct of the Department or parents, and from boundaries on the powers of the Children's Court under different types of protective orders.

### **Representation to support children's safety and relationships**

While observing lawyers representing children during negotiations with the Department and parents, I recorded how they sought to safeguard children's relationships with parents and other family members, while advocating for outcomes consistent with the views and safety concerns children had raised. These practices applied particularly when children and young people changed their instructions over time, either when their care experiences had deteriorated at home and led them to favour out-of-home care, or when care improved with parents, but they still wanted some oversight of their safety. Stephen, a solicitor, exemplified this aspect of representation during negotiations with Becca's parents and the Department (10-13 years, case 306).

Stephen utilised the negotiations process to achieve protective conditions consistent with Becca's instructions for a Supervision Order after she had recently returned to her parents' care. At the same time, Stephen sought to avoid a contested hearing between Becca's parents and the Department, because her parents opposed the protective grounds required for an order to be made. The Department initially became involved when Becca ran away from home. Becca had reported feeling unsafe at home and she was experiencing family violence. Further disclosures while talking with Stephen included alleged physical assaults by her father, and her parents' problems with alcohol and cannabis use. In contrast, her parents, who were self represented, attributed the family's problems to Becca, and denied any family violence. Becca had nonetheless reported back to Stephen that life had improved at home since the Department had become involved. Stephen and Becca did not want that improvement jeopardised by a contested hearing about protective grounds, which would put Becca in the position of having her disclosures relied on as evidence.

Stephen conducted negotiations with Becca's parents and the Department by speaking separately with the Department representative and Becca's parents until a possible solution was reached that everyone would agree to. He spoke carefully with Becca's parents to help them understand that Becca's behaviour was not just misbehaving or rebellion, but occurred in response to feeling unsafe at home. These negotiations occurred without going into specific detail about Becca's disclosures because, as Stephen explained to me, he wanted to uphold her confidentiality and avoid inflaming the situation with her parents. Becca's parents and the Department eventually agreed to settle on protective grounds of emotional abuse on the basis of a likelihood of harm rather than conceding harm to Becca had actually been proven. Becca also consented to this agreement because she was glad the order had conditions for her safety at home. The conditions about family violence helped her feel safe, particularly that "the parents have conceded to agree not to hit or hurt the young person for any reason", which Stephen was able to negotiate to be on the order.

Not all negotiations resulted in full agreements or outcomes consistent with the instructions children and young people gave about their care and safety, as the next sections demonstrate.



## **Conduct of the Department and parents during negotiations**

The conduct of the Department and of parents sometimes became a barrier to children and young people participating with representation during negotiations. There could be entrenched adversarial dynamics that prevented one or both parents and the Department from being receptive to the status of children and young people as participants.

Secondly, the way the Department managed the case could undermine the participation of a child or young person during negotiations.

I conducted participant observations with Patrick (solicitor) and Holly over the course of two court events (14 years & older, case 278). Holly's father was alleged to have physically assaulted Holly, including facial injuries requiring hospital treatment. Holly's mother also made family violence allegations against her father. Holly and her younger sibling (5 years & younger) had witnessed his family violence in addition to being physically abused. At the first hearing for the Department's application, Holly maintained her disclosure about her father assaulting her and family violence. But Holly's mother retracted her statement to deny family violence. Then instead of having an order excluding Holly's father from the home for a period of time until safety conditions were met, the Department "did not make an organised case" in Patrick's opinion. He was "surprised" because the DHS agreed to let Holly's father return home less than 24 hours after the alleged assault. Holly was therefore placed in the insidious position of either having to oppose the agreement between the Department and her parents in order to assert her safety concerns, or to return to the family home with her father despite not feeling safe with him. She did not oppose the agreement, and the magistrate granted the order. This set the scene for the subsequent hearing where Holly's parents escalated their adversarial conduct, and more pressure was placed on Holly to realign her views with those of her parents.

In the context of these events, Holly retracted her disclosures of physical abuse and family violence at the second court hearing. She told Patrick her injuries were from an accident with furniture, not from her father punching her. Patrick responded to Holly in a gentle tone of voice, explaining that he understood what she was saying but that,

“family violence means many things” including being “hit or scared” and that it “is taken seriously to protect you”. He tried to reassure Holly that if she was worried about the Intervention Order against her father applied on her behalf by the police, it was “not like a criminal record” but “a safety thing”. The police would keep the Intervention Order in place, regardless of retracting her statement or not. Holly replied that “Dad scared me” but he had “not done that before” (hit her in the face). Patrick advised Holly that counselling was a good idea for her, so that she had support and someone to talk to outside the family. Holly agreed, so long as this was after school, but was worried because she knew her parents did not approve of counselling. With Patrick’s advice, this meant that Holly was agreeing to a counselling condition being part of the proposed court order. Although Holly formally retracted her disclosure, Patrick’s response conveyed empathy for her experience, safety and position in her family. This enabled Patrick to continue representing Holly’s instructions during the negotiations while also advocating for conditions to support her safety.

Through their private lawyer, Holly’s parents’ opposed any court order being made. While attempting to negotiate through their lawyer, Patrick said there was “not merit in pushing for a contest” opposing any order. In his legal opinion they were “lucky last time”, because “usually in this court a father would have been ordered out of the house” for such serious allegations. Furthermore, Patrick told the lawyer “going to a contest would only put more pressure on Holly”. But Holly’s parents insisted they would not agree to any order and, according to their lawyer, “won’t budge”. To encourage Holly’s parents to negotiate, Patrick pointed out that there was strong evidence on record from the doctor, hospital and police, meaning that some form of protection order was unavoidable. He suggested a compromise option could be to agree to a shorter Supervision Order and have a notation attached to the order about “agreement without admissions”. Holly’s parents would not agree to this either, because they believed any court order would compromise the father’s reputation. This was also why they would not agree to Holly having any counselling.

Following this observation, Patrick explained to me that his intentions in representing Holly were first and foremost to reassure and support her given the enormous pressure she was under, especially because she had to live with her parents for the foreseeable future. Second, he sought to improve Holly’s ongoing safety at home. This was

necessary for Holly's safety, given her parents' focus on their own concerns and the fact that the Department had not put sufficient safety conditions in place from the beginning of the case. Patrick was navigating the ethical terrain of acting as a direct representative, which required him to advocate for Holly's instructions, while also responding to her vulnerability.

There are two themes in Holly's case that illustrate how the conduct of the Department and parents can undermine a child or young person's participation. First, agreements between the Department and parents might not necessarily meet the safety concerns of children, as happened at the first court event for Holly. This places children in a difficult position when the Department or parents do not respond to attempts by the child's lawyer to bring the focus of negotiations onto the child's concerns. Second, the conduct of parents and the Department can mean that negotiations fail to reach an agreement when particular positions become entrenched. In this example, Holly's parents refused to negotiate. The conduct of the Department and the parents contributed to Holly formally retracting her disclosures about physical abuse and family violence by her father, despite Patrick's efforts to support her and to diffuse the situation between Holly's parents and the Department.

### **Legal boundaries of the Children's Court**

There were circumstances in which lawyers represented children and young people who had views about their care and safety, but these matters were outside the legal boundaries of the Children's Court. In Chapter Two, I explained how the child protection legal system is fragmented, because there are limitations on the powers of the Children's Court under different protective orders, and certain decisions are under the Department's administrative and case-planning authority. On the whole, the Children's Court cannot direct the Department about placement of children in out-of-home care, including siblings being together or keeping a particular placement (unless a specific type of order was in place). Nor can the Court decide contact arrangements, provision of specific services, or make other conditions attached to orders when the Department has guardianship responsibility for a child. Depending on the type of protective order they

were subject to, this could be difficult for children to reconcile when their concerns became framed outside the Court's powers, but had been dealt with by the Court in the past under different orders.

Lawyers could sometimes utilise the negotiations process to reach agreements about matters outside of the Court's powers when the Department and/or parents were receptive to the views of a child or young person. An example of this occurred when Jane, a solicitor, represented Sarah (14 years & older, case 327). After Sarah revealed that she was experiencing physical abuse by her foster carer, Jane reached an agreement with the Department for Sarah's care arrangement to be changed. Unlike the outcome for Sarah though, lawyers were not always able to negotiate changes in care arrangements when the Department invoked its legal powers about out-of-home care and guardianship.

The following case study comes from Sam, who was represented by Vanessa and Peter, both solicitors (14 years & older, case 143). It shows the difficult situation children and young people faced when their safety concerns in out-of-home care were outside the legal boundaries of the Children's Court, despite lawyers' efforts to represent them in negotiations. Sam had been living in a residential unit as his main out-of-home care placement for almost a year. The Department was applying to extend his Custody to Secretary Order for Sam to remain in out-of-home care for another year. Sam had experienced child protection intervention multiple times during his life, with ongoing protective concerns about physical abuse by his stepfather, severe family violence, and substance use by both his mother and stepfather. Although Sam conceded that he had engaged in high-risk behaviour in the past related to alcohol, drugs and running away from home and the residential unit, he was not currently doing so. Sam understood that he could not live with his mother while she remained in a relationship with his stepfather.

Sam reported to his lawyers that he experienced serious bullying and physical violence at the residential unit, particularly from an older young person. He was injured on two occasions when the young person "smashed" his nose, with an ambulance and police attending as a result. Sam had continued to be fearful for his safety. A report by the Children's Court Clinic assessed Sam as suffering clinical depression and anxiety

linked to his living conditions at the residential unit, as well as to his traumatic personal history. However, the Department practitioner reported Sam's safety concerns as "exaggerated hostility", and that the young people were just mucking around. The incident with the ambulance and police was omitted from the Department's report for the Court, meaning the Department made no official record of the events. As a result of these experiences, Sam described not feeling believed or listened to by the Department.

Sam and his lawyers tried multiple strategies over time to have him moved out of the residential unit. They proposed that the Department move Sam to a different residential unit or out-of-home care placement, but the request was refused. The Victorian Child Safety Commissioner did not respond to individual claims as part of his role, making that avenue ineffectual for help. Applying to the Victorian Civil and Administrative Appeals Tribunal was considered, but legal aid would not fund representation, and there had not been a Departmental case plan review. Vanessa also tried a strategy of applying to revoke the Department's application, but the Children's Court struck that out. During my last observation in this case, Peter was testing the possibility of applying for an Intervention Order against the young person at Sam's residential unit to protect Sam.

Sam described to Vanessa that he felt he had no choice other than to agree to the protective order, because he had no options on where to live. This was reflected in the notations consistent with Sam's instructions that Vanessa had attached to the order:

Sam reluctantly elects to not contest the extension of the Custody to Secretary Order as he understands the Children's Court of Victoria has no power to order DHS to change his placement. Sam continues to assert that he has grave concerns for his future safety remaining at the same placement if he is continued to be housed with [named persons]. The solicitor for the young person put DHS on notice for any future negligence claims against the Department in the event the young person suffers further injury or damage as a result of residing in DHS care.

Sam's experience shows how safety could be compromised as a result of fragmentation in the child protection legal system. Negotiations with the Department were not consistently able to produce outcomes that addressed children's concerns about their out-of-home care, safety, or contact arrangements with a parent or sibling when framed as Department matters. Children do not have access to their lawyer or an alternative

independent advocate to support them in the Department's decisions outside of the Court. This leaves children and young people in precarious places of care when their lawyers are unable to convince the Department to undertake a case-planning review, or cannot achieve other means of redress inside the Children's Court.

So far this chapter has illustrated how direct representation assists children and young people to participate in negotiations at the Children's Court. Maintaining participatory parity was subject to conditions fundamentally outside of children's control: opportunities to meet their lawyer before hearings or at court, timely access to current information, and opportunities to update their instructions as negotiations unfolded and parameters of child protection proceedings changed. Representation in circumstances where their lawyers could negotiate with the Department and/or parents to reach agreements consistent with children's instructions about their care and safety were strengths in this type of decision-making. But negotiations did not always produce agreements, circumvent conflicts between the Department and parents, or address the concerns of a child or young person, particularly when decisions were outside the Children's Court's powers.

Cases without full agreements subsequently moved deeper into the court system, and representation in these instances is examined in the next part of this chapter.

### **Representation inside the courtroom**

Parity of participation inside the courtroom relied upon lawyers advocating on behalf of children and young people. Unlike Department representatives and parents, children and young people were not usually present in the courtroom, and sometimes were not present at the Court during hearings. This part of the chapter examines a range of strategies I observed lawyers using inside the courtroom when representing a child or young person.

## **Lawyers submitting children's views inside the courtroom**

Submissions by a lawyer representing a child or young person were required inside the courtroom when a full agreement was not reached through negotiations or formal alternative dispute resolution, and for a final contest hearing. In these circumstances, making submissions meant the lawyer communicated views held by a child or young person about their care and safety to the magistrate.

Previous research has reported that children and young people have sometimes been present inside court and this has potentially exposed them to distressing information about their parents and their own abuse (Sheehan 2001). In contrast, just five out of 56 children and young people I observed with their lawyer were present inside the courtroom at some stage during proceedings. This mainly happened when a decision was being handed down, and four of them were 14 years of age or older. The magistrate acknowledged the young person by name on each occasion. On a further six occasions, I observed other children take up offers from their lawyer to see inside a courtroom, but these visits did not happen when the child's case was being heard. Therefore a large majority of children and young people did not participate inside the courtroom during my ethnography study. Children and young people were reliant upon their lawyer to represent them fairly in their absence.

Lawyers' submissions tended to have brief or comprehensive characteristics, irrespective of whether children's instructions were hierarchical, partial or strong about a particular matter being decided (see Chapter Five). Although I describe brief and comprehensive characteristics separately, they were not mutually exclusive. A brief approach occurred when a lawyer simply stated the child's instructions or views to the magistrate. This reflected the characteristics of the dispute to some extent, with fewer matters and less complex issues requiring judicial determination. Rebecca's submissions for Mari provided an example of the brief approach (6-9 years, case 331). Rebecca, a solicitor, simply stated Mari's instructions about being "happy at home" living with her parents, and that she had "no concerns about the care she was receiving at home". The brevity of Mari's instructions were understandable given the protective concerns related to her youngest sibling's complex medical condition, even though the Department made the application for all the siblings.

Similar to lawyers representing children during negotiations, using a brief approach to submit instructions was sometimes a strategy to protect confidentiality and circumvent potential reactions against a child's views by the Department or parents. For example, I observed a contest hearing about supervision of contact and exposure to family violence for Millie and Paul in relation to their stepfather (both 6-9 years, case 106). Their stepfather had opposed any supervision of contact, and denied there was family violence, but he had recently been charged with weapons offences. Monica, their barrister, eventually stated that Millie and Paul had given instructions "consistent with their stepfather's position" but, "with a condition about not [being] exposed to verbal violence". The condition of not being exposed to verbal violence inferred that Millie and Paul had previously experienced their stepfather's violence. This brief approach was likely to have conveyed enough information to the magistrate about the children's experiences and protected their confidentiality in the context of the stepfather's denial and having to live with him in the foreseeable future.

Compared with the brief approach, submissions were more comprehensive when a lawyer provided a detailed picture about a child or young person's instructions and reasons for their views. This included describing the types of questions and responses during their interactions together, non-verbal communication, and detailing concerns children and young people had raised apart from the matters in dispute between the Department and parents. However, lawyers had to manage a child's confidentiality when revealing such details.

Peter's submissions for Jacob's instructions exemplified a comprehensive approach (6-9 years, case 330). Peter submitted that Jacob had "clear instructions" and the maturity to participate. Peter illustrated this further by describing how he had been engaging in general conversation and getting to know Jacob, when Jacob asserted his participation by asking "when are you going to ask me about where I want to live?" Jacob's instructions in his own words were for "the judge to let me go home with my mum". Peter went on to say Jacob had asked if he could draw a picture for the judge. Peter held up Jacob's drawing to the magistrate, describing Jacob's picture of being at the park with his mother and seeing an animal. Describing Jacob's non-verbal responses was another way Peter communicated Jacob's perspective to the magistrate. Upon having asked Jacob his views about a place he felt safe to stay "if the judge decided you



couldn't go home yet", Peter said Jacob's "eyes filled with tears". Peter's comprehensive approach to submitting Jacob's instructions illustrated the strength of his views about being in his mother's care, and provided some context for the magistrate, the Department and his mother to hear his views.

### **Advocacy inside the courtroom**

Some lawyers continued to advocate during the hearing after submitting the views of a child or young person to the Court. The views and instructions of children and young people could be consistent with the Department's position, the positions of one or both parents, or a combination of both. It was also possible for a child or young person's instructions to differ from those of both the Department and the parents, thereby requiring a lawyer to make submissions on their behalf. Other strategies lawyers used specifically to support a child or young person's status as a participant in a hearing responded to the intention of their instructions, capacity to instruct, and credibility of children's views.

#### *Running submissions on behalf of a child or young person*

Running submissions involved a lawyer (or self-represented party) appearing before the magistrate and submitting their instructions and reasons or evidence as to why the magistrate should make a particular decision. In four ethnographic cases (case 143, 289, 400, and 404), I observed lawyers make submissions on behalf of a child or young person when their instructions were not compatible with both the Department's and parents' positions. Although they represent a small number of cases from the total ethnography, the observations show that some lawyers were prepared to represent children and young people to the fullest extent possible. These children and young people held strong views about opposing the agreement reached between the Department and their parents, even after their lawyer advised them of all their options and the magistrate's likely decision. Lawyers in these cases explained their instructions to the magistrate as to why the child or young person opposed the Department's

application, and why negotiations had not reached an outcome that was acceptable to the child or young person.

One of the cases with submissions on behalf of a young person involved the only example in which I observed a lawyer represent a child or young person who had given instructions that clearly contradicted their own wellbeing and safety (case 400). Kelly, a solicitor, was representing Ben (14 years & older). Ben had engaged in family violence against his grandmother, who was his kinship carer, and used methamphetamines on a regular basis. The Department and Ben's family also held concerns for his mental health. Yet Ben insisted to Kelly that he would refuse all support services, counselling and drug treatment. Ben also rejected Kelly's advice that the judge would want to know his reasons for opposing the orders, but he refused to offer an explanation. Nonetheless, Kelly continued to advocate for Ben's instructions by making submissions on his behalf. She saw it as within his rights to express his views under direct representation. She also saw the magistrate as having responsibility to determine which order and conditions were appropriate for Ben's best interests. She did not consider it her role to decide his best interests.

In the remaining three cases with submissions made on behalf of a child or young person, Chris, Sam and Riley each had strong instructions, underpinned by fears for their own safety, that differed from the shared positions of the Department and parents. To use Chris as an example, Maria, a solicitor, and Linda, a barrister, represented Chris in submissions and a contested hearing on his behalf (10-13 years, case 404). Chris was shy, softly spoken, and polite on each of the four occasions we met over three months, but made little eye contact with either lawyer. Chris had firm instructions on each occasion, saying that he did not trust his mother's promises to care for him better. He had run away after being returned to her care, and had become distressed, including crying uncontrollably after a court decision ordering him to return to her care. In his words, there was "nothing that would make me want to go home". The Department did not believe Chris's allegations about his mother being physically abusive. Running away had led to Chris getting into trouble with police while homeless, including shoplifting, public transport and substance use offences.

At each court event with Linda or Maria, Chris insisted he would rather be placed in a residential unit or a secure welfare facility until arrangements could be made to return him to his grandparents. His grandparents had raised Chris for most of his childhood under an informal agreement with his mother. But his mother had moved a long distance away from his grandparents and taken Chris with her. At the end of three months of child protection and youth criminal proceedings, a magistrate permitted Chris to travel and move back to his grandparents' care. Maria and Linda maintained Chris's status as a participant by submitting his views to the magistrate at each court event, even though the Department and his mother had an agreement. Chris's case illustrates how agreements reached between parents and the Department might not necessarily be in a child's or young person's best interests according to the child's own views and the decision of the magistrate. By way of contrast, Maria and Linda might not have persisted in supporting Chris's views had they represented him on a best interests basis and decided it was in his best interests to return to his mother's care. This is because lawyers are not obliged to act on children's instructions with best interests representation, only to submit any views to the court.

#### *Responding to misuse of children's views*

Supporting a fair understanding of a child's or young person's views meant lawyers pointed out the evidence, case characteristics, or parts of the other parties' positions that aligned with their instructions. Although I observed lawyers apply these same strategies for instructions given by adult clients during hearings, there were two ways these strategies applied uniquely to children's participation. First, lawyers responded to the Department or parents' claims that a child's views were different to what the child's lawyer submitted. Second, lawyers responded to the Department or the parents applying selected parts of children's views, or misconstruing the meaning to support their own positions. Representation in these instances could defend the integrity of a child's views, and maintain their status as a participant in the court hearing.

An example of elucidating instructions when the Department or parents claimed children and young people had different views to what their lawyer had submitted comes from a contested hearing involving the Green siblings (Cooper, Fred, both 10-13

years, Frances and Jackson, both 6-9 years, case 172). In a long and complex case, Cooper, Fred, Frances and Jackson had been living with their foster carer for approximately four years, but were moved to a residential unit following a disagreement between the Department and their foster carer about their school arrangements. A contested hearing occurred in response to their lawyer, Julie (barrister), applying to revoke the Department's guardianship powers, with a supporting application from their biological mother, because the siblings had consistent instructions to be reunified with their foster carer. This was a strategy to navigate the barrier of fragmentation in the child protection legal system, because the Children's Court did not have the power to direct the Department to reunify the siblings with their foster carer. The Department opposed the application, despite a magistrate already finding the siblings were experiencing "inconsistent and inappropriate care" in the residential unit. The magistrate also determined that the Department was "listening but not properly hearing" the siblings about reunifying with their foster carer.

Contradicting Julie's submissions, the Department claimed that the Green siblings were ambivalent in their views towards their foster carer, and had settled into the residential unit. Julie objected, saying the Department's claim "impugns" the children's views. She argued that the Department was "...casting my instructions and [the] taking of my instructions ... into doubt". Julie reiterated that all the children had repeatedly indicated "in unequivocal language" that they wanted to return to their foster carer, and were "very excited" about this matter. Julie said she had used child-appropriate language in discussing this difficult court order and its implications with them. She also referred to evidence about the children suffering psychological harm as a result of removal from their foster carer, whom they saw as their mother. Julie therefore corrected the status of Cooper, Fred, Frances and Jackson's views against misuse by the Department. They were eventually reunified with their foster carer by an order of the Children's Court.

Advocating for a child's instructions was also observed when the Department or a parent selectively applied aspects of a child's views to support their own position about his or her best interests. The effect of the lawyer's advocacy in these circumstances was to show the Department's or parent's position was in fact not consistent with the safety and care arrangements from the child's entire perspective. My participant observation

with Cameron, a barrister, when he represented Charlotte in a contested hearing exemplifies these practices (6-9 years, case 159).

Charlotte's parents had recently separated because of serious family violence perpetrated by her father, including breaches of an Intervention Order, and threatening both mother and children with a weapon. Both parents had a history of alcohol and substance use, but Charlotte's father had more severe substance problems. Charlotte, her mother and younger sibling had since experienced housing instability. I observed Charlotte with her solicitor three times over a three-month period prior to the contest hearing. Charlotte's views were consistent overall—that she wanted to be in her mother's primary care and to live with her younger sibling. But Charlotte had become tired of moving around, telling Claire, "I want to be able to stay in the one place". Charlotte also agreed to stay with her paternal grandparents for a brief period during the school holidays. Charlotte had some ambivalence about her father though, who lived with her grandparents. There was already a condition for supervised contact with him, and Charlotte had repeatedly expressed wanting someone else around when she was with him. She was also aware of his alcohol and substance use. Charlotte was in a difficult position though, because her mother consented to both children staying temporarily with the paternal grandparents on that occasion because she was homeless.

The contested hearing in Charlotte's case centred on the Department and father agreeing that Charlotte and her sibling live long-term in the care of the parental grandparents and him, but the mother argued for the children to be in her primary care. The Department and father argued that it was in the children's best interests to have stable care and housing with the paternal grandparents, and applied selected parts of Charlotte's instructions in support. Charlotte's previous agreement to stay temporarily with her grandparents and father during the school holidays, as well as her unhappiness about moving house too much, was argued as supporting the Department's and father's shared position. But the Department and father ignored the most important part of Charlotte's views about remaining in her mother's primary care for the long-term, and that she feared her father.

In contrast, Cameron pointed out features of the case history and evidence that contradicted the Department and the father's positions, and instead supported

Charlotte's first preference to be with her mother. He argued that having Charlotte living with her paternal grandparents and father presented a problem for maintaining safe supervision of contact. The Department practitioner admitted during cross-examination that Charlotte's father had been aggressive towards the paternal grandmother. Cameron also restated the context of Charlotte's previous instructions: that her father had perpetrated serious family violence. Finally, he led cross-examination revealing that when the Department had initially become involved, there had not been an unacceptable risk of harm for Charlotte with her mother that was separate from family violence.

At the conclusion of the contested hearing, the magistrate acknowledged Charlotte's instructions to be in her mother's care for the long-term. In the magistrate's assessment, it was "significant that she wants her access supervised" and "although she is only [6-9] years old, she has expressed a wish for supervision" of contact with her father. The representation strategies Cameron used had upheld Charlotte's status as a participant against the Department and her father, who had appropriated her views in unintended ways to support claims about the children's best interests. Without direct representation, the magistrate might have reached a decision different from the order that Charlotte and her younger sibling reside with their mother, and that all contact with their father remain supervised.

### *Capacity to participate*

The next aspect of representation concerns lawyers supporting the capacity of a child or young person to participate in the proceedings. I observed this happen in response to occasions when the Department or a parent argued against the capacity of a child or young person to participate. This happened when the child's views differed from the outcome sought by a parent or the Department. The Department or parents questioned a child's maturity and developmental competence to have views about their care, and the child's solicitor or barrister in turn argued for the child's right to participate.

An example of lawyers responding to a parent's claims that a child was not capable of participating comes from Eric and Shaun, both barristers. This was also the only case of

best interests representation that I was able to observe in a contested hearing. Shaun represented David (6-9 years) on a best interests basis, and Eric represented Madison under the direct model (10-13 years, case 294). The hearing concerned an application for permanent care of David and Madison with their foster mother that their mother had opposed. Both children, and their older sibling who lived in a separate out-of-home care placement, experienced a range of psychological, emotional, and behavioural difficulties to varying extents, diagnosed as a result of earlier trauma with their mother and abuse by their father after being placed in his care by the Department. The magistrate did grant the Permanent Care Order, and made limited contact conditions for Madison and David with their mother.

Previously in Chapter Five, I detailed Shaun's interaction with David and how Shaun recognised David's status as a participant by meeting with him. Shaun heard David's views about being with his foster mother "forever", and "never" having contact with his biological mother. Similarly, Madison's instructions with Eric meant that she agreed to the Permanent Care Order with her foster mother, and did not want to see her biological mother unless she agreed to do so. The barrister representing their biological mother alleged that Madison could not understand the meaning of permanent care or instruct a lawyer, because a psychologist report had referred to Madison as having average-to-low cognitive functioning for her age. In the opinion of her mother's barrister, Madison's age and her "cognitive problem" provided evidence to question Madison's capacity. The mother's barrister also objected to David's views because of his cognitive and emotional conditions.

In response to the doubts raised about Madison and David's capacities to have views about their care, Eric and Shaun each used strategies to reaffirm the children's status as participants. Eric lodged an objection every time the mother's barrister claimed that Madison did not have capacity to participate. He responded that Madison's capacity had not been identified as an issue with his instructing solicitor, or when he met with Madison himself. Furthermore, during Eric's cross-examination of the children's current psychologist, the psychologist responded that Madison "clearly can give instructions". In the psychologist's experience, through the use of "child-appropriate language", both Madison and David understood the meaning of permanent care. Likewise, during Shaun's cross-examination of the children's psychologist, Shaun

described in detail the time he spent with David and his foster mother. Shaun asked if this was “David’s way of making sure the Court knew what his wishes were?” The psychologist agreed and added that “it would have been a lot of effort for him” to do that. The Department’s practitioner also endorsed the children’s views during cross-examination. This was the only example during the ethnography of a long-term relationship between a child protection practitioner and children, and the child protection practitioner’s support for the children’s views reflected her strong knowledge of Madison and David.

As David’s best interests representative, Shaun argued that it was in his best interests to grant the Permanent Care Order, but for David’s foster mother to determine contact arrangements with his biological mother rather than an order reflecting David’s preference for no contact. In contrast, Eric continued to advocate for Madison’s views about not having contact with her biological mother unless she agreed to it. Both lawyers supported the children’s capacity to have views about their care. However, the different models of representation meant that Eric followed Madison’s views at all times, whereas Shaun exercised his discretion as a best interests representative. Overall, both lawyers defended the children as capable participants.

## **Explaining outcomes**

The final aspect of participation in the decision-making processes requires that any outcome be explained to children and young people. Being able to explain outcomes immediately was an advantage of children being present at the Children’s Court. This was particularly important, given that decisions could result in profound changes to children’s lives about whom they lived with and regarding contact arrangements with parents. This was illustrated with Kelly, a solicitor, who was able to explain the “safe plan” to Ashleigh and Alex (14 years and older and 6-9 years, case 495). Ashleigh and Alex could return to the family home with their mother after they had been staying with her in a motel. Their father was moving out of the family home, consistent with Ashleigh’s and Alex’s instructions about their father having perpetrated family violence, and about not feeling safe living with him.



It was more difficult for lawyers and children to communicate about a decision when children were not at the Court. The usual practice across all lawyers was to phone the child or young person to talk about the decision. Providing a written record to children in the form of a letter was the other strategy all lawyers reported using. The letters I saw were crafted in child-friendly language to say which order had been made, and the conditions that related specifically to the child or young person.

My observations with Stacey, a solicitor, representing Meghan illustrated the process of explaining outcomes (6-9 years, case 328). Stacey and Meghan met off-site from the Children's Court before the hearing about the Department's application to extend her Guardianship to Secretary Order. Stacey asked Meghan if it was "okay if I call you tonight and let you know about what happens at court today?" Meghan agreed that was okay. Stacey gave Meghan one of her business cards and pointed to her name and phone number on the card so Meghan could "call me if you have questions about all this". Meghan was curious about Stacey's website and read the address aloud. Later that day Stacey phoned Meghan to tell her the decision was postponed for two weeks to give her mother and father time to come to court. When the order was granted two weeks later, consistent with Meghan's views, Stacey called Meghan again and sent her a short letter confirming the decision. Stacey told me she felt it was important to offer children the opportunity to ask questions, and to ensure they understood the outcome by talking together, even if this occurred over the telephone. The potential for parents or other adults to intercept letters sent to children, and for children not to understand what was contained in a letter, underpinned her concern.

Explaining decisions to children and providing a letter reflects the recommendations made by Masson and Winn Oakley (1999, p.155) in their pioneering study about representation of children in England. Masson and Winn Oakley identified a problem with best interests representatives not regularly communicating decisions to children. As a consequence, they recommended a letter or other written material be given to children to confirm the outcome and explain decisions. They suggested that children and young people could look over written material in their own time and refer back to it again when needed in the future.

## Conclusion

This chapter has revealed how lawyers represented children and young people in decision-making processes outside and inside the courtroom. Lawyers have considerable discretion as to how they might represent a child under the direct or best interests models. The CYFA (s.524(10)) contains a qualifier allowing a lawyer to act in accordance with instructions “or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child” under direct representation. Even broader discretion exists under best interests representation. Lawyers have a duty to submit a child’s views or wishes to the Children’s Court, but are required to advocate for what they determine the child’s best interests to be, notwithstanding whether the lawyer’s views about the child’s best interests are consistent with child’s views or not.

Overall, these findings build on my previous chapter and show that the majority of lawyers continue to recognise children and young people as participants when representing them in the decision-making processes happening outside and inside the courtroom. Direct representation was implemented to be consistent with children’s views. The exercise of discretion was slightly more evident in relation to children’s views in the example of best interests representation. This was illustrated when Shaun reiterated Thomas’s views about being permanently with his foster mother, but argued that it was in Thomas’s best interests to have his foster mother determine contact with his biological mother, rather than supporting Thomas’s preference for no contact.

The potential for best interests representation to depart from the views of a child or young person can be contrasted with lawyers making submissions during direct representation. If Kelly had been representing Ben on a best interests model, and decided that his views were not in his best interests, she would have had the power to choose not to advocate for Ben’s position opposing involvement of the Department and all mental health and drug treatment services. Likewise, Chris’s instructions opposing the agreement between his mother and the Department could have been put to the Court, but not advocated by Maria and Linda if they were representing him on a best interests basis and decided the agreement was in Chris’s best interests. Both of these cases also illustrate that the function of due weight, as enshrined in Article 12 of the UNCRC and CYFA (s.10(3)(d)), denoting the Children’s Court as ultimately responsible for the

extent to which a decision about a child's best interests accounts for his or her views. Having direct representation and a lawyer to advocate for a child or young person's instructions does not mean their views automatically determine the outcome.

In practice, lawyers have been shown to support children's parity of status as participants when representing them in negotiations, as well as making submissions and cross-examining witnesses before a magistrate. Representation, as lawyers fundamentally implemented it under the direct model, could influence decisions that accounted for safety and care from the perspectives of children. Lawyers were observed to navigate negotiations outside the courtroom with regard to the views of children and young people. At the same time, lawyers appeared to be sensitive to children's ongoing relationships with parents, carers and other family members. They also attempted carefully to assist children to accept support services and outcomes, while not overstepping their roles as direct representatives. As a result of lawyers' practices, decision-making processes between parents and the Department appeared to be dynamic in character and less binary than anticipated. Given reduced judicial oversight in a busy court system that physically could not hear submissions and contest hearings for every matter, representation performed by lawyers in this way to some extent accounts for due weight to the views of children in negotiations.

These practices contrast with the impressions some magistrates have of direct representation. A minority of judicial officers of the Children's Court previously argued against direct representation of children and young people, because a best interests representative could better mediate outcomes between parents and the Department (Children's Court of Victoria 2010). Instructions from children were "of minimal value" in assisting the Court from the perspective of these magistrates (Children's Court of Victoria 2010, p.66). In contrast, the findings in this chapter provide empirical evidence that lawyers can support resolution outside the courtroom when representing children with the direct model, and can advocate in ways that may support safer agreements. My findings support previous research by Maclean & Eekelaar (2009) and Pearce, Masson and Bader (2011), who found that lawyers do not simply ask parents what they want and provide legal advice in child protection cases. Instead, they work with parents to encourage them to address protective concerns, engage with services, and negotiate to reach settlements with a view to realistic outcomes for children and parents (Maclean &

Eekelaar 2009; Pearce, Masson and Bader 2011). Depending on communication during negotiations and submissions, these similar aspects of children's representation are hidden from the view of magistrates behind the bench, and sometimes from the view of the Department and parents.

Children without any legal representation had no way to be recognised as participants in negotiations outside or inside the courtroom. This included the unrepresented younger siblings of children and young people who had direct representation. The importance of children having access to an independent legal representative was demonstrated when lawyers responded to challenges against children's status as participants, including children's capacity to have views about their care or safety, and when the Department or parents took up aspects of children's views in unintended ways. Furthermore, agreements between the Department and parents did not necessarily reflect the safety concerns from children's perspectives. These themes reflect how adults can leverage claims about a child's best interests as a proxy for their own interests. Children's legal representatives can potentially act to correct that imbalance of power between children and adults.

Barriers to parity of participation for children and young people relative to parents and the Department in decision-making were also identified in this chapter. Maintaining parity relied on them having opportunities to meet with their lawyer and update instructions as negotiations and hearings evolved at court events. But this aspect of participation was easily disrupted in the absence of timely access to appropriate information and cooperation between lawyers, the Department and parents. Adversarial conduct by parents, a parent's legal representative, or the Department, along with the Department's case management strategies, also produced barriers to fair participation for children. Lawyers could also contribute barriers to children's parity inside the courtroom when using brief submissions rather than contextualising children's views more comprehensively. However, they were cautious about protecting children's confidentiality and ongoing relationships with family members or the Department.

My application of Fraser's (2009) concept of misframed representation relates to the fragmented child protection legal system illustrated in this chapter. This happens because children's safety and care concerns are framed outside of the Children's Court

jurisdiction when the Department holds guardianship responsibility and makes out-of-home care placement decisions. In these instances, instead of being within the boundaries of the Children's Court at the time of deciding the protective order, the means to address children's concerns with the Department are located in an administrative process where children do not have access to legal representation.

For lawyers and children, the priorities in decision-making were achieving outcomes focused on the matters most important to the child: their safety, whom they live with, and contact arrangements with parents. The next chapter presents my analysis of the case file study in relation to the instructions children and young people gave about the distribution of their care in contested child protection proceedings.

## Chapter Seven

### **Perspectives of children and young people on the redistribution of their care in contested child protection cases**

Children are ends in themselves and not the means of others. They form part of the family, a fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in matters affecting them. Children are especially entitled to protection from harm, and to human development. Those values are inherent in the best interests of the child, which is the foundational principle of the *Children, Youth and Families Act* (Bell J in *Department of Humans Services v Sanding* [2011] VSC 42, para.11).

Justice Bell's (2011) reflections above about the meaning of children's best interests acknowledge the importance of children's views alongside their entitlement to protection and the right to fully develop as human beings. A contrary argument is that children and young people have limited autonomy to be able to express views about their care because they are vulnerable, dependent, and unable know what is in their own best interests (Arneil 2002; Shemmings 2000; van Bijleveld, Dedding & Bunders-Aelen 2013). This chapter draws on the case file study to better understand children's views about what their care arrangements should be in the face of ongoing child protection intervention in their lives. I show how children's views can reflect complex meanings about their own protection and care, and how they can complement or conflict with the views held by parents and the Department about children's best interests.

The previous two results chapters presented data from my ethnography study. They revealed how lawyers recognised and represented children and young people during child protection proceedings. Implementing participation can involve scaffolding by lawyers to support children in expressing their views on matters important to them, and in representing those views in decision-making. Understanding children's perspectives about the distribution of their care between parents and the state is another aspect of

participation, consistent with the UNCRC Article 12 and CYFA provisions. This is because magistrates may need some indication of children's perspectives about their care in order to consider and apply weight when determining children's best interests, subject to children being willing and facilitated to share their views appropriately.

Fraser (2000, p.113, 2009, p.58) emphasises the importance of critiquing why and how social and material goods come to be distributed in any society as a dimension of justice. In Chapter Three, I contended that a distribution of care between the state and parents occurs in the context of child protection proceedings, and the concept of best interests is applied to justify the redistribution of care. Care may be distributed on a spectrum whereby parents can have both day-to-day care and parental responsibility for children with little child protection intervention, through to the state holding both day-to-day care and parental responsibility. Children and young people's views can be understood to represent how they feel their care should be distributed between the state and parents in a context where parents, the Department and Children's Court might be positioned similarly or differently. This chapter provides the first empirical evidence in Australia about the views of children and young people who have participated in child protection proceedings through direct representation. I illustrate how the redistribution of care can be understood from the perspectives of 35 children and young people who participated with direct representation in a finalised contested child protection proceedings between 1<sup>st</sup> July 2010 and 30<sup>th</sup> June 2011.

The findings presented in this chapter were possible because children's views and instructions were submitted to the Children's Court via their lawyer under the direct model, and the magistrate recorded at least one of the child's views in the judgment. However, it was not possible to include all children and young people from the case files sample in this chapter, because there were no perspectives, or status as a participant, reported by magistrates for the 25 children without legal representation, three children who had best interests representation, and one 10-13 year old child with direct representation. Most of those children were also younger than seven years old.

There are four main parts to this chapter. The frequencies of instructions given by children and young people, as well as examples of their instructions about parental care and out-of-home care, are presented in part one. Instructions about contact arrangements

with parents follow in part two. The remainder of the chapter presents the themes accompanying these instructions, according to my content analysis of magistrates' judgments. Part three is an analysis of cases where children gave instructions to remain or reunify with parents and supporting contact, and presents themes about relationships between a child and biological parents. Negative experiences some children had with out-of-home care are also reported. Part four is an analysis of cases where children gave instructions supporting out-of-home care and limiting contact with parents. It describes ongoing fear and safety concerns some children experienced regarding parents, in contrast to positive qualities in their relationships with foster and kinship carers.

### **Views of children and young people about who cares for them**

The most frequent view recorded for children's instructions across the case file sample concerned their care arrangements. All 35 children and young people who had direct representation and at least one view reported in the judgment gave instructions about who should be responsible for their day-to-day care. Two overarching categories of instructions about care emerged from my analysis of the judgments. The first category captured children and young people's instructions in favour of parental care. Instructions that meant a child or young person was not opposed to out-of-home care formed the second category. These are presented in Table 7.1.

Table 7.1. Frequency of instructions by children and young people about their care

Instructions	N	%
Remain or reunify with parent/s	20	57
Enter or remain in out-of-home care	15	43
Total	35	100

These instructions reflected children's views about how they should be cared for. More than half of the children and young people expressed the view that they should remain or reunify with one or both parents, including moving between separated parents. In



comparison, 43% were not opposed to entering or remaining in out-of-home care. Therefore, the number of children who preferred to live in out-of-home care is similar to those who preferred to live with one or both parents.

There were no discernable patterns for each of these two care arrangements when I analysed further according to types of maltreatment or types of protective concerns, because emotional/psychological abuse and family violence were almost universal. Younger children were no more likely to seek parental care than older children, and visa versa. Even allowing for the small sample size here, the absence of any trend in children's views about their care compared with their age and types of alleged abuse suggests it is not justifiable to restrict children's access to participation rights because of their age and maltreatment experiences. This finding contrasts with the idea that children will typically seek to be in the care of parents. This, along with protective arguments, has been levied against participation in these types of decisions because of children's vulnerabilities caused by their age and experiences of abuse (Shemmings 2000; Vis, Holtan & Thomas 2012). As this chapter will illustrate, children's instructions about their care are shaped by a range of complex, positive and painful experiences apart from their age.

### **Remaining or reunifying with one or both parents**

Approximately two-thirds of the 20 children and young people who gave instructions seeking parental care were opposed to remaining in out-of-home care. Their instructions contrasted with the Department, who took the position that the child should remain in out-of-home care.

The type of care arrangement children experienced at the time of a contest hearing shed light upon their instructions preferring parental care. Table 7.2 below compares current care arrangements of children whose instructions demonstrated their preference for parental care.

Table 7.2. Current type of care arrangement by child's instructions for parental care

Child's instructions	Current care arrangement					Total
	Foster care	Residential unit	Kinship care	With mother	With father	
Opposed to remaining in out-of-home care	7	5	2			14
Opposed to entering out-of-home care				2		2
Not opposed to remaining with parent				2		2
Not opposed to moving between parents					2	2
Total	7	5	2	4	2	20

Table 7.2 shows that if they were opposed to staying in out-of-home care, children were most frequently experiencing foster care, followed by residential units.

Most children and young people who instructed in favour of parental care were specifically seeking to be with their mother. Almost all of the 14 children and young people living in out-of-home care sought reunification with their mother (n=12/14). One child each sought reunification with their father or both parents. All six children who were already living with a parent had instructed that their preference was to be in the care of their mother, including two children living in the primary care of their father at the time of the contested hearing. Therefore, children's instructions for parental care largely favoured a redistribution of care towards mothers.

Children who were seeking to be in parental care usually had their parent or parents wanting the same outcome. When compared with parents' legal positions, almost all 20 children and young people who instructed that they should remain or reunify with parents had that parent share their view. The only exception occurred for Steven, who was living in out-of-home care, and whose first preference was to reunify with his father; a small increase in contact was his second preference (6-9 years, case 452). His father had conceded that he was not able to care for Steven and his younger sibling full-

time because of the father's physical disability and housing problems. Steven's father was not rejecting him; rather he was constrained by his circumstances. This group of children was therefore holding hopes for reunification in circumstances where one or both parents also shared that hope.

*Examples of instructions for parental care*

For the 14 children and young people already living in out-of-home care, their instructions as reported in the judgments were formulated around their desire to be reunified with one or both parents. Keeping in mind that there were no discernable differences in younger or older children seeking parental care, the following examples come from children in each age group:

It is Steven's wish to return home. If it came to preference, it would be his wish to be with his father. (6-9 years old, case 452)

The children wish to be reunited with their mother. (Phyllis, 10-13 years old, and Craig, 6-9 years old, case 255)

Ruth's wishes are to return home to live with her mother. She is happy to live with her mother at her grandparents' home. (14 years & older, case 160)

Intertwining children's desires for reunification with the instructions of their parent, usually the mother, was another way magistrates conveyed these instructions in judgments:

The mother, as well as Wayne and Byron, seek an outcome in court which will allow the children to reside in the family home... (10-13 years and 14 years & older, case 424)

Magistrates could reinforce the shared position of children and parents who were seeking to be together by reporting their instructions in this way. In other words, they had the same view about redistributing care towards parents and away from the state in these cases.

Not all children were living in out-of-home care at the time of the contest hearing when they gave instructions supporting parental care. Their instructions reflected a desire to remain with a parent, or to move from the primary care of one parent to their other parent. Six of the 20 children and young people whose instructions supported parental care were already residing with a parent. All six children were seeking to be in their mother's care. However, neither all fathers nor the Department necessarily agreed with those instructions, or the contested hearing was required to address other matters while a child remained with their mother.

Bailey's instructions provided an example of those in support of remaining with a parent (10-13 years, case 435). Bailey wanted to remain in his mother's care in circumstances where the Department was not seeking his removal. His case involved an application by the Department for court orders that would permit supervision of his care to continue. However, Bailey's father wanted Bailey to be in his care. The magistrate reported Bailey's instructions in the context of his current care arrangement continuing:

Bailey is [10-13 years] old and currently resides with his mother pursuant to a Supervision Order, the application to extend which is currently before the court...  
Bailey instructs through his legal representative that he wishes to remain with his mother...

Although many children who had views supporting parental care also had their parent share the same view, the cases presented in this section point to the potential for their views to be different from those of a parent or the Department. The next section adds to this evidence by looking at cases where children's instructions favoured out-of-home care.

### **Entering or continuing to live in out-of-home care**

Almost all of the 15 children and young people who instructed that they were not opposed to entering or staying in out-of-home care were seeking to remain in their current care placement (n=14/15). A little over half of these children were in foster care (n=8), five children had kinship care, and one young person was living in a residential unit on a part-time basis only. Hence children were usually living in family-based

settings when they were not opposed to remaining in out-of-home care. Children and young people were not living in residential units full-time when they agreed to out-of-home care. This is consistent with the findings presented in the previous section, which showed that five children living in residential units had been seeking to return to their parent's care.

Only one young person out of all 35 children and young people was not opposed to entering out-of-home care. Kelly had just recently moved into a residential unit before the contest hearing after a long period of unstable care between her separated parents (14 years & older, case 435). Kelly and her mother were in agreement about Kelly moving to the residential unit, and Kelly did not want to live with her father either. From Kelly's perspective, living in a residential unit appeared to be a better alternative in these circumstances than either parent's care. Her father was opposed however, and wanted Kelly to be in his care, despite having recently assaulted her.

Using the written judgments, I compared the views of each child and young person who was not opposed to remaining in out-of-home care with the views of their parents. Most children and young people who gave instructions to continue living in out-of-home care had a parent who wanted reunification. Eleven out of 14 children and young people who expressed a preference to remain in their current placement had at least one parent oppose that arrangement. For this group of children, there was often at least one parent seeking reunification when the child was clearly not seeking that outcome. These differences in view formed part of the basis for the contested hearing and the subsequent judgment, because the Department had applied for protective orders to continue out-of-home care, and the parent had opposed that application.

#### *Examples of instructions for out-of-home care*

The following examples show how magistrates reported children's instructions to remain in out-of-home care. Some instructions to remain in out-of-home care were linked specifically to children staying with their current foster or kinship carers:

Elizabeth instructed [her barrister] that she is content in her current placement... (10-13 years, case 135)

Lisa was represented by [barrister] and her instructions were that she wishes to remain with the [foster] family on a Permanent Care Order (6-9 years old, case 315).

These instructions reflect that in those instances where children preferred to continue out-of-home care, most children were experiencing family-based rather than residential care.

Another way children's instructions to remain in out-of-home care were framed in the judgments was in specifying that they were opposed to being cared for by one or both parents:

[Barrister] appeared on behalf of Gary and informed the court that Gary had instructed that he consented to the Long-term Guardianship Order and that he did not wish to reside with either his mother or his father (10-13 years, case 236).

Gary had been clear about not being in the care of either of his parents in this example, but his father had opposed the Department's application for a Long-term Guardianship to Secretary Order because he wanted reunification.

The relative frequency of children's instructions about parental care and out-of-home care shows that adults, including the Children's Court, cannot make assumptions about what each individual child's views may be in any particular case. This part of the chapter has also illustrated how children's instructions about their care can be similar or different to those of their parents' and the Department. Contact arrangements are another case in point here, and I address these in the next part of the chapter.

## **Contact arrangements between parents and a child or young person**

Access conditions about contact arrangements on court orders served as the main way relationships were maintained between children and parents who did not live together. Conditions about contact on protective orders can also serve a safety function for children by regulating the circumstances of contact—if any—and supervision. Overall patterns in children's instructions about contact with mothers and fathers are presented first, followed by examples of these instructions.

## Contact arrangements

I examined the judgments for instructions by children and young people about contact time with a parent, and included views about contact that had been the second preference after reunification. This enabled me to categorise each child's instructions as meaning that contact should be reduced, remain the same or be increased. Data were available for 17 children and young people with mothers, and 16 with fathers. The results are summarised in Table 7.3.

Table 7.3. Number of children and young people with instructions about contact time with parents

Parent	Child's instructions about contact			Total N
	Reduce	Remain the same	Increase	
Mother	3	4	10	17
Father	7	6	3	16

It can be understood from the above table that this group of children and young people were more likely to be seeking contact with their mothers, but conversely desired either less contact, or for contact to remain the same, with their fathers. Sixteen out of the 17 children with views about contact with their mother were currently living in out-of-home care, of which six children were also seeking reunification with her, with a second preference of increasing contact. A further four out of 16 children already living in out-of-home care gave instructions to increase contact with their mother, while still preferring to continue living in out-of-home care. The three children seeking to reduce contact with their mother were currently living in foster or kinship care placements.

Of the 16 children with instructions about contact with their father in Table 7.3, 12 were currently living in out-of-home care, of which three instructed for more contact, four instructed that contact remain the same, and five children currently living in foster or

kinship care instructed to reduce contact with their father. Only one child, Steven, gave instructions for contact to increase with his father as a second preference to reunification.

A distribution of care towards mothers was thus reinforced again in children’s views about contact arrangements. This is consistent with my earlier findings that children and young people instructed to be in the primary care of their mother when they were opposed to remaining in out-of-home care. However, some children were seeking more contact with their mother or father, while agreeing to remain in out-of-home care.

A comparison between children’s instructions about contact time and the position of the Department is presented in Table 7.4 in relation to mothers, and Table 7.5 in relation to fathers.

Table 7.4. Children’s instructions about contact time with mothers compared to the DHS

DHS position about contact with mother	Child’s instructions about contact			Total N
	Reduce	Remain the same	Increase	
Reduce	3	1	3	7
Remain the same	0	1	5	6
Increase	0	1	0	1
No position stated*	0	1	2	3
Total	3	4	10	17

\*Department already had guardianship or was applying for guardianship and gave no indication of its case plan for contact.



Table 7.5. Children’s instructions about contact time with fathers compared to the DHS

DHS position about contact with father	Child’s instructions about contact			Total N
	Reduce	Remain the same	Increase	
Reduce	4	1	1	6
Remain the same	0	4	2	6
Increase	0	0	0	0
No position stated*	3	1	0	4
Total	7	6	3	16

\* Department already had guardianship or was applying for guardianship and gave no indication of its case plan for contact.

Tables 7.4 and 7.5 show that when children and young people were seeking more contact with a parent, especially mothers, the Department held a position that contact time be reduced or remain the same. Ten children in Table 7.4 were seeking more contact with their mothers when the Department applied to reduce contact or keep it the same, or had not indicated a position. Where three children in Table 7.5 were seeking more contact with their fathers, the Department applied to reduce or keep contact the same. Just because a child might give instructions that are consistent with the position of the Department about out-of-home care does not mean they will have common views about contact arrangements.

In cases where their views were consistent with the Department’s, children and young people tended to be seeking less contact or the same level of contact with a parent. In Table 7.4, the Department’s position was consistent with three children wanting less contact with their mother and one child who wanted contact to stay the same. Table 7.5 shows that the Department’s position was also consistent with four children who sought less contact with their father, and four who wanted the same level of contact. However, these patterns are tentative because the sample size is small.

Tables 7.4 and 7.5 also reveal that children and young people sometimes expressed a view about their contact with a parent, but the Department had not indicated a position.

According to the magistrates' judgments, the DHS did not state a position about contact arrangements in three cases where children had expressed views related to contact with their mothers, including when children wanted reunification. This also happened for four children in relation to contact arrangements with their fathers, but three of those children were seeking less contact. These were all cases where the Department either already had guardianship, or was applying for guardianship. There were no cases where the Department had guardianship responsibility and indicated a position about parent-child contact, and where a child also had a view about this.

The Department was not required to submit a position about parent-child contact arrangements in cases concerning guardianship responsibilities for children. Decisions about contact are rendered to be outside the Court's powers when children are under the guardianship of the Department, as previously explained in relation to fragmentation of the child protection legal system (Chapter Two). Consequently, in cases where children living in out-of-home care have views about their contact arrangements under an order being made by the Court, but only the Department has the power to make that decision, fragmentation is a problem.

The importance of direct legal representation to foster children's participation rights was highlighted again when considering how their views could be different or similar to a parent's views about contact arrangements. Data were available for 17 children with mothers and 15 children with fathers where the parent also had a view about contact. These were cross-tabulated to compare their views in Table 7.6, and included cases where a parent or child would have been pursuing contact for reunification. No mothers or fathers wanted contact time reduced.

Table 7.6. Children’s instructions about contact time compared with parents

Parent’s instructions about contact	Child’s instructions about contact			Total N
	Reduce	Remain the same	Increase	
<i>Mother’s instructions</i>				
Remain the same	1	2	0	3
Increase	2	2	10	14
Total	3	4	10	17
<i>Father’s instructions</i>				
Remain the same	0	1	0	1
Increase	7	4	3	14
Total	7	5	3	15*

\* For N=16, one father was not a party but the child had views reported in the judgment about continuing the same contact arrangement.

When children were seeking more contact with a parent, Table 7.6 shows that the parent was also supporting contact. Mothers had the same instructions as all 10 children and young people who instructed that they wanted more contact with them. This also occurred for three children with fathers. There were also a few instances where both children and a parent wanted contact to remain the same, but the Department intended to reduce contact. On the whole, children and mothers shared a view that supported their contact more frequently than children and fathers did.

Table 7.6 also shows that some parents were seeking more contact time when a child did not. Five children gave instructions that differed from their mothers, who had sought an increase in contact. These cases had included two children who preferred that contact be supervised (not shown in Table 7.6). Fathers were seeking an increase in contact time when 11 children were not, including five children who preferred that contact be supervised. Therefore some children were cautious about the frequency and safety of contact with their parents, especially with fathers.

Through presenting quotes from judgments where their instructions were reported, the next section provides further context about children's views regarding contact arrangements.

### **Instructions about contact arrangements**

The following extracts from the judgments illustrate instructions given by children and young people about contact arrangements with a parent. As well as illustrating children's views about contact, each of the examples presented in this section replicates my ethnographic findings about the potential for children to express partial and hierarchical instructions about their care.

Instructions about supervision were usually combined with the frequency or time of contact, which reflects the experience of contact from children's perspectives.

Elizabeth's instructions provided an example of contact time and supervision together (10-13 years, case 135). She gave instructions to increase contact and not have supervision with each parent. As a condition on the order, both parents also sought an increase in contact, and for telephone contact to be formalised. The magistrate reported Elizabeth's instructions as follows:

... [She] would like fortnightly access with both of her parents. She would also like monthly overnight access with her parents and doesn't see that access with either parent needs to be supervised. She gave no instructions as to telephone access.

Because of her participation with instructions, Elizabeth's perspective about feeling safe enough without supervision during contact with both parents could be put to the Court independently. She also maintained her participant status without having to instruct about telephone contact, reflecting the benefit of partial instructions. Partial instructions enabled Elizabeth to participate in the contest hearing because she held a view about some matters being decided (fortnightly contact with her parents) but not all (telephone access).

Children and young people sometimes instructed for an increase in contact time within a range of preferences about their care arrangements. A hierarchy was documented in

magistrates' judgments when children gave instructions about increasing contact or changing to unsupervised contact, while also seeking immediate or future reunification. Siblings Jean and Murphy gave instructions about remaining in out-of-home care in the short-term, while maintaining contact with their mother (10-13 years and 6-9 years, case 245):

Jean and Murphy, who are both of an age entitling them to be represented, instructed that whilst they are currently happy residing with their maternal grandparents, they would like to stay with their mother on weekends, and eventually return to her care.

For Jean and Murphy, a change to overnight contact on weekends represented an increase in contact time with their mother. The children also conveyed some understanding about their short and long-term care during child protection intervention by preferring kinship care with their grandparents in the short-term, while holding a long-term view of care with their mother. This exemplifies the importance of contact arrangements in maintaining care relationships when gradual reunification may be possible (Delfabbro, Barber & Cooper 2002; Maluccio, Abramczyk & Thomlison 1996; Sen & Broadhurst 2011). This aspect of contact is considered further in the next part of the chapter.

In summary, this part of the chapter has reported patterns in the instructions given by children and young people about their contact arrangements with parents. Children most frequently sought more contact with mothers, and conversely less or the same level of contact with fathers. As with care arrangements, instructions children gave in favour of contact tended to be the same as those of their parent, but contrasted with the Department's position. However, when comparing children's and parents' views, fathers tended to contest contact arrangements when children and young people were not opposed to less contact, wanted contact kept the same, or supported supervision. When viewed in conjunction with children's views about parental care, these findings point to children experiencing a gendered distribution of care, in that they prefer care and contact with their mothers to a greater extent than with fathers.

These findings have provided more evidence about the potential for a child's views to run counter to those of a parent or the Department. Children's instructions were more complex than simply wanting more contact with a parent. Instead, children's views

intersected with their current and preferred care arrangements over time. The hierarchy of views about care arrangements and contact was particularly complex for children living in out-of-home care. Some children living in out-of-home care favoured more contact as part of a desire to return to parental care, especially with mothers, whereas other children preferred to remain in out-of-home care, but to increase, maintain or reduce their contact with a parent. These findings also highlighted the marginalised position experienced by children living in out-of-home care when they have views about contact with a parent, but the Department may either have guardianship power to make that decision, or be applying for guardianship. Neither the Department nor parents would have been able to represent children's views comprehensively or accurately in these circumstances, therefore strengthening the case for legal representation.

The remainder of this chapter provides insights into why a child or young person might prefer a particular distribution of care. Instructions supporting a distribution of care with parents are presented next.

### **When children's instructions supported parental care or contact**

The following themes identified from magistrates' judgments shed light upon the contexts in which children and young people supported care and/or contact arrangements with parents. Although positive qualities in their relationships with parents feature, problems with out-of-home care and the Department are the most frequent theme when children preferred a redistribution of care towards parents rather than the state. In simple terms, parents could represent the lesser of two evils.

### **Relationships with biological parents**

Two themes about the meaning to children of parental relationships emerged. One theme related to children and young people experiencing emotional ties with biological family. The other concerns children wanting to maintain their relationship with a parent.

### *Emotional ties*

Children's emotional ties with parents and other family members characterised their relationships, and could convey a sense of belonging or identity. Evidence quoted by magistrates as given by psychologists, Children's Court Clinicians or Department practitioners supported this theme, as well as submissions by children's lawyers about their instructions. The magistrate for Justin acknowledged his sense of belonging from evidence given by the DHS practitioner. The DHS practitioner had reportedly described how Justin "identifies himself as part of his family". This added a positive tone about Justin seeking reunification with his parents alongside the extreme difficulties he had experienced in out-of-home care.

Justin's situation was echoed by magistrates, who cited evidence that the emotional bond between a child and parent, conveyed children's desire for reunification. This was a strong feature in Suzie's case (10-13 years, case 267). Suzie opposed the Department's application to extend her Custody to Secretary Order and reduce contact time with her mother, which was part of a non-reunification plan. As an Aboriginal child with no siblings and only limited contact with her father, Suzie strongly identified her mother as her primary family. However, the magistrate did not specially acknowledge Suzie's Aboriginal identity (CYFA s.10(3)(c)) nor whether her identity had a maternal and/or paternal lineage. Nonetheless, Suzie had lived in her mother's care for most of her early life. The magistrate made a link between Suzie's instructions and the quality of her relationship with her mother:

"All through this case evidence has been given by various witnesses that [Suzie] and her mother have a strong bond and both child and mother would like to reside together."

Suzie's instructions to reunify with her mother and the positive qualities in their relationship occurred within a context of Suzie having been out of her mother's full-time care for approximately three years. This illustrates the importance of parent-child relationships in the long-term from a child's perspective.

By contrast, Keith and Nina were in their father's primary care, but were seeking reunification with their mother (14 years & older, 10-13 years, case 155). Their story illustrates how children's instructions could in part be an attempt to escape an uncaring

relationship with one parent, while also experiencing comparatively positive emotional ties with a preferred parent. Moving into their mother's primary care would require a Supervision Order by the Children's Court to override existing federal family law orders. The magistrate's judgment documented a long history of conflict between their parents. Nina and Keith had been seeking to be with their mother during the last two years and, in the magistrate's words, were "yearning to be with her". According to the magistrate, the situation had been unresolvable:

Because of the parental conflict and [the father's] rigid adherence to Family Court orders, any negotiation between the children and their father on the issue was futile.

Their desire to be in their mother's care was juxtaposed with Nina and Keith's experience in their father's care.

The emotional ties children experienced with mothers or both parents points to the importance of contact in children's relationships with parents.

### *Contact and maintaining relationships with parents*

Children involved in child protection intervention in Australia have a low chance of being reunified with a parent after being in out-of-home care for more than one year (Delfabbro et al. 2014). Children are also at risk of losing contact with parents the longer they remain in out-of-home care, exacerbating their feelings of uncertainty about belonging and identity (Cushing, Samuels & Kerman 2014; Samuels 2009). Even when reunification is never possible, the child maltreatment literature emphasises that maintaining parent-child relationships is important for children's long-term wellbeing (Collins, Paris & Ward 2008; CREATE Foundation 2011; Cushing, Samuels & Kerman 2014). Contact also accounts for the likelihood that upon leaving care as young adults, some may return to their family of origin or want to resume contact (CREATE Foundation 2011).

Children's instructions supported maintaining contact with birth parents in two ways. There were signs in the judgments that some children and young people had hopes of reunification in the short or long-term. Some children's instructions supporting contact



were a second preference to reunification with a parent. Their hierarchy of preferences, as reported earlier in this chapter, represented a compromise view, whereby they wanted contact to be maintained if they could not experience reunification in the short or long-term. Other children did not oppose out-of-home care, but maintaining relationships with parents continued to be an important part of their care experience.

Reunifying with his mother was Scott's first priority in his instructions over the course of two contested hearings (10-13 years, case 465). Unsupervised contact with her, while continuing to be in his grandmother's care, formed Scott's second preference. The magistrate stated, "It is Scott's firm position to continue living with his 'Nan' if he cannot live with his mother". His grandmother supported Scott's contact with his mother, including allowing unsupervised contact at times; this was contrary to the existing court order. In contrast, the Department applied for a Guardianship to Secretary Order that would result in no formal contact condition with his mother, and in Scott being removed from his grandmother as well, as this was the Department's care plan. Scott's instructions can be understood as seeking to maintain his relationship with his mother in the long-term, even if the magistrate did not grant an order permitting reunification.

This section has revealed evidence about children experiencing ongoing emotional ties with parents in cases where children and young people gave instructions for parental care or contact. Maintaining parent-child relationships emerged as important to some children, irrespective of whether reunification or out-of-home care were likely. This illustrates how parents remain important in the lives of some children and young people. Negative experiences in out-of-home care, as well as poor relationships with the Department, formed another substantial theme in these cases.

### **Negative experiences of out-of-home care and with the DHS**

Four types of negative out-of-home care experiences were evident in judgments where children and young people instructed in favour of parental care: unstable out-of-home care placements, separation from siblings, inconsistent child protection services, and being unsafe in out-of-home care. One or more negative experiences were apparent in

judgments for 14 children, comprising 10 out of 14 children and young people who had opposed remaining in out-of-home care, and four children in the care of a parent, but who were opposed to further Departmental involvement in their lives.

Experiences of multiple placements demonstrated the potential for out-of-home care to be an unstable experience for some children and young people. Unfortunately this is a common problem in Australian and overseas child protection systems (Bromfield et al. 2005; Fox, Berrick & Frasch 2007; Unrau, Seita & Putney 2008). Recent data from the Productivity Commission (2015) shows that the Victorian Department had the highest frequencies for multiple placements of children in its care for the last five years compared with all other Australian states and territories. As well as disruptions to their care, schooling and relationships, multiple placements can undermine the long-term connections children and young people experience with parents and other significant figures (Cashmore & Paxman 2006; Cushing, Samuels & Kerman 2014).

Ross's experience exemplified unstable out-of-home care (14 years & older, case 232). Ross instructed that he should reunify with his mother. Within approximately two years, he had been in four different care placements with the Department. That was preceded by a short period of time living with his father, with whom Ross had neither lived with nor had regular contact with since he was an infant. Ross had also been separated from his mother, and lost contact with her for a number of years following a series of tragic events. In this context, Ross's instructions can be understood as supporting a distribution of care towards his mother rather than continued uncertainty in the state's care.

Unstable out-of-home care arrangements were neither necessarily acknowledged nor understood by the Department as contributing to children's desire for parental care. Suzie had been living in out-of-home care for over three years (10-13 years, case 267). Suzie experienced multiple placements during that time, including two foster care placements during the contest hearing. Yet according to the magistrate, the Department gave evidence that her placement was "very suitable", and that the foster carers had "a strong commitment". However, the placement ended abruptly without explanation from the Department. The Department did not acknowledge that Suzie's experiences of

multiple and unstable out-of-home care placements and her uncertain future care arrangements could contribute to her preference to return to her mother's care.

Research has shown that multiple out-of-home care moves increase the likelihood of siblings becoming separated (Shlonsky, Webster & Needell 2003). Reflecting the international case law and literature critical of siblings being frequently separated in out-of-home care (Hegar 2005; Shlonsky, Webster & Needell 2003; Shlonsky et al. 2005), I found that a high rate of sibling separation occurred in the case file sample as a whole, including those with and without legal representation. Sibling separation affected 80% of the 74 eldest children and young people who had at least one sibling. The Department determines sibling placement, not the Children's Court (*Department of Human Services v B Siblings; H Siblings* [2009] VChC 4). The high frequency of sibling separation contrasts with the CYFA (s.10(3)(q)) best interests principle regarding "the desirability of siblings being placed together when they are placed in out-of-home care".

The loss of sibling relationships featured in many cases where children and young people gave instructions for parental care. Even from this small sample, a majority of the children seeking reunification were separated from at least one sibling. Twelve of the 14 children opposed to continuing to live in out-of-home care had siblings. Within this group of 12, 10 children were separated from at least one sibling. Comparatively fewer children, who did not oppose staying in out-of-home care, were separated from siblings. Of the 12 children who had siblings and favoured staying in out-of-home care, six had been separated from a sibling. The experience of separation from siblings can be understood as causing additional fragmentation to family life for children living in out-of-home care.

Sibling separation may further discourage children from staying in out-of-home care, as can be seen from Justin's instructions. Being with his siblings was part of Justin's instructions for reunifying with his parents (14 years & older, case 273). Justin was living in out-of-home care, but his siblings had remained with his parents. The magistrate in his case noted that "...[Justin] emphasised he wanted to see more of his siblings". Justin opposed continuing to be in out-of-home care, and favoured returning to parental care.

Experiencing inconsistent services from the Department was another noticeable problem reported in judgments where children had given instructions opposed to out-of-home care and Department involvement. Building on the theme of multiple out-of-home care placements, inconsistencies in the Department's services included children having had multiple child protection practitioners assigned to them, and not gaining consistent or timely access to therapeutic support services. Conflict and distrust towards the DHS subsequently occurred in some cases.

At the time of the second contested hearing for Suzie, whose relationship with her mother and multiple moves in out-of-home care were reported earlier, her case had just been transferred to a specialised Aboriginal support service, and she was in another foster placement (10-13 years, case 267). This recent change in the agency out-sourced by the Department to provide support services sought to circumvent the ongoing tensions between the Department vis-à-vis Suzie and her mother. Suzie had also experienced multiple child protection practitioners during the Department's involvement over four years. There was no evidence in the judgment as to whether the Department practitioners ever complied with obligations to provide a cultural plan, Aboriginal Family Decision-making Conference, or Aboriginal Placement Principle in the years prior to the second contest hearing. Under these circumstances it is unsurprising that Suzie and her mother had difficulty cooperating with the Department.

A similar case to Suzie's was heard by the Children's Court more recently, and released publicly by the Court (*Department of Human Services v K Siblings* [2013] VChC 1). As does Suzie's case, the judgment for the K siblings identifies chronic deficiencies in service provision for Aboriginal children in the care of the Department. As happened for Suzie, the Department had not undertaken the mandated Aboriginal services and legislated placement principles for the K siblings during a two-and-a-half-year period of guardianship. In addition, the siblings had never lived together as a group since coming into the Department's care more than three years prior, and regular contact arrangements had not been maintained for the children, parents and extended family members. The magistrate did not grant the Department's application to extend the children's Guardianship to Secretary Order for another two years. Instead, the magistrate adjourned the case to compel the Department to conduct an Aboriginal Care Plan and Aboriginal Family Decision-making Conference. The adjournment period

resulted in the K siblings being reunited together with an Aboriginal family member, consistent with the Court's direction.

An example illustrating inconsistent services and consequent distrust with the Department occurred with Carlos (14 years & older, case 459). Carlos's experience demonstrates why it can be difficult for children and young people to perceive any benefit to having statutory child protection intervention. Carlos was in his mother's care, and would remain with her, but he opposed the Department's application for a Supervision Order. Carlos objected strongly by giving evidence himself during the hearing. This was a rare example of a young person electing to give evidence in-person to the Court, the only case in either the case file or ethnography samples. Carlos gave his evidence in the context of having not been seen in-person by any DHS practitioner for more than a year, despite an order in place during that time. The magistrate reported that Carlos:

... has not spoken with the DHS workers. He does not like them. They don't do anything and have ruined his life. [He] said he has made the choice not to speak to them because he does not want to.

Both Carlos and his mother had developed a deep distrust of the Department. Likewise, the relationship that Suzie and her mother had with the Department was characterised by conflict. The evidence in both these judgments indicated that the Department had not fulfilled its statutory obligations and services. Such obligations included taking "all reasonable steps" to "provide the services necessary in the best interests of the child" (s.276(1)(b)), and the services "necessary to enable the child to remain in the custody of his or her parent" (s.276(1)(c)). Furthermore, specific obligations had not been satisfied for Suzie as an Aboriginal child (ss.10(3)(c) & 13). These children's instructions opposing state intervention had clearly been shaped by the poor care relationships they experienced with the Department.

### *Safety in out-of-home care*

Experiencing unsafe placements was another serious problem in the quality of out-of-home care for children who were seeking to reunify or have contact with parents. This

extended to allegations of abuse and risks of harm while in out-of-home care in a few cases. While serious allegations by children and young people were rare in the magistrates' judgments, the incidences supported my previous ethnographic observations about safety concerns in out-of-home care. Residential units were clearly the worst type of out-of-home care placement experienced by children and young people.

Most children and young people living in residential units were opposed to remaining in out-of-home care. Five out of six young people who lived in residential units as their main place of care at the time of the contested hearing were seeking reunification with a parent. Their circumstances and experiences conveyed serious problems with this type of placement (cases 232, 273, 160, 435, 195.) The sixth young person, Jeffery, was consenting to a part-time arrangement to permit him to use the residential unit as a temporary refuge from his parents' violence and alcohol use whenever he needed to (14 years & older, case 195).

On the whole, children and young people did not experience residential units as adequate caring environments. Evidence in the magistrates' judgments showed residential units to be precarious places for long-term care, and places where further abuse could occur. Sexual abuse, and bullying and violence between young people in residential units made this type of placement untenable.

Justin's experience of sexual abuse risks and violence were reported in the magistrate's judgment for his case (14 years & older, case 273). Justin was described above in relation to separation from his siblings and identification with his family. The magistrate recorded multiple residential unit placements, periods of secure welfare, and allegations of prior abuse in out-of-home care in the past. Justin experienced further recent harm in residential care, including exposure to prostitution, substance use with other residents, and violent bullying by another young person. In his instructions about the residential unit, the magistrate quoted Justin as saying that it "is bad for me and I am hassled all the time". He would regularly self-place (run away), preferring to be on the streets or a friend's house, if not hiding at his parents' home. The magistrate also reported that Justin had "raised the problems with prostitution among his reasons for not returning to the unit". Justin's safety concerns could be submitted to the Court in his

own words because he had direct legal representation. As well as sharing his desire to be reunited with his family, Justin's participation served to reveal his experiences of abuse in out-of-home care that might not otherwise have had an avenue for exposure.

Views children and young people have about their out-of-home care can differ from official views submitted in evidence by the Department to the Court. This is what happened in judgments when the Department disputed allegations made by children and young people in some instances, or minimised the seriousness of concerns. Like Justin's disclosures with his lawyer, according to the magistrate, Ruth (14 years & older, case 160) "raised with her lawyer [her] concerns about being threatened regularly by the other [young people] at the unit" for over 18 months. In addition, the residential unit was supposed to be a therapeutic environment for Ruth, but for over a year the Department had delayed referrals to specialist services. This was also a source of frustration for Ruth, because she wanted to change schools in order to improve her chances of achieving a post-secondary qualification.

Ruth's fears and dissatisfaction with her care as reported in the judgment contrasted with the views of her DHS practitioner. The content of the judgment indicated that the Department had minimised Ruth's allegations about the lack of safety she experienced at the residential unit. For example, the magistrate quoted the practitioner as saying the residential unit was "a house of three teenage[ers] who generally got along very well although there had been some incidents", and that Ruth was "happy and thriving" there. Furthermore, the Department's 18-month delay in therapeutic services for Ruth were rationalised by the practitioner as caused by a referral problem. The contrast between Ruth's views and those of the Department created an impression that Ruth was a vulnerable young person whose needs and violations of her safety were not being responded to. However, Ruth's status as a participant with direct representation meant that her experience was nevertheless put to the Court independently of the Department via her lawyer. Representation supported Ruth's agency to assert her care and safety needs in a context where power imbalances with the Department meant her perspective was not being adequately respected.

The findings from these judgments were echoed in media revelations about sexual abuse in Victorian residential units (referred to in the introduction of this thesis, Oakes

2014a, 2014b) and additional investigations into sexual abuse and exploitation of children while in the Department's care (Oakes 2015a, 2014c, 2014d). My findings are also supported by a report from the Victorian Commission for Children and Young People (2015), initiated following the revelations by children and their lawyers reported in the media. That report documents extensive sexual abuse, sexual exploitation, and neglect in residential care. As a whole, my findings and the subsequent media and Commission evidence demonstrate that extensive abuse over a long period had been experienced by many children and young people in residential care.

In summary, negative out-of-home care experiences and poor care relationships with the Department were reported in judgments where children and young people wanted to be in the primary care of a parent and had opposed further DHS involvement. The evidence portrayed a troubling quality of care by the state for this group of children. Under these circumstances, parents who themselves had a history of being abusive, neglectful, or otherwise unable to adequately care for children, were seen by children and young people as a better alternative to the state. When we look at their instructions, many children and young people do not want the Department to continue acting as their parent in these circumstances. At the same time, the history of child protection intervention indicates that any resumption of parental care or increase in contact relies on parents being willing and able to respond to children's care and safety needs, even with the support of services as directed by the Children's Court.

The next section turns attention to the group of children and young people whose instructions indicated support for out-of-home care rather than parental care or contact.

### **When children's instructions supported out-of-home care and limiting contact with a parent**

Some children and young people preferred a distribution of care towards the state; in other words, not to be in the care of a particular parent, or to have limitations on contact. The findings further our understanding about the context in which children's



instructions about their care are located. An ongoing fear and safety concern about parents is the first theme, and a positive relationship with carers the second.

### **Fear and safety concerns about parents**

Experiencing ongoing safety concerns and fears about a parent emerged as the strongest theme in judgments where a child or young person was not opposed to out-of-home care, was moving between separated parents, or was seeking limited contact with a parent. This theme was evident in judgments for 15 children and young people, including two children limiting contact with their father while moving into their mother's care. In conjunction with children's instructions, magistrates' judgments in all these cases featured evidence from the Department and independent witnesses about abuse and neglect, especially family violence.

Ongoing fear and safety concerns applied almost universally to family violence and physical abuse perpetrated by fathers, with a further two children alleging sexual abuse by their stepfather. Just one child out of 15 was specifically identified in a judgment as feeling unsafe and fearful of their mother. These children's instructions had the effect of asserting their safety and experiences of family violence and abuse, especially with fathers, and drawing the Court's attention to these problems from their own perspectives.

Evidence in the magistrate's judgment for Jeremy, Mitchel and their younger sibling, Christine, illustrated the intersections between children's instructions, gendered family violence, and continuing to be fearful about a father (both 6-9 years, case 302). Jeremy and Mitchel gave instructions in favour of continuing to be in a kinship care placement. Both instructed that they were not opposed to contact with their mother and father, albeit on a less-frequent basis than their current arrangement. Jeremy and Mitchel did oppose each parent's request for overnight contact. Their experiences of family violence by their father featured strongly as reasons why they felt safer remaining in kinship care, and wanted limitations kept on their contact arrangements. Their father, however, wanted the siblings reunified with him.

Both Jeremy and Mitchel made multiple disclosures to school and health-care professionals about their father being violent to their mother. The magistrate quoted these disclosures in the judgment. For example, a witness from their school said that Jeremy disclosed he was worried “Dad would kill Mum”. Likewise Mitchel had disclosed, “Dad would hurt Mummy really badly and Mummy would have to go to hospital”. In contrast to their home environment, the school counsellor reported that Mitchel said he felt “safe” at his kinship carer’s house. The children’s disclosures were supported by evidence about their father’s capacity for violence, including evidence about physical injuries to their mother and a history of domestic violence convictions. Jeremy and Mitchel’s anxieties for their mother’s safety and fear of their father echoed the disruption to mother-child relationships caused by gendered family violence (Humphreys 2007; Humphreys et al. 2006).

How to maintain some safe and appropriate frequency of contact with parents, if any at all, became a dilemma for children and young people who were fearful. Some children raised concerns about their safety during contact, concerns for the safety of siblings during contact, and refused to have any contact with parents. Their views about safe and effective supervision, or monitoring during contact, could differ from what the Department and parents considered a suitable arrangement.

Julia gave instructions that “she wished to remain in her current placement and that at present she did not wish to see her mother” (6-9 years, case 138). The magistrate in Julia’s judgment recorded aggression by both her parents during contact, despite contact apparently being subject to supervision. Julia’s mother had engaged in aggressive behaviour towards her on more than one occasion. She had since been refusing to see her mother, which can be understood as a self-protective strategy. Prior to her father’s incarceration, Julia also witnessed him being violent towards another adult. However, Julia’s younger sibling continued to have contact with their mother, and this had become a source of anxiety for her. According to the magistrate, counselling for Julia had been delayed with the Department for many months.

Julia’s experiences show how contact with parents could be a source of further fear for some children, especially when inadequate supervision occurred, and effective support for children before, during, and after contact was in not place. These findings reinforce

the importance of children and young people's participation rights in all decisions about contact with parents to ensure a sense of control (Kiraly & Humphreys 2012). In addition, the marginalised participation status of children under guardianship of the Department is problematised by these findings. Children are dependent upon the Department for participation in contact decisions, while the Department has authority to arbitrarily determine the arrangements according to its resources, including availability of staff for supervision. The presence of contact conditions attached to protective orders acts as a safety mechanism in these circumstances, both in terms of regulating contact between children and parents, and regulating how the Department is required to organise the minimum frequency and supervision of contact. Fears and safety concerns about parents contrasted with the positive relationships some children had with their foster and kinship carers, which is the theme of the next section.

### **Positive out-of-home care relationships**

Positive relationships between seven children and their foster and kinship carers were conveyed in the judgments. Although this theme appeared less frequently in the judgments than fears about a parent, it contributed to some children's preference to remain in out-of-home care. Foster and kinship carers were sources of loving relationships for this group of children and young people. This theme reflects previous Australian and international research showing that stability of foster and kinship placements was facilitated by the quality of caregiving, carers nurturing and responding to children's complex needs, and children feeling loved (Fox, Berrick & Frasch 2007; McHugh 2013; Minty 1999; Oosterman et al. 2007; Riggs, Delfabbro & Augoustinos 2009).

Positive experiences of care relationships tied directly to the carers themselves. However, relationships with carers did not appear to translate to positive relationships with the Department and child protection practitioners. No child or young person had instructions or experiences conveyed in the judgments that suggested the Department as an institution, practitioners, or contracted care agencies were seen as protective or positive sources of care and support. It can be understood that children and young

people did not experience the Department as a parent, even under guardianship-related orders that meant the DHS was, in effect, a parent to them. Instead it was their foster or kinship carers who functioned as parents in children's eyes.

Children and young people who were not opposed to staying in out-of-home care had often been with carers for a significant period. As well as ongoing fear of his father, Gary had been seeking to feel "normal" through continuing to be with his foster carer on a long-term Guardianship Order (10-13 years, case 236). Gary's positive relationship with his carers contrasted with fear he felt towards his father. Children like Gary had developed strong, stable relationships with their caregivers. The impression of parental relationships was clear in these cases, reflecting how experiences of family life in out-of-home care are shaped by relationships with the adults who provide day-to-day care (Fox, Berrick & Frasch 2007, 2008; Riggs, Delfabbro & Augoustinos 2009).

Parental qualities in relationships between children and foster or kinship carers were conveyed in magistrates' judgments with language about positive attachment and bonds. The magistrate in Lisa's case recorded evidence about her sense of family with her foster carers that underpinned her instructions to remain in their care. That evidence had been submitted by the foster care agency outsourced by the Department to manage her placement. Notably Lisa:

...calls [her foster parents] 'Mum and Dad' and sees them as her parents. She is very happy and content in their household. Lisa regards [her foster carers' children] as her siblings and is very attached to them, especially [her foster sister].

Children's concepts of family life can be more broad and flexible than the nuclear family norm, and children living in out-of-home care are no exception (Fox, Berrick & Frasch 2007; Hill & Tisdall 1997; Smart, Neale & Wade 2001). This also speaks to the importance of maintaining stable and caring out-of-home care relationships and relationships with biological parents through safe and supported contact arrangements that incorporate children's views about contact (Atwool 2013; Fox & Berrick 2007; Fox, Berrick & Frasch 2007).

## **Conclusion**

This chapter has contributed to an understanding of children and young people's views and experiences in relation to their care when they are involved in child protection proceedings. I have proposed that the redistribution of care between parents and the state is a function of child protection intervention. The findings presented in this chapter show how the instructions children and young people give about their care appeal to the Children's Court to redistribute their care in ways that respond to their views and experiences. The spectrum of instructions and experiences of care, together with the fact that children's views about care and contact aligned fully neither with the Department's nor those of the parents, have provided further evidence for the importance of legal representation for children in child protection proceedings. The evidence shows that the Department and parents cannot be assumed to adequately represent children's views or care experiences (Jenkins 2008).

The patterns and complex themes documented in this chapter illustrate the multiple vulnerabilities experienced by children in parental care and in state care. Returning to the quote from Justice Bell at the beginning of this chapter, children's views have been shown to interact with what is required for their care and protection. The views of children and young people show how being cared for by the state and parents can be painful and detrimental, alongside positive experiences of belonging and love (Holland 2010; Skoog, Khoo & Nygren 2014). These vulnerabilities have come to the attention of the Children's Court through the implementation of their participation rights.

While more than half these children instructed in favour of being cared for by a parent, the findings overall show that children and young people do not necessarily always seek parental care or contact. Both groups of children—those who preferred parental care or contact, and those who preferred out-of-home care or limited parental contact—held concerns for their own safety and quality of care. Children are responding to alternatives that may in many cases be less than ideal. It becomes a matter of finding the least negative alternative from their perspective and experience. In this sense, children's views may be analogous to judicial officers weighing up the 'least detrimental alternative' when deciding children's best interests, whereby there are usually no ideal options to choose from in reality (Freeman 1997; Goldstein et al. 1996; Mnookin 1975).

For these children, their views expressed through participation are indissoluble from their safety.

Some children's instructions for parental care and contact occurred in a context of serious problems in the care provided by the Department over a long period of time. The care experienced by most of the children and young people in this part of the sample, particularly when living in residential units, would fit with Bessant's (2011, p.259) observation that "the treatment that many children and young people receive while in state care is less than that required by the state's own legal frameworks and community standards". Bessant (2011, p.259) points out that when the state fails in its role as a parent, "there is no higher authority that will intervene and remove those children and prosecute the state". However in the case file study, direct representation of these children and young people enabled their experiences of poor care by the state to be independently put to the Children's Court, and alternatives to be recommended. Therefore implementing children's participation rights may serve a forensic function, in that children's views bring to the Court's attention their fears and safety concerns related to the Department and parents in the quality of care.

Further supporting the forensic function of participation, many children's instructions in favour of out-of-home care or limiting contact with a particular parent were situated in their experiences of fear and safety concerns about parents. However, they relied on the Department to ensure that orders for contact and supervision were complied with appropriately, and to make contact decisions when it retained guardianship power. Instances of harm and distress experienced by some children regarding parental contact indicate that the Department was not always fulfilling those responsibilities. Positive relationships with kinship or foster carers provided an experience of family life for some children, but they were also dependent upon the Department to maintain those placements. These findings reinforce the problem of fragmentation in the child protection legal system when considered in conjunction with the negative experiences of Department care by so many children seeking parental care or contact. There is no effective recourse available for children when the Department acts as an ineffective parent, and the problem is framed outside of the Children's Court because the Department itself is supposed to function as the protective intervener.

Cumulatively, the findings in this chapter counteract three dominant protective-based claims against participation of children and young people: that children and young people cannot understand child protection matters; will usually want to be in the care of parents; and will seek outcomes inconsistent with their best interests because of their immaturity and vulnerability (Duquette 2000; Jenkins 2008; Malempati 2013; van Bijleveld, Dedding & Bunders-Aelen 2013; Vis, Holtan & Thomas 2012). Despite the potential for these complex issues to be present in individual cases, my research provides empirical evidence challenging these assumptions. The combination of safety concerns and positive experiences of care expressed through children's instructions justify a safety function of participation. Instead of their vulnerabilities justifying exclusion from participation, it is precisely these vulnerabilities that necessitate recognition of participation rights for children and young people.

This chapter has only included children who had direct representation with a lawyer, and cases where the magistrate had recorded at least one of their views in the written judgment. I was limited to using these cases, because where children had best interests representation or no representation, no child's views about their care were reported in judgments made by magistrates. Implementing participation also rests upon how magistrates respond to children as participants when determining their best interests and applying any weight. Chapter Eight will focus on magistrates and their recognition of children and young people as participants.

## **Chapter Eight**

### **Recognition of children and young people in judicial decisions arising from contested child protection proceedings**

Final responsibility for recognition of children and young people's participation rights in child protection proceedings rests with the magistrate, who makes a decision about their best interests. Previous literature and the UN General Comments on Articles 3 and 12 contend that if the decision is to meet the definition of a child's best interests, a decision should ideally be informed by the views of the child who will live with the consequences of a court order (Child Rights International Network 2012; Crossman et al. 2002; Eekelaar 1994; Taylor 2009; UN Committee 2009, 2012). My previous chapter analysed children's instructions and care using magistrates' judgments from the case file study. Chapter Seven revealed that a range of complex themes in children's care, safety and relationships underscored a redistribution of care to parents or the state in children's instructions. This chapter also draws on the case file study as a whole, as well as the written judgments, to understand how magistrates responded to children who had legal representation, and to the participant status of children without legal representation when determining their best interests.

This chapter is composed of five main parts. The first expands my discussion of recognition from Chapter Three to examine the recognition power of magistrates, and its legal and ethical basis. Part two presents overall patterns of recognition in the judgments when children did and did not have legal representation. A comparison between the substantive outcomes and children's instructions when they had direct representation is presented in part three in order to understand how consideration and weight to children's views were recorded. Part four contains five themes about recognition arising from judgments where children and young people had direct representation. Building on the findings from Chapter Seven, the themes provide insights into how magistrates can respond to participation of children and young people. I argue that these responses support recognition in procedural and forensic ways. In part five, barriers to recognition by magistrates when children did and did not have legal



representation are considered. Barriers identified from the judgments show how recognition may be influenced at system, child, individual and societal levels. Together these findings lead me to argue that recognition of children's status as participants and implementation of their participation rights, especially with direct representation wherever possible, are necessary for magistrates to make decisions that fully address children's safety and care.

### **Recognition power of magistrates**

In child protection cases that proceed to court determination, magistrates decide what distribution of care between the state and parents is in the best interests of a child or young person. A magistrate has considerable power to decide to what extent their decision should take into account the instructions and views expressed by each child, in the context of any evidence considered important to a case and the interests of the Department and parents as parties to the case (*Department of Humans Services v Sanding* [2011] VSC 42).

### **Recognition – legal and ethical basis**

My interpretation of Fraser's integrated theory of justice, established in Chapter Three, proposes that magistrates have a legal and an ethical basis for recognition of children and young people. At a legal level, the UNCRC Article 12 and the concept of 'due weight' obliges judicial officers to ensure that children and young people are recognised as participants. As explained in Chapters Two and Three, the legal foundations for Article 12 are provided locally by the CYFA best interests principle of applying appropriate weight to children's views, provisions for their legal representation, and the procedural guidelines for magistrates to support children's participation.

Recognition goes beyond children being consulted about their views. Ensuring that the procedure of decision-making is made available to children and explanations are provided as to how their views are considered also characterise recognition. When the

other relevant factors and evidence in a case might result in a different outcome to what they hoped, the importance of these procedures cannot be underestimated in helping children to understand that their views were genuinely considered (Henaghan 2012). Therefore, the written judgment serves as a form of dialogue between the child and magistrate. Children and young people are not normally present to hear a magistrate hand down a judgment, so a written judgment goes some way to fill this gap. If a child or young person has legal representation, they might receive a copy of the judgment from their lawyer, or their lawyer can explain the judgment.

A Supreme Court judgment made by Justice Bell early in my research provides further context to the legal obligations upon the Children's Court to recognise children and young people's participation rights. Justice Bell in *Department of Human Services v Sanding* (2011, paras.29-31) acknowledged the consistency between section 10(3)(d) and the UNCRC Article 12, and that the procedural guidelines (s.552) oblige the Children's Court to facilitate children's participation. According to Justice Bell, the Court is also required to explain the meaning and effect of an order to the child as plainly and simply as possible (para.31). Justice Bell pointed out that magistrates could ensure participation by enabling children to obtain legal representation (para.32).

The judgment by Justice Bell was the first appeal to apply the Victorian *Charter of Human Rights and Responsibilities* to children's rights. In doing so, he further concluded that magistrates should consider children as parties to civil proceedings, and that they should be afforded judicial fairness, have the right to a fair hearing, and have their rights considered consistent with the *Charter* (s.24), even though the CYFA does not formally recognise them as parties (Bell J 2011, paras.202-204). The Children's Court is a specialist jurisdiction with discretion to inform itself and proceed as it thinks fit, "provided that the information on which it acts is sufficiently reliable and probative to form a proper basis for its decision", according to Justice Bell (2011, para.153). The CYFA consequently bestows considerable power, responsibility, and discretion on magistrates to recognise children and young people as having participant status, and to facilitate participation when the Court is informing itself and making decisions.

In addition to legal obligations, I have proposed that magistrates have an ethical basis to recognise children and young people as having participant status in child protection

proceedings. Liebenberg (2007) argues that courts have the power to transform recognition of marginalised and oppressed people in society beyond the legal system. Using the example of ethical duties to social rights and destabilising stereotypes about poverty in South Africa, Liebenberg (2007, p.192) explains "... the court's discourse can serve as a constant reminder that the redress of poverty and inequality are questions of political morality and collective social responsibility", both inside and outside the courtroom.

Applying Liebenberg's logic to child protection proceedings, the Children's Court can similarly model recognition of children and young people as an ethical responsibility to the state, parents and society. Thinking about children's participation rights in this way is consistent with Martha Minow's (1990, p.296) argument that rights discourse can register community commitment "to a basic equality among participants as participants, even when the participants are children". Analogous to my argument for implementing participatory parity, this means applying "equality of attention" to children as participants (Minow 1990, p.297). Furthermore, children and young people may themselves also see they are worthy of recognition via judicial decisions, and consequently experience lower stress in contexts where they have little power, and difficult family, parental and out-of-home care experiences (Birnbaum, Bala & Cyr 2011; Block et al. 2010; Graham & Fitzgerald 2011; Quas et al. 2009; Weisz et al. 2011). Importantly, Weisz et al. (2011) found that children experienced more positive feelings about child protection proceedings and were less upset by the process when they participated and had a judge actively engage with them. Therefore, courts can respect people who are subject to the authority of the state, and give empathy and encouragement, when justifying intervention (Eekelaar & Maclean 2013, p.151), including respect and empathy for children. Upholding transparent procedures for children and young people, and conveying positive regard for their status as participants in judgments, are fundamental ways in which the Children's Court can model recognition to benefit the wider community and all involved in child protection proceedings, especially children.

## **Analysing recognition**

By understanding recognition as dynamic and multidimensional in character, I was able to examine how a magistrate conveyed recognition for each child in a judgment. At a legal level, I considered how the CYFA was applied to children and young people, particularly the sections discussed above. This meant looking at whether or not any instructions and views expressed by a child had been clearly reported in a judgment. Some explanation was scoped as to how the magistrate considered the instructions and views of children, and why weight was or was not accorded. This provided a means to understand the procedure followed by the magistrate in the process of reaching the decision. I also attended to any references the magistrate made in their judgment regarding the procedure of implementing participation during the contested hearing, including how other parties or the child's lawyer responded to the magistrate's directions.

At an ethical level, my analysis of each judgment considered how the magistrate engaged in sensitive and respectful dialogue towards the participation and perspectives of children and young people (Fitzgerald et al. 2009). This meant that recognition could maintain the participant status of children, while considering their views in the context of evidence and factual issues in a forensic way, along with the applications made by the Department and parents. Recognition of a child by a magistrate does not require a decision to be exactly the same as a child's views about their care. The concept of due weight means that a child's views may influence a decision to the extent that is appropriate in their particular situation. However, what is considered appropriate influence in judicial discretion is the subject of debate (see Chapter Three). In Chapter Five I reported how lawyers in my ethnography study had explained to children that participation was a democratic process, and judges had responsibility for the final decision. Consistent with that ethos, a magistrate's recognition using due weight can ensure that children are included in the judgment with their own perspectives and experiences of care.

## **Evidence of recognition of children and young people in magistrates' judgments**

In keeping with my definition of recognition, I assessed all 39 written judgments available from the sample of 50 case files for any reference to a child or young person as a participant in the proceeding; the child's instructions, views, or 'wishes' (s.10(3)(d)); and whether the magistrate explained how they had considered and applied weight to children's perspectives. Table 8.1 below presents the number of cases and children where there was a written judgment available and the judgment referred to views of one or more children in the case.

Table 8.1 Written judgments and references to child's views per case and per child

Written judgments	Cases N	Children N
Judgment available from file	39	64
Judgment referred to views of one or more children in case	24	35
Total case file sample	50	84

Table 8.1 shows that 39 out of the sample of 50 case files had a written judgment, with the views of one or more children reported to by magistrates in 24 of those 39 judgments. In Chapter Seven, I outlined how instructions and views were only available for 35 children and young people who had direct representation. For the purposes of this chapter, these continued to be the only cases that met this basic level of recognition. In other words, 55% of the 64 children with a written judgment had a magistrate record one or more of their views.

The next phase of my analysis examined whether magistrates provided some indication of having considered those views, and any weight accorded. Consideration and weight were defined broadly to capture magistrates who said a child's views had been taken into account, were considered to be significant, were important, or gave reasons why

they had influenced the decision or not (CYFA s.10(3)(d); Robinson & Henaghan 2011). This is a procedural quality of recognition, as it indicates how participation of the child or young person was incorporated into the magistrate's decision-making process when making the protection order.

At a case level, I found that at least one child had direct representation in the 13 where the magistrate referred to consideration and weight, out of the total 39 judgments. This means that only those judgments where at least one child or young person in a family had direct representation displayed this stronger quality of recognition.

Further analysis at the individual child level revealed differences in the frequency with which consideration and weight were applied to children and young people. Out of the 35 children and young people who had at least one of their views reported in a judgment and had direct representation, 20 had a magistrate also refer to consideration and weight. In other words, 15 children and young people with direct representation had at least one of their views recorded in a judgment, but did not have the magistrate go on to explain how those views were considered in the decision and taken into account with any weight. Overall, this means that less than one-third of all 64 children and young people in the case file sample with a written judgment were recognised in this procedural way by having a magistrate refer to consideration and weight to their views.

Table 8.2 provides a comparison of children's age groups according to instances in judgments where magistrates did not record whether a child had any views, had recorded one or more views but not explained consideration and weight to those views, and recorded a child's views and explained consideration and weight to those views.

Table 8.2 Judgments according to the record of child’s views and magistrates’ references to consideration and weight to a child’s views by age of child

Record of child’s views, consideration & weight	5yrs & younger	6-9yrs old	10-13yrs old	14yrs & older	Total N
Did not record any views of child	24	4	1	0	29
One or more of child’s views but did not refer to consideration & weight	0	6	7	2	15
One or more of child’s views and referred to consideration & weight	0	3	9	8	20
Total N children	24	13	17	10	64

Table 8.2 indicates that the age of a child and direct representation intersected with the frequency with which magistrates made any reference in their judgments to having considered and accorded weight to a child’s views. In the cases of 29 children, the judgment did not clearly refer to them as participants, their views, or due weight. These were mostly children five years of age or younger. In terms of their legal representation (not shown in Table 8.2), three of these 29 children had best interests representation: one child was in the 5 years old or younger age group, and two were in the 6-9 years old age group. One child was in the 10-13 years old age group and had direct representation.

Table 8.2 also reveals that judgments for the 20 children where a magistrate indicated having considered their views and due weight equated to just over half of 10-13 year old children and eight out of 10 young people 14 years and older. In comparison, magistrates referred to considering views and weight for only three out of 13 children who were 6-9 years old, of which nine were directly represented, and at least one of their views was recorded in the judgment.

A procedural level of recognition by magistrates explaining their response to children’s participation and views, consistent with magistrates’ legal obligations, was thus most likely to be demonstrated in judgments for children and young people with direct

representation and who were older. Recognition in the procedure of decision-making was comparatively less detectable in judgments involving young children without representation, children with best interests representation, and younger children with direct representation. The differences in consideration and weight to children's views according to their age suggests that having direct representation, and having a magistrate go through the procedure of recording a child's views, was not the whole solution to recognition of children and young people in these decisions about their best interests.

The next part of this chapter looks at the outcomes in judgments where a child or young person had direct representation, in order to examine further the circumstances in judgments that contained qualities of recognition.

## **Outcomes and recognition of children and young people with direct representation**

The following analyses of the substantive outcomes in the case file study sample and the available written judgments provide further insights into circumstances where judicial recognition could be seen to apply to children and young people who participated in the contested hearing via direct representation. A comparison between the Department's application and the type and length of protective order granted by the Court is provided first. The second section presents a comparison between court-ordered outcomes and at least one instance of a child's viewpoint.

### **Protective orders**

The Children's Court usually granted the type of protective order the Department had applied for. The type of order was consistent with the Department's application for 91% out of all 84 children in the case file sample (including cases with and without a written judgment). Seven of the eight children with an order granted different to that sought by



the Department had direct representation, and they were opposed to the type of order the Department sought.

The length of the protective order granted by the Court in the case file sample was also frequently consistent with what the Department had sought, comprising 76% of all 84 children in the case file study. When the length of order was shorter in time for 12 children, it tended to be a compromise of less time than the Department's position but longer than the parents' position. Again, most children had direct representation where a shorter protective order was granted (n=8/12) and they had opposed the type or length of order the Department applied for.

Although the Children's Court usually granted the type and length of protective order the Department applied for, cases tended to involve children and young people with direct representation in the instances where a different outcome was ordered.

Furthermore, these children were inclined to have had views against the Department's position. Participation of children and young people with direct representation may have the potential to influence substantive outcomes decided by magistrates. Again, given their direct representation in the decisions, it is important to keep in mind that these children were at least seven years of age or older, meaning that recognition in the Court's decisions may be displayed more favourably for older children than younger children.

### **Recognition and comparing outcomes to children's views**

The written judgments from the case file study shed further light on the multiple dimensions of recognition by comparing outcomes and children's views when they had direct representation.

Magistrates often made decisions that were consistent to some extent with at least one of the instructions or views given by a child or young person who had direct representation. Magistrates made a decision consistent with one of the views given by 30 out of 35 children (83%) reported in the judgment, either regarding their type of care or contact arrangements with a parent. This total included partially-consistent outcomes

whereby the decision was not wholly the same as a child's first preference if they had a hierarchy of instructions, but reflected another aspect of their instructions. For example, to manage a process of gradual reunification with his mother, the magistrate in Ross's case granted an order with conditions increasing contact (14 years & older, case 232). This meant the magistrate's decision was partially consistent with Ross's views, because immediate reunification was his first priority, but this contrasted with the Department's position against reunification.

Table 8.3 presents a cross-tabulation of magistrates' decisions, whether an outcome was consistent or not with at least one of a child's views, and whether the magistrate referred to having considered and applied any weight to a child's views. This table does not include all outcomes from magistrates' judgments nor all of children's views, but rather focuses on the outcome closest to a child's first preference about their care.

The frequency with which magistrates referred to considering and giving weight to children's views did have some relevance to the consistent outcome and types of instructions children gave about their care. Table 8.3 shows that magistrates frequently went through the procedure of giving consideration and weight in their judgments when an outcome was consistent with at least one of a child's views. Consideration and weight had been applied to a total of 19 out of 30 children who experienced an outcome consistent with at least one of their instructions. Eleven children experienced an outcome consistent with at least one of their views, even though the magistrate did not expressly indicate having gone through the procedure of consideration and weight in the judgment. Conversely, the outcomes were not at all consistent with any views for only five out of 35 children. Just one of these children, Clark (10-13 years), had expressed a view in favour of parental care. The magistrate referred to considering and giving weight to his view, but decided out-of-home care was in Clark's best interests.

Table 8.3 Magistrates deciding an outcome consistent with at least one of a child's views and any reference to consideration and weight to a child's views

Magistrate's decision	Consistency with child's view	No reference to consideration & weight	Consideration & weight	Total N children
Supported parental care	Consistent	Suzie Wayne & Byron	Carlos Edward & Martin Justin Nina & Keith (from father to mother) Scott*	10
Supported contact with parent	Consistent		Elizabeth Jean & Murphy Ross (gradual reunification) Ruth & Teresa (gradual reunification) Steven	7
Supported OOHC	Consistent	Jeffery, Joan & Wanda Julia Jeremy & Mitchel Josie	Cynthia Gary Kelly	10
	Inconsistent	Phyllis & Craig Lee	Clark	4
Limit contact with parent	Consistent	Lisa	Bailey Dennis	3
	Inconsistent	Nicole		1
Decision: Total children	Consistent	11	19	30
	Inconsistent	4	1	5
Total N		15	20	35

\*The magistrate decided Scott must remain in the care of his grandmother and have conditions for access with his mother instead of an order giving guardianship to the DHS. Scott's mother retained guardianship.

Table 8.3 also provides insight about the types of matters where magistrates often reached decisions consistent with at least one of a child's views. The type of care arrangement resulting from the judgment was consistent with the views of 20 children, comprising 10 children whose views supported parental care, and 10 who sought to remain in out-of-home care. Contact arrangements with a parent were also consistent with the views of seven children who supported contact with a parent (including three children who had agreed to remain in out-of-home care), and three who wanted limitations on contact. When comparing the types of matters in Table 8.3, it can be seen that magistrates referred to having considered children's views in relation to supporting parental care and contact slightly more often than out-of-home care and limiting parental contact.

Four implications for the multiple dimensions of recognition are evident in these findings when understanding procedural qualities and substantive outcomes in magistrates' judgments. First, outcomes were most often consistent with at least one aspect of the child's views when procedural qualities of recognising a child as a participant were evident in judgments. Cumulatively, this meant that the magistrate had recorded a child's views, indicated the child's views were considered and accorded weight, and then the decision contained at least one outcome that reflected a child's view.

Second, judgments where the magistrate did not indicate how the child's views had been considered and whether any weight was accorded were missing this procedural aspect of recognition. Nonetheless, a substantive outcome was consistent with at least one of the child's views in many cases, meaning that outcomes consistent with a child's view might not necessarily depend upon this procedural aspect of recognition. Alternatively, the magistrate might have undertaken that procedure but not acknowledged in the decision that he/she had done so.

Third, there was a small group of children who had a judgment where their views were recorded but the magistrate did not explain consideration and weight, nor did the decision contain any outcomes that were consistent with their views. In other words, the child's views were simply reported; there was very little dialogue, if any, with those views in the judgment.

Finally, there are no instances where a magistrate made a decision that supported parental care in circumstances inconsistent with a child's view, including for children seeking to remain in out-of-home care. This meant reunification was not ever ordered against children's expressed views, and implies that the Children's Court takes seriously children's views supporting out-of-home care or reluctance to return to parental care. The next part of this chapter provides thematic insights across the judgments to further understand both how participation of children who had direct representation came to be recognised by magistrates, and the reasons for substantive outcomes.

## **Recognition themes in judgments where children and young people had direct representation**

This part brings together five themes from judgments where recognition of children and young people who had direct representation was evident to some extent: perceptions about a child's maturity, consistency of a child's views, explaining due weight alongside factual issues, protecting participant status, and responding to children's fears and safety concerns. These findings come from cases where magistrates gave reasons justifying their consideration and weight, and cases where outcomes reflected some aspect of a child's views.

### **Perceptions about maturity**

Perceiving a child or young person as mature appeared to encourage magistrates to give consideration and weight to their views, and in turn strengthened recognition of participation. This was evident from magistrates' judgments in two ways: references to biological age of a child or young person, and hearing directly from the child or young person during the contested hearing.

The age of a child or young person was sometimes used as a proxy for maturity when justifying consideration and weight to children's views. Reflecting my earlier finding from Table 8.2, age and perceived maturity only intersected favourably in judgments for

young people aged 14 years and older, and for a few children in the 10-13yr old age group. In contrast, there were no judgments indicating that a younger child with direct representation was perceived as mature (i.e., the 6-9 years age group). Nevertheless, a 6-9 year old child would have previously been assessed by their lawyer, with endorsement of the Court, as sufficiently mature to give instructions for direct representation, despite not being overtly described as mature in the judgment. The dominant hierarchical understanding of children's developmental trajectory and attitudes to young children as participants may be a barrier to perceiving them as mature and, as a consequence, limit the application of weight to their views. On the other hand, the assumptions underpinning the becoming developmental approach to childhood may work in their favour for older children and young people who can more readily be perceived as mature.

The magistrate's judgment for Ross provides an example of the intersection between giving consideration and weight to a young person's instructions and perceiving him as mature when there was also evidence about his experiences of care (14 years & older, case 232). Ross had instructed that he opposed the Department's application to extend his Custody to Secretary Order for out-of-home care, and was seeking reunification with his mother and siblings. The magistrate recorded evidence from Ross's counsellor, who was independent of the Department. Following a discussion of Ross's current age and past experiences of trauma, the magistrate described Ross's behaviour in out-of-home care as indicative of maturity:

Ross is a [age] year-old boy who has experienced significant trauma throughout his life... Ross's behaviour in out-of-home care has been exemplary. He has demonstrated maturity and self-regulation, he has coped admirably with the intrinsic pressures and influences of the residential care system, and he has been committed to his counselling. [Ross's counsellor] acknowledged this was a good indicator for future behaviour and I am of the view it is a positive sign for a successful reunification back home to his mother when it occurs.

After the section quoted here, the magistrate again acknowledged both Ross's older age and maturity when justifying a short-term order permitting contact to be increased with his mother and siblings for gradual reunification.

Hearing directly from the child or young person during the hearing could support magistrates to have an opportunity to assess their maturity, in addition to hearing their instructions submitted to the Court through a lawyer. Carlos (14 years & older) elected to give evidence himself during the contested hearing, and Scott (10-13 years) submitted his own letter into evidence (case 459, 465). This could facilitate positive perceptions of maturity.

Such interactions between magistrates and children are rare in this jurisdiction, unlike family law jurisdictions in New Zealand, Canada and parts of the United States, where judicial interviews are practised, or children's presence in the courtroom is encouraged (Birnbaum & Bala 2010; Henaghan 2012; Weisz et al. 2011). Consistent with the rarity of these interactions, some magistrates were not necessarily receptive to children wanting to actively participate. The magistrate for Suzie, by refusing Suzie's request to attend court to hear the decision as "inappropriate", illustrated such reluctance. That contrasts with the procedural guidelines of the CYFA as well as with the possible benefit for the magistrate's perceptions of a child and a child's potential acceptance of a decision (Henaghan 2012; Weisz et al. 2011).

The judgment for Scott (10-13 years) illustrated how a child's maturity could be perceived positively via some form of in-person or virtual interaction with the magistrate (case 465). The magistrate recorded Scott's opposition to the Department's application for a Guardianship to Secretary Order. Granting the application would have resulted in the Department having discretion to decide his placement, including removing him from his current long-term kinship care arrangement stipulated under a Supervised Custody Order, and deciding contact with his mother and grandmother without a court ordered minimum. The magistrate further acknowledged Scott's views and his agency in having written a letter to the Court:

It is Scott's strongly expressed wish to live with his mother. Scott wrote a letter to the Court asking the court to "allow me to live with my mum"... If he cannot live with his mother, Scott wishes to continue living with his grandmother.

Next, the magistrate demonstrated positive weight to Scott's instructions because of his age: "I have also considered the effect on Scott given his views and wishes expressed particularly as a [10-13] year old". Furthermore, the magistrate accepted evidence from

a psychologist that Scott had “developed his self-protective capacity”, and was “more mature than his years”. The magistrate’s weight to Scott’s views contributed to the decision to refuse the Department’s application:

...the plans by the DHS to assume guardianship responsibilities for Scott, although this may eventuate, are premature at this point. This is especially in the face of Scott’s strenuous opposition to this course, the Court is of the view that it is in Scott’s best interests to permit further time for the Secretary to provide services necessary to meet Scott’s best interests.

The magistrate consequently permitted unsupervised contact between Scott and his mother, with provision for the Department to monitor and gradually increase overnight contact under an Interim Protection Order. It was also possible that Scott’s demonstrated maturity could counteract some of the risks of unsupervised parental contact, and lead to the maintenance of his kinship care placement in these circumstances. Therefore, as well as taking account of a child’s age, magistrates’ access to evidence verifying a child or young person’s maturity could reinforce recognition, including hearing from the child or young person themselves.

### **Consistency of a child or young person’s views over time**

Unlike some family law and criminal proceedings where judicial decisions can be short-term or one-off events, child protection proceedings typically occur over a long period of time to manage ongoing state intervention in families. Multiple decisions can be required, including an initial decision to permit statutory intervention, monitoring, assessing services, and responding to improvements or deterioration in parental or state care. The ethnography study illustrated how lawyers could respond to changes in children’s views over time to support participation. Magistrates sometimes supported the credibility and reliability of a child’s views when the child maintained consistent views about their care and contact arrangements.

Consistency of Cynthia’s views appeared to add to her credibility in her judgment (14 years & older, case 306). Cynthia’s instructions were accounted for clearly at the outset:



Cynthia's instructions are that a Guardianship to Secretary Order should be made. She does not wish for her parents to have any ongoing decision-making role in her life. She has maintained this position since the Department of Human Services first spoke to her about the disposition [six months ago].

In the later pages of the judgment, the magistrate returned to the consistency of Cynthia's instructions, along with her age and maturity, as part of justifying the decision to grant a Guardianship to Secretary Order that reflected her instructions. While her parents were reported as alleging Cynthia to be "acting on a whim", the magistrate determined conversely that:

Her wishes and instructions have remained consistent. She has been described as intelligent, extremely articulate, and insightful. She is said to be aware of what she wants and has the ability to think things through... At the outset of the proceedings, Cynthia's barrister confirmed her instructions. During the proceedings, I requested her barrister speak to Cynthia again to confirm her instructions remained the same. I have placed great weight on those wishes...

The magistrate looked favourably upon Cynthia's consistency in her views consenting to the Department having guardianship power, and this supported giving weight to Cynthia's instructions.

While consistency in a child's views may support a magistrate affording recognition, a potential limitation of this approach could be encountered when a child changes their views. Röbbäck and Höjer (2009) argue that consistency and stability of a child's views may be seen as an indicator of their reliability in family law legal proceedings when equivalent expectations are not held for adults. It would be reasonable for a child's views to change if the quality of their care or contact experiences were to change for better or worse. Sensitivity to the changing circumstances of care would be important to avoid reducing recognition of participation when a child changed their views.

An example where less weight was attributed to children's instructions when they had changed their views occurred in the magistrate's judgment for Kelly (14 years & older), Clark (10-13 years), and Bailey (10-13 years, case 435). Each sibling had experienced unstable care arrangements against a backdrop of family violence, with periods of moving between each parent and out-of-home care. The Department applied for Clark

and Kelly to reside separately in out-of-home care, and had agreed that Bailey could reside with his mother. Kelly consented to living in out-of-home care. Clark was recently living in a residential unit, despite his younger age, and instructed to return to his mother's primary care. Bailey had experienced comparatively more stable care with his mother, and agreed to remain in her primary care.

The magistrate noted changes in Kelly and Clark's views over time, "By [date] however the recurrent themes of the [children's] fluctuating views as to where to live and absconding behaviours began to re-emerge". The magistrate also acknowledged that an alleged physical assault by his father contributed to Clark's behaviour and changing views. Nevertheless, the magistrate still indicated giving the children's views consideration and "some" weight:

I have also given some weight to the children's wishes. In the case of Clark and Kelly however, this has been a difficult task given the fluctuating nature of their views in the past and their current unstable circumstances.

This suggests that the magistrate accommodated the physical abuse and instability Clark and Kelly had experienced in their care when considering their changing views. In particular, this helped to explain how Clark's participation had been recognised in a procedural sense, even though the substantive decision meant he was to live in a residential unit against his instructions.

### **Children's views alongside factual issues**

At the outset of this chapter, I explained how recognition does not require a magistrate to make a decision that aligns with a child or young person's instructions. Explaining how a child's views had been considered and accorded any weight in the judgment was a way for magistrates to recognise participation in a procedural sense. This procedure was illustrated for Clark in the previous section by the magistrate having considered his instructions and moderated the weight applied because of his care experiences and changing views. Also earlier in this chapter, I showed how the majority of children and young people who participated in the contested hearings with direct representation also

had at least one outcome consistent with one of their views to some extent. However, this did not necessarily mean that all of their views were consistent with every matter decided by the magistrate. These findings prompted me to examine how factual issues may intersect with children's views in magistrates' judgments.

Some magistrates delivered a decision that included outcomes different from a child's views while maintaining recognition of the child as a participant. Consistent with ethical qualities of recognition, recognition could be demonstrated when these magistrates wrote their judgments in ways that conveyed positive regard for the child's participation, while clearly explaining how factual issues beyond the child's views were influential in their decision. This also adds a forensic quality to recognition with a child's views contextualised alongside medical, psychological or other factual evidence.

The magistrate for Carlos took an approach that acknowledged factual issues had affected the decision. At the same time, weight was given to Carlos's views. The magistrate explained:

I have taken into account Carlos's specific wishes that DHS not be involved in his life. I have also taken into account his medical problems and his reluctance to leave the house when he is in pain. Whilst I acknowledge those wishes, in my view, it is in Carlos's best interests to see a [medical practitioner] as recommended by [clinician].

This quote illustrates how other factual issues, which included Carlos's health in this case, had an influence on the decision alongside Carlos's views. The magistrate's decision meant that Carlos remained with his mother in circumstances where a less intrusive and shorter protective order was granted than what the Department had applied for. Even though having some involvement with the Department and conditions about services for Carlos was not entirely consistent with his instructions, the magistrate maintained strong recognition of Carlos in clearly recording his views, and then respectfully discussing how they had been considered and weighed alongside factual matters. Magistrates could thereby satisfy both ethical obligations to respond respectfully to children's participation and legal obligations to ensure the proceedings could be comprehensible to children when explaining their decisions, irrespective of whether an outcome was consistent with a child's views.

## **Monitoring participant status**

Another procedural aspect of recognition emerged in judgments that contained a record of how the magistrate had responded to instances where the Department, parents, or lawyers representing a child had undermined a child's status as a participant during the contested hearing. Judgments indicated that some magistrates monitored the quality of representation lawyers gave for children. Some also raised concerns about the Department's poor engagement with children as participants in their care. As well as modelling an ethical regard for children's participation rights, these practices safeguarded a fair hearing for children, and elevated their right to have their participation treated fairly by other adults.

For example in Carlos's case, the magistrate identified problems with both the Department and Carlos's lawyer subverting his participation rights. The magistrate stated that during the proceedings, he/she had "raised my concerns" that "no-one from DHS had seen Carlos for over 13 months", despite a protective order already in place. The magistrate went on to criticise Carlos's barrister and solicitor because Carlos had not been seen in person for "several years". This recognition constituted another way magistrates could support participation of children and young people in a procedural sense.

Similarly, the magistrate in Keith's case recorded having reprimanded his barrister for poor practice during the contested hearing (10-13 years, case 155). Keith's lawyer had contradicted Keith's experiences of abuse, including allegations of physical abuse against his father, and instructions about his care:

[Keith's barrister] then proceeded to cross-examine as if she were junior counsel for the father. Having wondered if her instructions as to the allegations had changed, I was surprised to be told by her that she had not thought it appropriate to speak to Keith about the allegations, despite speaking to him regularly and updating the Court on the minutiae of his instructions as to access. Any attempts by other counsel or the Court to have [Keith's barrister] represent Keith in accordance with his instructions either fell on deaf ears or was met with a hostile response.

Keith's lawyer appeared to have formed a personal view, and represented that view instead of Keith's instructions. The conduct by Keith's lawyer exemplifies the slippage that can occur when lawyers form an opinion about a child's best interests instead of acting on the child's instructions (Cashmore & Bussey 1994; Elrod 2007; Federle 1995; Federle & Gadomski 2011; Ross 2012, 2013).

In the face of other adults not recognising the participation rights of a child or young person, magistrates can proactively apply their power to support children's participation. Magistrates have significant power to hold other adults accountable, and to compel them to respect children as participants during child protection proceedings, reflecting both an ethical basis for recognition and legal standards under the CYFA. This may have the effect of correcting mistakes made by lawyers, the Department or parents. The examples above particularly illustrate this in relation to how magistrates can apply their power to counterbalance inequalities of power between children and their lawyers in the quality of representation, and between children and parents and the Department in the quality of care. In doing so, magistrates reinforce recognition when children's participant status in the court proceedings might otherwise be weakened.

### **Responding to children's concerns about their safety and care**

In Chapter Seven, I identified that many children and young people had instructed that they should be in the care of a parent in a context of having one or more serious negative experiences in the care of the Department. Likewise, a majority of children and young people whose instructions supported out-of-home care, limited their frequency of contact with a parent or wanted supervision of contact, had experienced ongoing fears and safety concerns about a parent. I argued that these themes illustrated how participation has a safety function for children and young people. The following sections illustrate how magistrates responded to these fears and safety concerns in judgments as part of the decision about children's best interests.

### *Children's safety and care with the Department*

Magistrates applied judicial oversight to assess the extent to which the Department was meeting its duty of care when children and young people raised concerns about their safety and quality of out-of-home care. In these judgments, magistrates questioned the extent to which the Department had taken all reasonable steps to provide services “necessary in the best interests of the child” (s.276(1)(b)) and “the need to protect the child from harm” when determining whether a decision or action was in the best interests of a child (s.10(2)). As a result, the judgments documented doubts about the parenting capacity of the state when the Department had not met these obligations in relation to children whose views opposed out-of-home care or other Department involvement in their life. The judgments in these circumstances indicated that the magistrate had assessed the quality of care provided by the Department, and found that the risks associated with a parent were comparatively lower when decisions supported parental care or contact consistent with a child's views.

The judgment for Justin illustrates how a magistrate considered a young person's views and safety concerns while assessing the risks of state care compared with parental care (14 years & older, case 273). The magistrate recorded “periods of weeks where Justin has not been monitored by the resi unit workers”. The magistrate seemed frustrated by the Department's reluctance to acknowledge some responsibility for the risks Justin experienced in out-of-home care, reporting that the DHS practitioner “was not prepared to attribute Justin's high risk and criminal behaviours to problems with his placement”. This is another illustration of the procedural aspect of recognition, whereby the magistrate acted to hold the Department to account for the quality of Justin's care and safety in a way that responded to Justin's experiences. Furthermore, a section of the magistrate's judgment for Justin outlined evidence from police, DHS practitioners, Justin's parents and Justin himself about his exposure to prostitution and grooming for sexual abuse while in the Department's care. In ordering that Justin and his parents and siblings be reunited using a graduated process of contact and support services, the magistrate made the following determinations about his best interests consistent with Justin's instructions:

The family have satisfied the Court that they probably have a better chance of being able to more effectively manage and support Justin at this time, especially given both Justin and his parents' wish for him to return home...

This coincides with Justin's articulated fears for his safety and his palpable vulnerability in remaining in residential care. On the evidence I find that his life-style in out-of-home care, including exposure to prostitution near his resi unit, have presented real threats to Justin's safety and sense of well being. Justin is also more likely to be safe living where he is prepared to stay...

At this time, the concerns about him remaining in the care of the state outweigh any concerns I have about him being returned to his parents care...

The magistrate's response to Justin's status as a participant in the proceedings, and to Justin's serious concerns about the Department's care, reflect a forensic function of recognition for safety. At a forensic level, Justin's participation raised these serious concerns about his safety in out-of-home care to the attention of the magistrate, independent of the Department and his parents. Responding to Justin's experience of inadequate safety and care, as well as applying weight to Justin's views, contributed favourably to the magistrate's decision that parental care was in his best interests. This constituted another quality of recognition of a child or young person's participation through the procedure of decision-making, and is also illustrated in the next section with children who expressed fears and safety concerns about care or contact arrangements with a parent.

#### *Children's fears and safety concerns about parents*

No magistrate ordered a child or young person who expressed ongoing fears about their own safety to be in the care of a parent, or to have more contact against his or her instructions. Further strengthening a safety value in the forensic aspect of recognition, consideration and weight to children's instructions was evident in seven out of eight judgments where a child expressed fear and safety concerns about a parent. This formed part of each magistrate's justification for refusing reunification sought by the parents, and for deciding on safe contact arrangements for each child, including reducing

contact, not increasing contact, and supervision of contact with parents consistent with children's instructions.

Determining contact arrangements with appropriate conditions for a child's best interests was another way magistrates recognised children's views when parents did not necessarily appreciate fears and safety concerns held by children. Magistrates mandated limits on the frequency of contact, and required supervision of contact by a representative of the DHS or a nominated family member, as safety measures in these circumstances. Requiring that a parent not expose a child to family violence or be affected by alcohol or other substances also instituted safety conditions for contact. Another safety condition magistrates used was to order that any contact only occur with the child's agreement, thereby providing for a child's agency in his or her contact experiences. These legal conditions could support children's sense of safety during any contact with a parent, which would not be available if the Department decided contact under administrative powers.

The magistrate ordered these types of safety conditions for Nina and Keith regarding contact (access) with their father (14 years & older and 10-13 years, case 155). The magistrate acknowledged Nina's instructions in the context of her feelings about her father:

I note that Nina does not want to see her father at present and that her psychologist gave evidence that it would cause Nina emotional distress if she were forced to do so. A Supervision Order [to Nina's mother] with a condition for supervised access will give her some reassurance if she changes her mind about seeing her father.

The magistrate also acknowledged that the order was consistent with Keith's instructions when having contact with his father. Keith's participant status was recognised in conjunction with Keith and Nina's best interests:

... I am satisfied that it is in the best interests of the children to make a short Supervision Order. This is because Keith, who is having access with his father, has expressed a desire for the DHS to continue to supervise that access. It would be unfortunate if between these proceedings and the Family Court proceedings there was a hiatus in Keith's access with his father because of a lack of appropriate supervision.



The conditions for contact were then formalised for both Nina and Keith on the protective order. The magistrate placed an obligation on the Department to ensure safe contact arrangements were provided should Nina and Keith agree to have contact with their father:

Subject to the children’s wishes, the father may have access with the child for a minimum of twice per week at times and places as agreed between the parties. DHS or its nominee will supervise access unless DHS assess that supervision is not necessary.

This approach to decision-making recognised children and young people as participants in deciding what constituted safe contact with a parent. An understanding was present in these judgments that children and young people can communicate when they do and do not feel safe, and may experience agency by having a say and sense of control about their contact with parents.

Magistrates displayed ethical recognition by bringing children’s experiences of fear and harm to the attention of specific parents who were the cause of trauma. Ethical recognition emphasised to parents that their children were individual beings with their own rights as well as being members of a family. An example illustrating this aspect of ethical recognition comes from the judgment in Gary’s case (10-13 years, case 236). The magistrate noted how Gary’s significant fears about his father were among the main reasons for Gary’s consent to a Long-term Guardianship to Secretary Order. In deciding to grant the order, the magistrate remarked:

Despite the protestations of [the father], the evidence is overwhelming that Gary does not want to live with his father (or his mother) and is petrified of him.

The magistrate thereby linked Gary’s instructions to remain in out-of-home care with his ongoing fear of his father. This conclusion was preceded by the magistrate describing Gary’s father as having been abusive and aggressive during the court proceedings. The father had apparently also stated that Gary “belonged to him and that [Gary] should therefore live with him”. This validated Gary’s ongoing fears as justified and as forming a basis for his best interests, while also attributing some responsibility to Gary’s father—Gary was not his father’s possession. The forensic aspect of participation—whereby children’s views can provide insight into the safety and

protective concerns in a case—is underscored here, because Gary’s fear of his father would not have been as clearly understood if there had not been an opportunity for the magistrate to hear his perspective. However, in this case, the magistrate could not order conditions limiting Gary’s contact with his father, because the Department held guardianship responsibility for Gary. This and other limitations will be addressed in the next part of this chapter.

## **Barriers to recognition of children and young people by magistrates**

The judgments handed down by magistrates in contested child protection hearings were situated within a system in which multiple barriers could influence the extent to which any recognition of a child or young person’s participation was possible. This final part of the chapter examines four barriers identified from my analysis of the judgements: the participant status of young children, fragmentation of the child protection legal system, intersecting practices of individual lawyers and magistrates, and social norms when responding to children’s experiences of gendered parenting and family violence.

### **Participant status of young children**

The CYFA does not recognise all children and young people as parties to child protection proceedings, although children may have standing as parties when directly represented. Children and young people must also meet legislative and policy criteria for direct or best interest representation. The previous chapters have illustrated how the structure of the child protection legal system contains multiple barriers to children and young people having an opportunity for their participation rights to be realised, even when they do have legal representation. Cumulatively, these barriers to participation for children also make it difficult for magistrates to see and hear from children during contested hearings.

Previously, I have reported how best interests representation is very rare in this jurisdiction. When appointing best interests representation, magistrates have to

determine that there are exceptional circumstances, and a child is not mature enough to instruct a lawyer. Cases where best interests representation occurred in the ethnography and case file studies indicated that exceptional circumstances comprised when children had a disability or developmental condition, complex medical conditions, parents with violent criminal histories, or there were disputes about permanent care. This illustrates how the exceptional circumstances requirement is a barrier to magistrates being able to appoint best interests representation for young children who are otherwise not eligible for direct representation. As well as creating a barrier to legal representation, this aspect of the child protection legal system acts as a barrier for magistrates instigating participation for young children under the best interests principles and procedural guidelines at a systematic level. This is because magistrates do not have access to independent evidence from a legal representative who can provide insights into children's views and experiences, advocate during the hearing, or otherwise look out for young children amongst the competing claims being made by the Department and parents.

The Department, as model litigant and representative of the State, has a mandated role to perform by submitting evidence and investigations to the Court in the form of disposition reports. While this may sometimes include interviews with children or other evidence from witnesses who had contact with a child, the information and level of detail may depend upon the skills of the Department's report writer, and on selection of information considered consistent with the Department's application (VLRC 2010). Unlike in federal family law proceedings, parents do not usually submit an affidavit or give evidence on their own behalf in child protection proceedings, although parents may sometimes do so in contested hearings. As with the Department, the content of any such evidence would depend upon the extent to which it supported the parent's position.

Therefore magistrates are reliant upon the Department and parents for access to reliable evidence and witnesses who have had contact with a young child in the absence of any legal representation. The Children's Court has power to inform itself, but does not have inquisitorial powers, which could allow the Court to conduct evidence-gathering, problem-solving or therapeutic jurisprudence, unlike many European child protection jurisdictions (Borowski & Sheehan 2013; Gilbert, Parton & Skivenes 2011; Hoyano & Keenan 2007). The Children's Court (2010) has repeatedly supported these types of less

adversarial approaches, but such legislation has never been developed. My findings reported earlier in this chapter illustrate the consequences of this barrier for magistrates' decision-making with regard to the 26 young children who did not have any legal representation, any reference to their participant status, or any views reported in relation to the matters being decided in a judgment. The Court has limited powers to obtain independent evidence about young children's perspectives and experiences, with some exceptions, such as ordering Children's Court Clinic reports, because it is not inquisitorial.

Adding to these system-level barriers to recognition, communication with young children is a child-level barrier for magistrates in responding to them as participants. Although the social science literature provides evidence of very young children and infants being able to express their preferences and experiences in various verbal and non-verbal ways, this requires professionals to have a very high degree of sensitivity during any interaction together (Alderson 2010; Alderson, Hawthorne & Killen 2005; Skivenes & Strandbu 2006). Participation in this way also requires intensive resources to be available to support young children in the child protection legal system, including funding, expertise in best interests representation, and time (Jenkins 2008). However, magistrates do not routinely have access to independent specialised professionals in all cases, including the Children's Court Clinic, who would have direct contact with young children for this purpose. System-level and child-level barriers potentially compound any reluctance a magistrate might have to recognise young children as participants.

### **Fragmentation of the child protection legal system**

Early in this research I identified the problem of fragmentation in the Victorian child protection legal system. Fragmentation has been documented throughout my findings in relation to the inconsistent separation of decisions about children's care and contact arrangements between the Children's Court and the Department, with further barriers for children to appeal the Department's decisions in VCAT. In particular, decisions about contact arrangements between children and parents are highly complex matters in child protection contexts where a child's views, maintaining relationships, and a child's

identity are considered alongside safety. Access or contact in the child's best interests was the most frequent of the CYFA (s.10(3)) principles applied across all written judgments, appearing in 63% of 39 judgments. However, who has authority to make these decisions is dependant upon the type of protective order. Fragmentation of the child protection legal system was a barrier to the extent to which magistrates could recognise a child or young person as a participant.

The problem of fragmentation in the child protection legal system was most acute when children and young people gave instructions about their care or contact arrangements in a context of fear and safety concerns, but any remedy was outside the powers of the Children's Court. Although the magistrates recognised children and young people in these instances by having recorded their views and experiences in the judgment, magistrates were powerless to respond any further when concerns related to out-of-home care placements, and when the Department held guardianship responsibility to determine contact arrangements with parents. This barrier occurred for children and young people who had negative experiences in out-of-home care, including bullying and violence in residential units, but the magistrate did not have jurisdiction to order the Department to change the out-of-home care placement. Nor could magistrates order the Department to ensure a child's foster or kinship care placement did not change when children's views supported that arrangement to continue. Likewise, magistrates did not have jurisdiction to make conditions about the frequency and supervision of contact with parents when children raised their fears and safety concerns, but were under the guardianship of the Department.

Returning to Gary, whose ongoing fear of his father was described above, barriers arising from fragmentation of the child protection legal system were present in the judgment (10-13 years, case 236). I showed how the magistrate responded in a way that validated Gary's fears and countered the power imbalance between Gary and his father. However, the magistrate was unable to respond in a practical way to Gary's views about out-of-home care and contact arrangements with his father. Gary would agree to supervised contact with his father on a limited basis per year, but he could not experience reassurance and certainty about that arrangement because the Department had parental responsibility. The magistrate did not have power to attach conditions about the frequency and supervision of contact between Gary and his father. Gary's

experience of contact with his father reinforces the problems of fragmentation in the child protection legal system when the Children’s Court does not have authority to place safe contact conditions on orders to protect children.

Another serious concern for Gary, which I also reported in Chapter Seven, was that he wanted to feel like a “normal” child by continuing to be with his foster carer for the long-term. One of Gary’s fears about his father was that he might take him away from his foster carer. Children like Gary had developed strong, stable relationships with their caregivers over a long period of time. Like his contact arrangements with his father, Gary could not experience certainty about his care arrangement either, because the Department held parental responsibility for him. For reasons not explained in the judgment, his foster carer was not in a financial or personal position to care for Gary under a Permanent Care Order. The magistrate did not have power to direct the Department to support Gary’s placement with his foster carer for the benefit of Gary’s security, stability and safety. Therefore, fragmentation of the child protection legal system influenced the extent to which magistrates could recognise children’s participation and respond to children’s views when applying the Court’s powers to order substantive outcomes in their best interests.

### **Practices of lawyers and magistrates**

Lawyers and magistrates are powerful figures in facilitating the participation of children and young people. Individuals within these professions have significant discretion in how they apply their role under the CYFA. The choices made by lawyers and magistrates can intersect to shape the extent to which children and young people may be recognised as participants, and the judgments offered some insights into how these choices can be a barrier to recognition.

Magistrates would have been somewhat reliant on how a lawyer implemented participation with a child during the instructions process, and how the lawyer submitted any instructions to the Court. The amount and quality of information about children’s views available to a magistrate when writing their judgement would depend to some extent upon the barrister who represented the child during the contested hearing. A

child's solicitor is responsible for briefing the barrister about the case before the contested hearing, and the barrister may or may not have met the child. The barrister is then responsible for submitting instructions, and for cross-examination of witnesses on behalf of the child. As I reported in Chapter Six, the broader details and context of children's instructions varied when lawyers made submissions to the Children's Court. In turn, it is then up to the magistrate to record instructions, the level of detail about a child's views, and any other evidence in the judgment. There are no conventions to standardise how magistrates craft and format their judgments in the Children's Court, because judgments are not published. This means that recognition of a child or young person relies on how both a lawyer and a magistrate have responded to participation.

These barriers meant a judgment could be completely silent on children's views, as was the case for Richard (10-13 years old, case 475). The judgment did not contain any indication about Richard's legal representation and participation. There was no record as to what Richard's instructions, if any, were about his care or contact with his mother and siblings. There was no reference to Richard's perspectives about his care with his mother, how he felt about moving long-term into a residential unit, or being separated from siblings. Likewise, no instructions were reported about his access arrangements to maintain contact with his mother and siblings while living in out-of-home care for the foreseeable future. Nor was there any explanation given in the judgment as to why Richard did not have any instructions, such as whether his solicitor or barrister had not been able to work with Richard to form any instructions. Given Richard's age, he would have been entitled to best interests representation if he had not been able to give any instructions to his lawyer. It was unclear whether the absence of Richard as a participant was the outcome of his lawyer not having effectively represented him, and/or a reflection of how the magistrate had responded to his participation in the hearing. Consequently, neither the legal nor ethical basis for recognition was evident for Richard in a procedural or forensic sense through the judgment.

Doubts are raised about how lawyers might perform best interests representation, and in turn, how magistrates respond to children who have best interests representation. The three children who had this model of representation were not recognised as participants in the judgments (cases 245, 278, 281). Laura was in the 5 years and younger age group and Mark and Connor were each 6-9 years old. None of the judgments for these young

children indicated whether the instructing solicitor or barrister had met with the child or not. Nor was there any indication whether the children had expressed any views through their lawyers or through any witnesses, such as a psychologist or Children's Court clinician, even though a report had been prepared for Laura by the Children's Court Clinic.

Accounting for Laura's young age, both Mark and Conner were just within the age threshold for direct representation. Neither child was affected by their disabilities or developmental conditions to the extent that verbal communication with them was impossible, meaning that barrier to participation was not evident. None of the magistrates referred to having considered or accorded weight to the children's views. Overall, it was not possible to tell from the judgments to what extent each lawyer or magistrate had contributed to the lack of recognition for Laura, Mark and Connor as participants with best interests representation. Being of a younger age and an absence of perceived maturity may have also enabled their participant status to be overlooked. Neither the legal nor ethical basis for recognition was detectable in procedural or forensic ways for these children who had best interests representation.

### **Responding to children's experiences of gendered parenting and family violence**

The multiple and complex protective concerns that I identified in families can be framed as gender-neutral and individualised social problems. This is illustrated by the capacity of a parent or caregiver (s.10(3)(j)) being the second most frequent best interests principle magistrates cited across all judgments (45% of 39 judgements). Section 10(3)(j) was typically cited alongside statements about an individual parent, or parents together, not putting children's interests ahead of their own. Although magistrates did take children's fears and safety concerns seriously, and ordered substantive outcomes that responded to those concerns overall, the judgments did not appear to respond to the gendered character of children's parenting and family violence experiences identified in Chapter Seven. In particular, some judgments did not seem to appreciate the position of children when fathers had a history of family violence or serious domestic violence against their mothers when assessing individual parenting capacity.



The judgment for Jeremy, Mitchel, and their youngest sibling, Debbie (5 years & younger), addressed their parents regarding family violence and substance use (both 6-9 years, case 302). However, the judgment did not reflect how the children had a clearly-gendered experience of parenting and family violence. As I described in Chapter Seven, Jeremy and Mitchel each made multiple disclosures to independent witnesses about their father's violence against their mother, and continued to be anxious about her safety, including fearing he would kill her. In the magistrate's view, the parents had a mutual role in the family violence, and the father had never intentionally harmed the children, despite their fear of him and exposure to family violence. Furthermore, the magistrate decided that their mother should cancel contact if she was visibly injured so as to prevent the children being distressed by her appearance. In effect, this held the mother responsible for protecting the children from the father's future violence at the expense of their contact with her. This reflects how a child's gendered experiences of violence could be obscured when decisions about their best interests perceive parenting and family violence as gender neutral.

Prioritising ongoing relationships between children and fathers in a context of violence was another way in which children's experiences of gendered parenting roles and family violence could cross over in the judgments. For example, Laura's father had a criminal history involving multiple murder convictions, a long period of incarceration for severe violence against his two children and their mother from a previous relationship, and a history of serious violence against Laura's mother (5 years & younger, case 278). Laura had best interests representation, but the judgment did not contain any reference to her lawyer's position about Laura's best interests in response to her father seeking to maintain contact. Even allowing for Laura's young age (approximately 3 years old), there was a distinct absence of any description and consideration in the judgment as to what contact was like for Laura before, during and after seeing him, or how such contact could undermine her primary care relationships.

In Laura's case, the Department supported the father's application for contact. However, Laura's mother and kinship carer were opposed to contact because of their fear of him and concerns for Laura's safety and developing identity. Ongoing contact was accepted as inevitable, even from the evidence of the Department's psychologist and Children's Court Clinic, despite the Court clinician emphasising that Laura's father

had still not fully accepted responsibility for his extreme violence. The magistrate expressed an opinion that one day Laura would realise supervision of contact was “unusual and unnatural” when ordering ongoing contact between Laura and her father. This normative view of what constitutes a natural childhood contradicted the frequent use of supervision in child protection and family law. It did not take account of the fact that there are well-developed ways to explain this to children when maintaining safe relationships, or that face-to-face contact may not always be essential for some relationships between a child and parent.

## **Conclusion**

A fundamental benefit of recognising children and young people as participants in child protection proceedings is for judicial officers to understand children’s perspectives about their care and safety, and for children’s perspectives to then inform what constitutes their best interests. The findings presented in this chapter reveal that the participation rights of children and young people were recognised most clearly in judgments when they had access to direct representation. Consistent with the legal basis for recognition, the benefits of recognition in a procedural way were confirmed when the instructions children gave about their care and contact arrangements were given consideration and accorded weight. The benefits of recognition were also evident in a forensic way when magistrates responded to children’s concerns about their care and safety, and maintained consideration for children’s views alongside factual issues.

It can be difficult for magistrates to respond to the participation rights of young children who have no legal representation. This barrier was borne out in the frequencies of recognition across all the written judgments. The 55% of 64 children in all the written judgments with at least one view reported were approximately seven years of age or older and had direct representation, which was consistent with the legal and policy provisions. This is much higher than Röbbäck and Höjer’s (2009) finding that judicial officers reported the views of just 38% of 66 children in a sample of family law cases in Sweden. Children in Röbbäck and Höjer’s (2009) study did not have legal representation, but age patterns of children were not examined. By contrast, Robinson and Henaghan’s

(2011) analysis of 120 New Zealand judgments in child protection and family law cases showed that almost three-quarters referred to a child's views. All children had legal representation in New Zealand. Representation was mostly on an instructions basis for older children and best interests basis for young children according to the legislation and practice notes issued by the New Zealand Family Court around that time (Boshier 2011). Therefore, judicial officers may face fewer barriers to recognising children as participants when children have legal representation. Direct representation, as it is largely implemented in the Victorian child protection jurisdiction, may provide magistrates with a sound basis upon which to recognise children and young people as participants.

The system-level barriers that limit younger child from gaining access to participant status because of their age were also significant barriers to their recognition in judgments. Conversely, older children and young people could more readily be perceived as mature, and have their views considered and given weight as a consequence. Biological age might be an adequate and time-efficient heuristic for magistrates to perceive children's maturity and competence for the most part (Lansdown 2005; Uprichard 2008). This logic is also consistent with the notion of children's evolving capacities to participate under the UNCRC (Lansdown 2005). However, such thinking can lean towards the becomings approach to perceiving children as progressing through linear psychological development as they age rather than responding to individual circumstances of participation (Coady 2008). As I described in Chapter Two, the becomings approach can easily underestimate younger children's capacities and overlook the context of their participation, including "just how hard it can sometimes be for them to exercise autonomy in a world which is controlled and defined for them by adults" (Thomas 2002, p.35).

The results presented in this chapter have indicated that magistrates can effectively counterbalance the unequal power dynamics between children and parents when making decisions that respond to children's fears and safety concerns about parents. Namely, the magistrate elevated the status of the child to a participant with his/her own rights within their family when parents did not necessarily share that understanding of children. Equally, magistrates can counterbalance the unequal power dynamics between children and the Department when responding to children's instructions as they relate to

negative experiences with the Department's care. Magistrates were also able to apply judicial oversight to maintain a procedure of recognition when the Department, parents, or lawyers representing children did not respect children's participation rights. Recognition of participation of children and young people by magistrates can thus be seen as critical to addressing power inequalities experienced by children, as well as producing best interests outcomes.

On the whole, these findings contrast with previous research reporting that reunification or contact between parents and children can be enforced against children's views in a context of family violence and child abuse (Holt 2011; MacKay 2013; Röbbäck & Höjer 2009; Vis & Fossum 2013). Contrary to that literature, magistrates in the Children's Court did not make orders requiring children to reunify with a parent or increase contact when children's views opposed that outcome, and children had expressed ongoing fears about their parent. This adds further support to my argument that participation with legal representation may bring a forensic aspect to support safety when magistrates make decisions that recognise children. Weighing up children's best interests with children's views, fears and concerns about their safety and care became a process in which magistrates steered decisions towards the alternative likely to be least detrimental (Goldstein et al. 1996; Mnookin 1975).

However, I have identified a number of barriers to magistrates exercising recognition of children and young people in judgments, in addition to child-level characteristics of age and participant status without legal representation. At a system level, fragmentation of the child protection legal system constitutes a substantial barrier for magistrates responding to children's views. This was revealed when children's concerns about their care and safety had been recognised, but the Children's Court did not have jurisdictional power to make protective orders that could address out-of-home care and contact arrangements. Other barriers raise some caution about individual practices of lawyers and magistrates when implementing participation.

In Chapter Two, criticisms of the child protection legal system were raised in terms of minimising male violence and holding non-violent mothers responsible for failing to protect children (Douglas & Walsh 2010; Humphreys & Absler 2011; Johnson & Sullivan 2008). Similar concerns have been raised in the Australian family law system.

In the context of post-separation parenting, children's relationships with fathers who have perpetrated violence have been supported as being in their best interests. These outcomes have occurred despite mothers holding serious concerns for their own safety and the child's safety, and children's articulated fears and exposure to violence (Hart 2010; Kaspiew 2005, 2008; Morrison 2009). Such contact between a child and father within a history of family violence, or ongoing violence, overlooks the emotional disruption caused to the mother-child relationship (Humphreys 2007; Humphreys et al. 2006). A minority of judgments, together with the literature, suggest that broader cultural norms about gender, parenting and family violence may also be a barrier in some instances when responding to children's participation in child protection proceedings. In turn, mothers or carers are held responsible for facilitating and encouraging relationships between children and fathers who are perpetrators of family violence, even in some extremely severe instances. Therefore, individual and societal-level barriers may limit the potential for children and young people to have parity of participation during the proceedings, and for their views to fully and meaningfully inform decisions about their best interests. The overall conclusions about participation rights for children to be drawn from the case file study, along with those findings from the ethnography, are discussed next in Chapter nine. Recommendations to improve justice for children in statutory child protection will also be made.

## **Chapter Nine**

### **Conclusions and recommendations for justice reforms**

Three research questions have framed this research. First, how are participation rights of children and young people legally constructed in statutory child protection proceedings? Second, what influences, if any, does legal representation have on participation for a child or young person? And third, how do magistrates respond to participation of a child or young person when determining his or her best interests in these proceedings? This chapter provides a final discussion in response to each of these three research questions (parts one to three), and offers recommendations to address barriers to children's participant rights (part four). Overall, the findings support a conclusion that recognition of children, legal representation and redistribution of children's care are inseparable dimensions of justice if statutory child protection proceedings are to constitute children's best interests.

#### **The legal construction of participation rights for children and young people in Victorian statutory child protection proceedings**

Consistent with Article 12 of the UNCRC, my analysis in Chapters Two and Three identified multiple references to participation of children in the legislation governing child protection proceedings in Victoria. The CYFA included consideration and weight to children's views and wishes in decisions about their best interests (s.10(3)(d)). Furthermore, the procedural guidelines required the Children's Court to ensure children were informed, allowed to participate, and understood the implications "as far as practicable" (s.522). However, there is a disjuncture between the qualities of participation described in the legislation and the extent to which children have status as participants and opportunities to actually participate. My review of the CYFA and policy as it stood during my fieldwork, the case law, ethnography with lawyers and case file study have shown that not all children and young people have formal legal status as

parties and legal representation to implement their participation during child protection proceedings.

Participation rights for children and young people were constructed in the CYFA (s.524) to mean they could have direct representation, if deemed mature enough to instruct a lawyer, or best interests representation in exceptional circumstances. This was translated into policy for children seven years of age, plus or minus one year, having an opportunity to meet with a lawyer. In practice, Chapter Five showed how lawyers undertook assessments as to whether direct representation was suitable. I reported that lawyers met children in person and drew on multiple sources of information about a child and his or her circumstances instead of applying the age threshold as a deciding factor. The Children's Court usually accepted this practice, except in one ethnographic case study when Aisha and Bree (6-9 years and 10-13 years) successfully appealed to the Supreme Court to retain direct representation. Lawyers also made applications for children younger than seven years old to have best interests representation. However, the criteria for exceptional circumstances meant that best interests representation was rare and granted inconsistently in the Children's Court.

This construction of participation rights in legislation and policy has produced misrecognition at a governance structure level for children and young people. Applying Fraser's (2009) all-subjected principle to define the boundaries of inclusion and exclusion for those who can make justice claims, all children and young people who are subject to the governance structures of the child protection system are entitled to be fully recognised as participants. Being recognised as a participant requires both status as a participant and a practical, fair means to participate so there may be parity with other participants. Together the legislation and policy lacked the practical provisions necessary to give effect to participation rights by not recognising all children affected by child protection intervention as parties to the proceedings with legal representation. This forms a status order barrier to participation within the governance structure of statutory child protection. Children and young people may have standing as parties when legally represented on a direct basis. However, the misframing of legal representation in law and policy excluded most children younger than seven years old from both full status as a party and having a lawyer represent them on a direct or best interests basis.

The frequencies of representation in the ethnography and case file study are consistent with misrecognition of young children. Thirty-six percent of 110 children in the ethnography sample, and 40% of 84 children in the case file sample, did not have any legal representation. They were all younger than seven years of age. Only four children in the ethnography sample and three in the case file sample had best interests representation, and this included one child who was a member of both samples. Although most children had direct representation, a substantial proportion of children were subjects of child protection proceedings without having any independent legal representation.

A lack of party status forms a barrier to participation for young children. The main practical benefit for granting all children party status is that it creates a strong obligation upon the state and Children's Court to ensure legal representation in these proceedings. Avoiding the provision of legal representation for all children is a likely reason why party status has not been granted under the CYFA. The history of not allowing parents party status and access to legal aid in child protection proceedings in the UK prior to 1986 is understood not to have afforded parents respect and a fair process (Eekelaar & Maclean 2013). Likewise, the lack of formal party status for all children presents a justice problem. It creates an "illusion of due process" for children who are not a party and are without legal representation (Malempati 2014, p.181).

Not having full status as a party and legal representation for all children and young people in child protection proceedings in Victoria is out of step with other Australian states and territories (VLRC 2010, p.317). As pointed out by the VLRC (2010, p.317), denying children status as a party contradicts contemporary human rights protections and the Victorian *Charter of Human Rights and Responsibilities*:

Under the Charter, a child who is the subject of a protection application has the right to be recognised 'as a person before the law' and to be treated equally before the law.

Both the VLRC (2010) and PVVC (2012) inquiries recommended that all children be recognised as parties, but there has not been political resolve to apply these recommendations. The VLRC (2010, p.115) noted that "giving the child status as a party would support the overarching concept of children's participation in decisions that affect them". Granting party status to all children and young people in child protection



proceedings would make it clear that the *Charter of Human Rights and Responsibilities* does apply to them, with rights to receive a fair hearing (s.24(1)) and equal treatment before the law (s.8(3)). Equal treatment before the law includes legal representation to balance children's status relative to the state and parents. For example, the Child Rights International Network (2012, p.21) review of 132 court decisions concerning children's rights noted that children were unlikely to initiate proceedings concerning their rights, but do participate and raise claims against violations of their rights once joined as a party to proceedings initiated by a parent, other party or the state. Recognition of children and young people as parties in child protection matters would empower them to legally access their rights under the Victorian *Charter*, and to make appeals against violations to their rights.

Determining best interests is an aspect of justice that is uncertain when all children do not have party status and legal representation. Leaving young children without an independent legal representative in child protection proceedings presumes the Department and/or parents can account for their best interests during negotiations and proceedings inside the courtroom. This ignores the reality that both the Department and parents are constrained by their own interests and resources, which has been documented from the ethnography and case file study. Chapter Six recorded evidence of the Department and parents applying children's views in inaccurate ways to suit the parent's or Department's desired outcome. As well, Chapters Six and Eight reported how the Department's official reports submitted to the Court were sometimes missing children's views, or minimised the significance of those views, and had downplayed children's unsafe experiences in out-of-home care. Revelations about the Department not fully cooperating in justice processes and not responding adequately to chronic sexual abuse, sexual exploitation and neglect of children in out-of-home care added further evidence about these problems (Commission for Children and Young People 2015; *Department of Health and Human Services v Jonathon* [2015] VChC1; Oakes 2014a, 2014b, 2014c, 2014d, 2015a). Chapter Five also described how lawyers independently raised concerns and investigated children's care and safety with parents, carers and the Department when acting as best interests representatives. Therefore, lawyers representing children can serve to correct parity of participation to a strong extent in these circumstances.

Without recognition justice at the governance structure level, there is not a clear legislative foundation upon which to apply the best interests principle of consideration and weight to children's views (CYFA s.10(3)(d) and UNCRC Article 12), nor the procedural guidelines in the CYFA. Children may appear to have participation rights, but not all children actually have a formalised and independent means for those rights to be put into practice. This reinforces the marginalised position of children in the generational order, where exclusion is justified for their own best interests and adults are assumed to account for their rights. As Freeman (2011, p.24) has observed, a fundamental barrier to children's rights is that "[t]he shadow of children as property, rather than persons, still hangs over debates about children". The presumption that the Department and parents adequately represent children's rights has echoes of that shadow of a child as property of parent or the state. Applying Fraser's lens, children without status as a party and legal representation are not counted as entitled to make justice claims in these matters, or have a best interests representative do so on their behalf, despite being directly affected. Their position in the generational order makes children particularly susceptible to misrecognition in governance structures, but without ready access to the power and resources necessary to challenge injustices (Alanen 2001; Mayall 2006).

The next part of this chapter reflects on the findings in relation to the second research question.

## **Influences of legal representation for participation of children and young people**

Recognition ethics, whereby lawyers respect children and young people as participants and use their skills to scaffold children's participation, emerged as the defining feature of representation when applying participation rights. The findings presented from this research reveal that representation of children under the direct model was more complex in practice than the CYFA definition of acting in accordance with instructions or "wishes" expressed by a child (s.524(10)). Best interests representation was also more complex, and involved forensic characteristics not conveyed by the legislative statement

of acting in the best interests of a child and communicating a child's views to the Children's Court (s.524(11)). At the same time, the extent to which lawyers may support parity of participation for children is constrained by multiple barriers, over and above any limitations set by an individual lawyer's skills and an individual child's communication. Fragmentation in the governance structure of the child protection legal system and the conduct of adults – the Department, parents, the Children's Court and some lawyers – were particularly significant barriers when implementing representation, rather than any intrinsic characteristics of children and young people.

The first section below discusses my findings about lawyers scaffolding participation with children. Section two considers why lawyers might recognise children as participants when other adults and the state have difficulty doing so during child protection proceedings. Section three discusses the influence of legal representation on the safety of children and young people, and the barrier formed by fragmentation of the child protection legal system.

### **Scaffolding: Interactions between lawyers and children for participatory parity**

This research has illustrated how lawyers can scaffold participation with children and young people in flexible ways, in any given hearing and over time. Adults interacting with a child have power to shape participation, and this includes lawyers representing children, as the findings from this research empirically demonstrate (Percy-Smith 2012; Wyness 2013b). Such power incorporates a lawyer's skills in responding sensitively to each individual child or young person and their context. Chapter Five reported on the qualities of scaffolding in the relationships I observed between lawyers and children when implementing participation, and how lawyers described their practices to me. These included democratic communication, legal education, developing a shared understanding about child protection intervention, and constructing flexible participation with children and young people. This called for lawyers to be sensitive to children's verbal and non-verbal communication, and respectful of their confidentiality and trust, which the majority of lawyers were observed to do. The qualities of

scaffolding respond to children and young people being both vulnerable and agentic when participating in child protection proceedings.

There is considerable discretion contained in the CYFA for lawyers to directly represent children as far as it is practicable (s.524(10)). The provision does not appear, on the whole, to be applied in ways that diminish children's status as participants. Chapter Five showed there was no indication from the ethnography study that lawyers reacted to children's varying extent of participation, flexible instructions or events that affected them as reasons to exclude children from proceedings or not follow instructions. Based on self-reports from lawyers and my observations of their behaviour reported in Chapters Five and Six, nor did these qualities appear to result in lawyers perceiving children as immature and incapable of participation. Some children and young people who held strong views about their care and safety were supported by their lawyers making submissions to the Children's Court, rather than taking a position that doing so was not "practicable". In some instances submissions were made because the child or young person did not feel adequately safe about agreements between their parent and the Department. Responsibility was instead placed on the Court to determine appropriate protective orders rather than lawyers expecting children to give instructions about everything in a case, always knowing what was in their own best interests, or compromising children's participation rights because of a parent's or the Department's actions. This approach reflects previous literature from legal experts, who have argued that children should not be required to know their own best interests in order to have participation rights, and instead responsibility for best interests lies with judicial officers and representatives of the state (Bilson & White 2005; Elrod 2007; Federle 1995, 2000).

Partial instructions were a common feature of lawyers scaffolding participation in flexible ways with children. Partial instructions meant children could instruct their lawyer about one or more issues, but not necessarily all the issues being decided in a case or being disputed between one or both parents and the Department. Many children participated with partial instructions across both the ethnography and case file study. In Chapter Seven, my analysis of the case file judgments showed that children and young people most frequently gave instructions about their care and contact arrangements. These were the matters of greatest concern to children, not all the matters being dealt with by the Court, such as satisfying protective grounds.

As reported in Chapters Five and Six, the withdrawal of children's disclosures about sexual abuse, family violence and physical abuse illustrated the negative consequences of the Department, parents and the Court having overtly or inadvertently placed children in a conflicted position in giving instructions about protective grounds. This occurred despite the efforts of lawyers to circumvent that conflict, and despite their advice to children they did not have to instruct about all matters. Given the entrenched positions of parents and the Department, such pressure would have likely occurred regardless of whether children and young people were represented. By comparison, lawyers were sometimes able to reach settlements with the Department and parents, without children being placed in a conflicted position about protective grounds and allegations. As an aspect of flexible participation, partial instructions are an advantage of direct representation for children and young people during negotiations and inside the courtroom.

In Chapter Five, I explained how Justice Garde (2012 VSC 589, para.106) endorsed the legitimacy of children participating with partial instructions in Aisha and Bree's successful appeal to the Supreme Court of Victoria to reinstate their direct representation. The appeal judgment concluded that it would contradict the children's best interests to deny their right to participate with direct representation, just because they gave partial instructions and did not instruct about allegations made by the Department and their mother. The implication of the Supreme Court judgment is that parity of participation can be maintained for children and young people when lawyers, the Department, parents and the Children's Court respect flexibility in the extent to which children instruct about matters with direct representation.

Lawyers could ensure children and young people's right to participate was respected beyond reporting their views and instructions to the Court. Chapters Five and Six showed how participation was a process over time. Chapter Five captured the expressions of emotional and practical support lawyers gave to children in response to child protection intervention. That support included advocating for safer arrangements and timely access to counselling when parents and the Department had not cooperated to do so, as seen in Chapter Six. It was also noted in Chapter Six that lawyers had responsibility for explaining outcomes to children, whether in person at court or over the telephone, and for providing a written record. As I argued in Chapter Five, these

qualities of scaffolding reflect the ideal characteristics of a trusted children's advocate who acts as a passage agent during legal proceedings (Douglas et al. 2006; Masson & Winn Oakley 1999; Ross 2013).

Scaffolding between lawyers and children largely occurs behind the scenes of the Court, and out of view from the Department and parents. What might appear to parents, the Department or the Children's Court to be brief or simplistic instructions given by a child (Children's Court of Victoria 2010), belie the complex qualities of scaffolding between lawyers and children to form those instructions. Scaffolding includes lawyers respecting confidentiality by negotiating with children about what can and cannot be said publicly during negotiations or inside the courtroom. However, disruptions to the relationship between a lawyer and child could undermine democratic communication, trust and parity of participation. This was exemplified in Chapter Five following emergency removal of children in current cases, when a lawyer was not a child's usual representative, and did not have access to the case history or sufficient time amongst the cases already booked for the day. In Chapter Six, parity of participation was also disrupted when circumstances had changed at a hearing, and children were not available to update their instructions about issues that concerned them, such as planning for a return home that felt safe from their perspective. Meetings did not regularly occur between a child and their lawyer before a hearing unless Departmental reports, updated information and cooperation between the adults enabled appointments to go ahead. These were all factors beyond a child's control, but which nonetheless affected the extent they could participate in proceedings.

### **Why might lawyers demonstrate recognition ethics?**

Whether a legal representative actually represents a child or a child's best interests is a fundamental difference between the direct and best interests models that has long been identified and debated in child protection and family law literature (Bala, Birnbaum & Bertrand 2013; Bilson & White 2005; Birnbaum & Bala 2009; Blackman 2002; Duquette 2000; Elrod 2007; Federle 1995, 2000, 2008; Griffiths & Kandel 2000a; Guggenheim 1984; Khoury 2010, 2011; Mandelbaum 2000; Marguiles 1996; Margulies

2007; Taylor 2009). This difference is reflected in the legal construction of children's participation with representation in the CYFA (s.524). There are stronger obligations on a lawyer to act in a way that is consistent with a child's views under direct representation (s.524(10)), compared to acting "in accordance with what he or she believes to be the best interests of the child" and communicating the instructions or wishes of a child under best interests representation (s.524(11)).

According to lawyers who took part in the ethnography, on the whole, direct representation rather than best interests representation was the preferred approach to children's participation wherever possible. Reflecting the literature above, best interests representation was seen as paternalistic, prone to lawyers overriding children's views, and only suited to very young children or children with limited communication abilities. Best interests representation was highly regarded by most lawyers as a suitable model to enable participation rights of children who could not otherwise give instructions. The forensic function possible when implementing best interests representation was also seen as an advantage for young children. Similar to recent Australian research in the family law jurisdiction (Kaspiew et al. 2013), this involved being an independent investigator, increasing the accountability of the Department, and assessing evidence to improve the quality of decision-making during child protection intervention. The value of this role can be particularly appreciated given the emphasis on reaching settlements, and given that the large numbers of cases in the Children's Court everyday have meant judicial adjudication and evaluation of evidence may be minimal. However, the legislation does not provide clear support for the forensic aspect of best interests representation, and this constituted a barrier for lawyers, including gaining timely access to information and cooperation with the Department in some instances.

Recognition ethics of lawyers who participated in the ethnography reflected confidence, comfort and commitment to representing children, especially on a direct basis. The findings contrast with previous research that has identified problems in how representatives for children apply participation under different types of models. In contrast to previous Australian (Cashmore & Bussey 1994; Ross 2012a, 2012b) and international research (Masson & Winn Oakley 1999) about lawyers in child protection cases, there was no indication in the ethnography that these lawyers experienced role confusion between supporting children's participation with direct representation and

acting as a best interests representative. Previous research has found representatives often act inconsistently with children's views, perceive children as incompetent, use protection to justify excluding children, and sometimes do not believe children's safety concerns (Cashmore & Bussey 1994; Griffiths and Kandel 2000a, 2000b; Kaspiew et al. 2013; Masson & Winn Oakley 1999; Ross 2012b, 2013). However, some lawyers raised with me their concerns about the quality of representation in the jurisdiction, and two judgments in the case file study indicated that these sorts of problems are possible.

Ross (2012b) concluded from her interviews with lawyers representing children in family law, child protection and youth crime in NSW that a lawyer's ethical approach has a substantial influence upon their preparedness to engage with children as participants, as well as the model of representation. A relational approach characterised a minority of lawyers who had a stronger commitment to children's participation, meaning they appreciated participation, a child's family relationships and the lawyer's duty to the Court. These tended to be lawyers working in child protection and youth justice jurisdictions where direct representation was more common. By comparison, those lawyers in Ross's (2012b) study who could be characterised as having a responsible approach tended to emphasise their duty to the Court, sometimes at the expense of children's participation rights. Similarly, the limitations identified in this research also indicate that some lawyers may not always perform representation in a way that reflects recognition ethics. In such circumstances, a lawyer might not communicate with a child using open-ended questions, or represent them inside the courtroom in ways that are sensitive to children's status and participation rights. Nonetheless, most lawyers in this research did appear to recognise children as participants during their interactions when representing children outside and inside the courtroom, and also in their reasons for supporting direct representation wherever possible.

This raises a question as to why lawyers in the Victorian child protection jurisdiction might be more likely to represent children, particularly with the direct model, in ways that respect participation rights. Three factors may contribute. First, there was a reasonably strong legal culture supporting direct representation for children in child protection proceedings among Victorian lawyers. As I explained in Chapters Two and Three, the model has a long history in Victoria, spanning 30 years for children



approximately seven years of age and older. There had been a specialist legal service for the Children's Court within Victoria Legal Aid throughout that time, until the Youth Legal Service was disbanded during my fieldwork. Therefore lawyers in my research were trained and working in an environment that regarded direct representation as a normal part of children's participation. Their personal ethics, belief in human rights and sense of social justice also likely fostered the culture of participation and attracted lawyers to this area of law – it is not well paid or prestigious.

The second factor is the experience of these lawyers working in child protection and youth justice. The dual practice of most lawyers across the child protection and youth justice areas of the Children's Court meant they were familiar with representing children as young as 10 years of age. The children and young people lawyers represent in youth justice proceedings usually have, or have had, child protection proceedings as well. This contrasts with lawyers who represent children in the federal family law jurisdiction, and in some child protection jurisdictions where best interests representation forms the bulk of their practice when representing children. The lawyers in my Victorian study also represented parents and other family members as part of their daily practice in child protection. Like children, parents can also be vulnerable when the state intervenes in family life, meaning lawyers have considerable experience forming instructions with disadvantaged people. Many of their clients are in crisis and have difficulty comprehending child protection intervention. Representing parents and children in child protection and working in youth justice on an instructions basis make these lawyers experienced in sensitive and complex legal arrangements between highly-vulnerable people and the state.

Third, when a lawyer represents a child or siblings, they are the sole focus of the lawyer's attention. This is a unique position for the lawyer, different to that with parents, the Department and the Children's Court. A lawyer representing a child or young person can thus have a clearer focus on them in the decision-making and attend to the effects of child protection intervention in their lives, where other figures in the system may be less able to. The primary duty of the Children's Court is to determine a child's best interests while taking into account a child's views, the evidence, and interests of the Department and parents (Bell J 2011 VSC 42; Eekelaar 2006, 2013;

Eekelaar & Maclean 2013; Sheehan 2001). Consequently, children's participation is one of many competing considerations for magistrates.

Conversely, it is not always easy for parents to have their children's best interests at the fore. Parents can have their own concerns, irrespective of the extent to which those concerns are separate or connected with children. As Chapters Seven and Eight illustrated, parents' instructions and perspectives can differ from children's, and parents can find it difficult to see children as having their own rights, even though children's rights are both interdependent and independent of parents (Fineman 2004; Freeman 2007b; James & James 2004; Lee 2005). At the same time, many parents are dealing with their own complex problems – trauma, family violence and poverty – while trying to come to terms with child protection intervention (Bromfield et al. 2010; Douglas & Walsh 2010; Pearce, Masson & Bader 2011; Walsh & Douglas 2009). Parents are also increasingly unrepresented in proceedings, thereby adding to the difficulties they might face in understanding the implications of child protection for themselves and children.

Compared to lawyers representing children, the Department and its practitioners have a position of being model litigants representing the State of Victoria in child protection proceedings. As explained in Chapter Six, being a model litigant means the Department has a duty to comply with a code of conduct and exercise a range of duties when representing the State (State Government of Victoria 2011). The Department and its practitioners also have institutional, financial and managerial obligations. Previous inquiries have documented how these obligations can interfere with a practitioner's ability to do their job effectively (Ombudsman 2009, 2010, 2011; PVVC Inquiry 2012; VLRC 2010). These obligations compete with the Department's legislative and ethical obligations regarding children's rights. Furthermore, frequent turnover of staff, high caseloads, time constraints and protective attitudes of social workers are barriers to treating children as participants (Barnes 2012; Križ & Skivenes 2015; Ridley et al. 2013; Shemmings 2000; Skoog, Khoo & Nygren 2014; van Bijleveld, Dedding & Bunders-Aelen 2013, 2014). Therefore, lawyers are in a unique and valuable position to focus on the rights of the child or young person they are representing in child protection proceedings compared with the Department, parents, and even the Children's Court itself.

## **Children's views, safety, and participation with legal representation**

A fundamental advantage of legal representation was that children's instructions and views could be heard. As a result, safety concerns and issues with their care and contact arrangements were raised independently of parents and the Department. This advantage was evident across both direct and best interests models of legal representation.

Children without legal representation did not have ready access to this aspect of safety, either because they did not have access to an independent person with whom they could air their safety concerns, or did not have safety concerns identified on their behalf when the Department or parents might not be forthcoming.

Chapters Five, Six and Seven reported that children and young people could raise matters of concern to them that might be different to those of one or both of their parents and/or the Department. Chapter Six also showed how negotiations did not necessarily equate to safe outcomes from the perspective of children when parents and the Department reached agreements. Furthermore, some children agreed with a parent or the Department about one or more issues, but disagreed about other issues. This was exemplified in Chapter Seven when some children gave instructions to remain in out-of-home care that were consistent with the Department's position, but they were also seeking to maintain or increase contact with a parent, which was consistent with their parent and contrary to the Department's position.

Children's discussions with their lawyers, documented in Chapters Five and Six, showed how they raised different concerns to the agenda of parents or the Department, such as the importance of staying together with their siblings. These were not matters disputed between the Department and a parent, or even raised by the Department and parents, but were nevertheless important from the perspective of each child, and did contribute to decision-making. Children and young people also sometimes expressed safety concerns about the Department's or a parent's proposed care and contact arrangements. Chapter Six provided examples of children's own concerns being endorsed by the Children's Court following advocacy by their lawyer. Lawyers communicated those concerns and sought solutions, while navigating their obligations

as direct representatives during negotiations and inside the courtroom. In some instances, they may have made submissions to oppose the agreements.

In contrast to protective arguments against children's participation, neither the ethnography nor the case file study found convincing support for the claim that children will seek dangerous care arrangements or invariably want to be in a parent's care against their best interests. Instead, the themes revealed in Chapter Seven about children's negative experiences with the Department's care, and how some children had ongoing fear and safety concerns about their parents, speak to the power of participation as a means for children to assert their need for safety. The conduct of lawyers when representing children inside and outside the courtroom, reported in Chapter Six, evidenced how lawyers can act in ways to support safety and conditions on protective orders consistent with children's concerns without breaching confidentiality. Legal representation also served as the means for some children and young people in the ethnography and case file study to ventilate their experiences of harm and abuse in out-of-home care. Representation can enable children to speak with an independent legal advocate and raise their safety concerns, irrespective of whether those concerns relate to parents or the Department, or whether or not they are framed within the powers of the Children's Court.

However, fragmentation in the child protection system compounds safety concerns and power inequalities for children and young people. In Chapter Two, I identified limitations on the powers of the Children's Court to direct care and contact arrangements according to the type of protection order to which a child may be subject. Misframed representation happens because the solutions to problems children experience, as well as the procedures for decision-making, can be framed outside the Children's Court. Solutions become framed within the power of the Department instead of within the boundaries of the Court, where the basis of a decision originates. Fragmentation in the child protection legal system also contributes to ordinary misrepresentation for children and young people, because the rules for representation do not afford parity for all participants in the decision-making. The Department can continue to access expertise and legal advice in administrative decisions, particularly in VCAT, but children do not have equivalent access to advice and representation to facilitate parity of participation.

Masson and Winn Oakley (1999) previously observed problems in the division of powers between the state and courts in the UK child protection system. Children and young people in their study expressed concerns about their out-of-home care, contact or other issues in their lives. However, these concerns were often framed as part of the local authority care plan and “viewed as under local authority control” when raised by the Guardian Ad Litem or solicitor (Masson and Winn Oakley 1999, p.135). As a result, Masson and Winn Oakley concluded that issues that were important to children and young people were not considered to be important issues for the Court when under the power of the local authority. This inconsistency contributed to Masson and Winn Oakley’s recommendation that care plans should be regulated more closely and court powers extended to care plans so that the interests of children and young people could receive proper consideration. Equivalent fragmentation in the Victorian child protection system has negative consequences for the care and safety experienced by children and young people when their lawyers and magistrates are not able to navigate the legal boundaries to address children’s views about problems with the Department’s care or contact.

Illustrating the consequences of fragmentation, Chapters Six and Seven reported that some children and young people had raised with their lawyers their experiences of violence, bullying and inadequate care in residential units. However, these concerns were sometimes minimised or refuted by the Department, including in circumstances where police, ambulance or Children’s Court Clinic reports provided independent evidence. This was illustrated acutely with Sam in the ethnography and with Justin in the case file study. Chapter Six described how lawyers attempted to navigate legal boundaries when children’s concerns were misframed outside the Court’s jurisdiction. Nevertheless, negotiations produced mixed results, because reaching an agreement to change an out-of-home care placement or improving contact arrangements with parents, siblings or other family members relied on the Department being receptive to children’s views.

Victorian residential units have been repeatedly criticised in the out-of-home care literature and official inquiries for failing to meet basic needs of care and protection over the last five years (Bessant 2011; Commission for Children and Young People 2015; Victorian Ombudsman 2010). At the conclusion of my fieldwork, residential

units were revealed to be sites of frequent sexual abuse and neglect for children and young people, both within the homes and through targeted grooming by paedophiles (Oakes 2014a, 2014b, 2015a; Commission for Children and Young People 2015). The Australian Royal Commission into Institutional Responses to Sexual Abuse also launched an investigation (Oakes 2015a), such is the extent of the problem. This reflects Justin's experiences, recorded in Chapters Seven and Eight from the case file study. These are not rare, isolated experiences for children and young people living in out-of-home care; nor is it a simple funding problem in services. These are endemic injustices, in part produced by inadequate accountability and oversight in a fragmented child protection system. The governance power structure of this system suits the autonomy of the Department and flexibility in its decision-making, but is not effective, fair or safe when understood from the perspectives of children and young people who live with the consequences. Fragmentation of the child protection legal system is a significant barrier for children and young people to access justice when exercising their participation rights.

### **Magistrates responding to participation of children when determining their best interests**

This research has revealed how magistrates in the Children's Court have significant power to recognise children's participation rights when making decisions about children's best interests, and that most often, they respond to them. At the same time, magistrates grapple with multiple competing considerations when exercising the civil jurisdiction of the Children's Court, including evidence for child protection intervention, the position of the Department, and the rights of parents and other family members (Bell J 2011 VSC 42; Eekelaar 2013, 2006; Eekelaar & Maclean 2013; Sheehan 2001). As well as regulating families when parents are unable or unwilling to care for children satisfactorily, the Court is regulating the care and conduct of the state when it intervenes in the lives of children and their families. The Children's Court is thus redistributing care for children between parents and the state.

## **Overall recognition by magistrates**

As with lawyers, magistrates have power to recognise participation rights of children and young people in child protection proceedings. This occurs at an individual level of recognition ethics, and at an institutional level of recognition justice when magistrates apply the CYFA. My analysis of the Act shows a legal basis for magistrates recognising children as participants via the best interests principles, including consideration and weight to children's views, appointing legal representation for children and applying the procedural guidelines. The operation of the Children's Court can also model ethical recognition of children's rights to the Department, lawyers, parents and wider society. This forms a practical way to understand how the broad principles of a child's best interests and participation rights, as enshrined in the UNCRC, can apply together in decisions made by the Children's Court.

The quality of recognition contained in magistrates' judgments varied considerably according to the age of the child who was the subject of the child protection application, and whether the child had direct representation. Chapter Eight reported my analysis of magistrates' judgments available in the case files, and found no children's views about their care, or status as a participant, were evident for those without legal representation and for three children who had best interests representation. Most children were younger than seven years old, but two of the three children with best interests representation were older than seven, and did not have severely-restricted communication abilities. Furthermore, Richard was 10-13 years old and had direct representation, but the magistrate did not mention whether he had any views at all.

Language and communication skills can form a barrier to a child's participation, but may not be insurmountable for young children when sensitivity, interpersonal knowledge and resources are made available (Alderson 2010; Alderson, Hawthorne & Killen 2005; Skivenes & Strandbu 2006). However, such resources are not made available for young children because the CYFA and policies limit best interests legal representation. As a result, this governance level of misrecognition constitutes a significant barrier to magistrates responding to children as participants. As I argued earlier in this chapter, there are very limited ways to actually implement participation rights for children of all ages, even though the CYFA frequently refers to children's

participation. This clearly has a flow-on effect of constraining recognition of young children when magistrates make decisions. As a consequence, it is doubtful whether the principle of consideration and due weight for children's views, as provided for in the CYFA (s.10(3)(d)) and the UNCRC Article 12, is possible for magistrates to fulfil when children do not have legal representation. This separates judicial decisions about children's best interests from their participation rights.

Conversely, all but one child with direct representation had at least one of their views recorded by a magistrate in the written judgments. These children comprised 55% of all the 64 children with a written judgment available. Adding to the influence of direct representation was my finding that a large majority of children with direct representation also had at least one substantive outcome consistent with one of their views in the case file study judgments, even though such consistency was not necessary for recognition to be evident. Magistrates indicated having considered children's views and applied weight for more than half of those with direct representation. This adds further support for the positive influence of direct representation for children's participation rights in judicial decisions.

These results indicate higher numbers of magistrates responding to children's participation compared with previous research conducted in Sweden about judicial decisions, which showed that approximately one-third of children's views were reported. Röbbäck & Höjer (2009, p.669) assessed family law cases and found written judgments reported the views of just 25 out of 66 children. Children did not have separate legal representation in that system; instead a social worker or a mediator might have contact with children just for the purpose of writing a report. This suggests children's views are less likely to be recorded and responded to when judicial officers have few opportunities to understand children's views and have those views advocated during a hearing – qualities that direct representation can offer. A report also serves as a “momentary act” of participation compared with ongoing one-to-one support and advocacy with legal representation (UN Committee 2009, para.13).

Supporting this argument, my findings reflect a lower proportion of magistrates recording children's views than Robinson & Henaghan's (2011) New Zealand study. In their sample of 120 family law and child protection judgments, 73% referred to a child's



views, of which approximately three-quarters discussed according weight to children's views. Unlike the Victorian context, legal representation was compulsory for all children at the time of Robinson and Henaghan's study (although that is no longer so since changes to the *Care of Children Act 2004* (NZ) in 2013 restricted children's access to representation). Consistent with a dual approach in New Zealand, lawyers could represent younger children on a best interests basis, and directly represent older children (Fernando 2013; Henaghan 2008). Practice notes issued by the New Zealand Family Court have directed lawyers to use direct representation as the preferred approach wherever possible (Boshier 2011). Given the comparatively higher frequency of New Zealand judges recording children's views and referring to due weight compared with magistrates' judgments in my case file study, legal representation for all children and the direct model appear to be particularly important for judicial officers responding to children as participants.

There are additional avenues for New Zealand judges to respond to children's views. These include psychologist reports, Counsel to assist the Court and judicial interviews. However, Robinson and Henaghan (2011) observed that few judges interviewed children in child protection cases (4/30 cf. 12/28 parental care/contact), Counsel to assist the Court was rare (2/30 cf. 6/15 parental alienation), and just under half had a psychologist report. Magistrates in the Victorian Children's Court likewise rarely have direct contact with a child or young person, although the few instances where this occurred in the case file study indicated a tendency to perceive a child or young person as more mature. A magistrate may have access to an independent psychologist's report or Children's Court Clinic report by the time a case reaches the stage of a contested hearing, but these are not always available or conducted for the purpose of understanding a child's perspective. This adds further to the value of representation for providing opportunities to judicial officers to respond to children as participants, given that other independent sources of information about children's perspectives might not be available.

The age of a child or young person may influence to extent to which judicial officers are receptive to participation, irrespective of legal representation. Support for this comes from some judgments not containing a clear response to the participant status of young children who had best interests representation. It also comes from the lower frequency

with which magistrates indicated giving consideration and weight to the views of children 6-9 years old compared to 10-13 year olds and young people 14 years and older. Robinson and Henaghan (2011) observed a similar pattern in the New Zealand cases, whereby judges sometimes excluded children aged five years and younger. In their study, some judicial officers also discounted giving any weight to the views of several children based on their age when between four and 13 years old. Although these were a minority of cases in Robinson and Henaghan's sample, the researchers suggested that some judges might not have internalised the support for children's participation such as that present in the New Zealand legislation.

Cumulatively, my findings and the literature suggest that a normative becoming approach to children can influence courts to undervalue recognition of young children as participants. A becoming approach applies in assuming children can only be permitted status as a participant upon reaching a particular age or developmental stage. An understanding of children's development is not problematic; rather it becomes problematic when applied in isolation at the expense of understanding children as both becoming and agentic beings (Uprichard 2008). As I argued in Chapter Three, the capacity debate as to whether or not children are developmentally adequate to be considered participants is a reflection of rights bearers traditionally being constructed as autonomous, rational adults (Federle 1994). As a result, the value of children's participation, both to decision-making and to children themselves, can be underestimated. Therefore any legislative and policy change to improve the status of children would need to be accompanied by progress in the level to which the Children's Court and professionals in the child protection system are receptive to recognition of all children as participants.

A positive aspect of recognition evident from the procedure of decision-making in judgments came from magistrates having an influence on how children's participation was implemented during the proceedings. Reflecting a procedural quality of recognition, Chapter Eight indicated that some magistrates recorded having monitored the child's status as a participant during the hearing, and having held lawyers accountable for meeting basic principles of representation. I also recorded how recognition by magistrates counterbalanced unequal power dynamics when the Department and parents did not appreciate children's perspectives.

Recognition in this procedural sense was less clear during participant observations in the ethnography. This difference is likely due to the high frequency of agreements reached through negotiations during the ethnography, rather than through submissions and contested hearings where magistrates make judgments. As argued previously in Chapter Six, lawyers representing children and young people have power to redress consideration and weight to children's views during informal and formal negotiations in cases where judicial involvement may be minimal. However, that chapter also illustrated how consent between the Department and parents does not necessarily guarantee an appropriately-safe outcome for children. The benefits of the procedural quality of recognition evident from case file judgments indicates that this could be extended more often in cases where magistrates are granting orders settled via any form of negotiation.

### **Recognition and safety: A forensic aspect**

Magistrates did not simply decide an outcome because it was consistent with a child's views. Instead, this was about how the magistrate had considered and given weight to the child's views in the context of factual issues and other evidence. A forensic function of recognition emerged from many judgments as a result, whereby the evidence about children's care, contact and safety coloured children's instructions about those matters. In turn, a forensic function of recognition was evident from magistrates responding to children's views and reaching decisions about children's best interests in the context of fears and safety concerns about their parents, and their negative experiences in state care. This exemplifies how the construction of children's best interests is intertwined with their participation in child protection proceedings.

Another potential advantage of recognition having a forensic function can be understood from the judgments. In Chapter Two, I described how a medicalised, forensic approach characterises contemporary child protection systems alongside legal governance. This had enabled abuse and neglect of children to become more visible and be taken more seriously, although medicalisation also tends to individualise complex social problems and position children (and parents) as subjects of forensic assessment.

The forensic aspect of recognition potentially brings a child's views about their safety and care into focus in a way that may counterbalance the investigative, medicalised perspective in child protection. Consistent with the relationship between a child's best interests and participation rights in the UNCRC, their subjective experiences of care and safety, or lack thereof, may then inform judicial decisions. Magistrates' responses to children's views, safety concerns about parental care and contact, and negative experiences of state care, provide evidence of this.

#### *Children's views and safety concerns about parental care and contact*

No judgments were made that supported parental care or increasing contact when children's instructions opposed such arrangements, and when there was evidence of fear or other safety concerns in the context of children's views. Conditions attached to protection orders, particularly regulating the frequency and supervision of contact and having a condition for contact only with consent from a child or young person, demonstrated the safety aspect of recognition when magistrates respond to children's perspectives. This contrasts with the very few previous studies about judicial decisions, particularly in family law contexts, where orders about contact or changing a child's residence from one parent to another have sometimes prioritised parent-child relationships over children's own safety concerns (Holt 2011; MacKay 2013; Röbbäck & Höjer 2009; Vis & Fossum 2013).

Röbbäck & Höjer (2009) noted that Swedish judicial officers could invalidate children's views opposing contact arrangements or residence with a parent. This occurred by disregarding safety conditions that children were seeking, including supervision of contact. As explained above, children did not have direct representation in Sweden. Likewise, children did not have direct representation in the 151 Norwegian child protection welfare board cases examined by Vis and Fossum (2013). Instead, a social worker or layperson usually met with the child once and then acted as a best interests type of representative in 95% of cases. Although children tended to be granted more contact with mothers where their views supported this, Vis and Fossum found that fathers also tended to have more contact ordered when children did not support that outcome. Vis and Fossum (2013, p.2107) concluded that children's views had a "minor

impact” on rulings about contact, but acknowledged that there tended to be a low level of contact ordered.

Nor did children have direct representation in the context of parenting disputes in Scotland during MacKay’s (2013) research. Children had expressed their views directly to the Court, a court reporter, or a curator ad litem (a type of best interests representative). Mackay (2013, p.[4]) identified that 45 out of 107 children expressed views opposing contact with a non-resident parent, and almost all of those children described experiencing or witnessing abuse by the non-resident parent. However, 30% of children experienced a contrary outcome to their views. In contrast with this body of research, my findings tend to point to magistrates recognising participation of children who had direct representation, when children’s views reflected ongoing fears and safety concerns about parents.

#### *Children’s experiences of gendered family violence and parenting*

A qualifier to this conclusion concerns children’s experiences of gendered parenting and family violence, and the reproduction of inequalities when these experiences were framed in gender-neutral ways. Children’s views tended to favour their mothers when seeking parental care or contact, compared to keeping contact the same or reducing contact with fathers. Although this finding comes from a small number of cases amongst the broader sample of case files, it is nevertheless consistent with Vis and Fossum’s (2013) study of Norwegian child protection welfare board cases with a larger sample. Children’s relationships with mothers and fathers in a context of family violence were not necessarily discussed in judgments in a way that appreciated gendered power dynamics in families, and the implications of these dynamics for children. The effect of this was illustrated when fathers were seen to not be accountable for the consequences of their violence on the relationship between a mother and child. In particular, this included examples of having a mother moderate her contact with children, and emphasising the onus upon a mother and kinship carer to encourage a young child’s relationship with an extremely violent father.

Further illustrating this pattern, the Department sometimes minimised children's experiences of gendered parenting and family violence when making agreements with parents. In Chapter Six, some agreements reached between the Department and parents outside and inside the courtroom did not meet children's own safety concerns in contexts of family violence and physical abuse. For instance, Charlotte's case illustrated how the Department and a parent could take up children's views in unintended ways. That had occurred in response to an agreement between the Department and her father for the paternal grandparents and him to have primary care, minimising the severity of his ongoing family violence. However, the magistrate on that occasion gave weight to Charlotte's views supporting supervision of her contact with her father, and to be in her mother's long-term care with her younger sibling.

Taken together, the ethnography and case file study suggest that the Children's Court and Department are not always immune to the deep social norms that discount gendered inequalities in family violence so as to continue children's relationships with fathers (Douglas & Walsh 2010; Holt 2011; Humphreys 2010; Humphreys et al. 2006; Moloney, Weston & Qu 2014). This is a reflection of the potential for judges, professionals within statutory systems, and the legislation under which they work to apply social values when interpreting a child's best interests (Skivenes 2010). While values can reflect rational principles of fairness or equality before the law when deciding a child's best interests, values can also reflect problematic dominant norms about children and families (Skivenes 2010). Nevertheless, the overarching findings of this research support a view that magistrates respond appropriately to children's concerns about their care and safety with parents when deciding their best interests. Children's experiences in out-of-home care are another illustration of this forensic aspect of recognition.

#### *Children's views and negative experiences of out-of-home care*

Risks associated with redistributing care towards parents if there has been child maltreatment are well established for all forms of abuse and neglect (Cashmore & Shackel 2013; Holt, Buckley & Whelan 2008; Hunter 2014a, 2014b). However, magistrates' decisions to redistribute care towards the state also have substantial risks

for children and young people. As well as the trauma caused by separating a child from his or her parent, the cases documented in this research show that the state is not always a source of safe and adequate care in current times.

Out-of-home care services in Australian and international child protection jurisdictions have invariably been characterised as overwhelmed and in perpetual crisis (Bromfield et al. 2005; Gilbert, Woodman & Logan 2012; Schorr 2000). Problems include insufficient resources and services to support children and carers; chronic shortages of foster carers, especially for older children; unstable care arrangements; and high social worker turnover. Doubts have been raised about how the state and its agents can function as an adequate parent under such circumstances, including the Victorian Department (Bessant 2011; Bullock et al. 2006; Masson 2008). Repeated inquiries into the operational failings of the Department are a testament to these problems (Victorian Ombudsman 2009, 2010, 2011).

These problems are consistent with the views and experiences of many children reported in this research. The themes in Chapter Seven particularly capture unstable out-of-home care placements, a high frequency of separation from siblings, inconsistent child protection services, and being unsafe in out-of-home care. In turn, judgments that had recorded children's negative experiences of state care in effect corrected the Department's inaction and minimisation of those problems. Magistrates could sometimes place conditions on orders for maintaining a minimum frequency of parental contact, counselling for a child, or other measures to increase placement stability and safety in out-of-home care. Ordering gradual reunification with one or both parents also became a less detrimental, or less worse, outcome when compared with ongoing state care in some cases.

The Children's Court functions to regulate parental care in circumstances where parents have been found to be unable or unwilling to care appropriately for children, or when there has been deliberate abuse or neglect. Another function of the Children's Court is to regulate state intervention in families and to provide independent judicial oversight in the quality of state care when such intervention is sanctioned. The ongoing revelations being made to the Royal Commission into Institutional Responses to Child Sexual Abuse are further testament to the fundamental importance of independent, periodic,

judicial oversight of the safety of children and young people who experience state care. However, the powers available to the Children's Court limited the extent to which magistrates could respond to children's negative experiences of care, and to their views about contact with parents while living in out-of-home care. This problem was caused by fragmentation in the child protection legal system, as illustrated throughout this research. Chapter Eight showed that despite having recognised children's views about the frequency and supervision of contact with parents, out-of-home care placement problems, and inadequate access to counselling and education services, some magistrates could not give a response. Those decisions were framed outside the legal boundaries of the Court and within the Department's administrative authority over out-of-home care arrangements and guardianship. This constitutes a barrier to children's justice in the distribution of their care.

## **Final recommendations**

Fraser (2009, p.60) argues that progressing participatory parity means “dismantling institutional obstacles that prevent some people from participating on par with others.” The following recommendations are intended to progress participation rights for children and young people by addressing the main barriers identified in this research: implementing the UNCRC and alternative mechanisms; party status and legal representation for all children; reducing fragmentation of the child protection legal system; and having an effective complaints mechanism for children and young people.

## **Implementing the UNCRC and alternative rights mechanisms**

At the outset of this thesis, I reported that successive Victorian and Australian Commonwealth governments have failed to fully incorporate the UNCRC into domestic law. Instead there is an inconsistent patchwork of different legislation across state and federal jurisdictions that may contain aspects of the UNCRC (ALRC 1997; Child Rights Taskforce 2011). This continues to be an obstacle to recognition of participation rights for children and young people. Although the UNCRC sets a low threshold for



participation, it can nevertheless be a minimum standard to which states and its agencies can be held to account, and it would enable children to make legal claims against violations of their rights within state or federal jurisdictions (Bessant 2011; Nicholson 2006). Implementing the UNCRC would go some way to address the status order inequalities that children continue to experience at legal, cultural and institutional levels.

To be fair, although some signatory states have full or partial direct incorporation of the UNCRC in domestic law through their constitution or Acts of Parliament, indirect incorporation, as seen in Australia, is more common (Lundy et al. 2012; Lundy, Kilkelly & Byrne 2013). In the mean time, Bessant (2011) has proposed that Australia's concluding observations by the UN Committee on the Rights of the Child and Shadow Reports to the UN Committee, prepared by non-government organisations, offer mechanisms to document evidence and recommendations to address failings in the child protection system. Another recommendation concerns the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure (United Nations 2011). At the time of writing, Australia had not signed the Optional Protocol despite it having entered into force on April 14<sup>th</sup> 2014. Adopting the Optional Protocol would enable children and young people to make a complaint about violations of their human rights to the UN Committee, even though the UNCRC is not fully incorporated in state or federal Australian law.

### *Strengthening the Victorian Charter of Human Rights and Responsibilities*

The Victorian *Charter of Human Rights and Responsibilities* has gone a small way to fill the gap in implementing the UNCRC, as illustrated by child protection case law in the Victorian Supreme Court that occurred during work on this research (Bell J 2011 VSC 42; Garde J 2012 VSC 589). However, the *Charter* does not specifically address the UNCRC and children's participation rights. The Government has also displayed an ability to overturn case law through enacting contrary legislation or overlooking inconsistencies between the *Charter* and Acts of Parliament in legislation affecting children participating in child protection proceedings (for example, *Justice Legislation Amendment (Cancellation of Parole and other Matters) Act 2013* (Vic.); Young 2015).

There is potential to strengthen the *Charter* in these respects according to a final eight-year review of the *Charter*, which had just been tabled to the Victorian Parliament at the time of writing (Young 2015). In particular, the review recommended adding a principle in the Preamble to address participation of people in decisions that affect them, and a statutory authority to receive and adjudicate complaints (Young 2015 p.14). These could apply to children in the child protection system.

The European approach to rights also offers a model upon which the Victorian *Charter* may be improved to recognise children within generalist human rights provisions. The *European Convention on Human Rights and Fundamental Freedoms*, the European Court of Human Rights as arbitrator, and a wide range of specific conventions issued by the Council of Europe have proven to be fruitful for appeals and civil litigation rights in child protection, youth justice and family law (Kilkelly 1999, 2011). For example, the UK High Court awarded £17,000 in damages to an infant, mother and maternal grandparents for breaches in human rights by the Northamptonshire Local Authority (*Northamptonshire County Council v AS, KS, and DS (By his Children's Guardian)* [2015] EWHC 199 [Fam]). Similar to the practices of the Victorian Department, the Local Authority had used a private agreement to take the infant into out-of-home care initially. Among the many failings, the Local Authority delayed court proceedings and failed to organise contact between mother and child. The *European Convention on Human Rights and Fundamental Freedoms* served as the basis for the litigation, reflecting the utility of rights instruments when they are implemented and can apply to children. Civil litigation using the Victorian *Charter* on the basis of rights violations may be necessary to compel this State to lift the quality of out-of-home care, redress the erosion of children's participation rights in the child protection system, and bring financial compensation.

### **Party status and legal representation for children**

Recognition of all children and young people as parties to child protection proceedings and entitled to legal representation would be a positive step towards addressing their marginalised legal status. The question remains as to how all children and young people

can be legally recognised as having participation rights in a way that can enable those rights to be implemented in this jurisdiction.

Even though children's views are a meaningful component of exercising participation and safety, the findings of my research also show that participation means more than having a decision-maker hear a child's views. Participation rights in child protection proceedings also encompasses scaffolding to support choices about the extent of participation in a particular matter and over time, advocacy during informal and formal negotiations, advocacy inside the courtroom, access to information, having decisions explained, and passage agent support throughout the experience of intervention. As discussed above, the findings demonstrate that approaches to participation that might only give a magistrate access to a child's views, like a judicial interview or report from a social science consultant, neglect the wider functions of children's participation rights that lawyers can support in addition to children's views.

*Direct representation for children 10 years and older and best interests representation for children younger than 10 years of age or unable to instruct a lawyer*

The approach to legislating representation of children and young people recommended by the PVVC Inquiry (2012, p.378) holds the strongest likelihood of achieving participation rights for all children and young people, dependent upon application conditions. In summary, the Inquiry recommended all children be recognised as parties to child protection proceedings, consistent with the findings of the VLRC (2010). This would make it clear that the Victorian *Charter* applies to children. Most significantly, the PVVC Inquiry recommended direct representation for children 10 years and older and best interests representation for younger children and those children otherwise not able to give any instructions to a lawyer.

The age threshold of 10 years would be compatible with the age of criminal responsibility in Victoria, thereby setting a consistent approach to the existing responsibilities upon children. Inclusion of a rebuttable presumption for direct representation would account for circumstances where that model was appropriate for a child younger than 10 years old. A rebuttal would apply, for example, if a child held

strong views about a matter that were not the same as the views of their lawyer as to what was in their best interests.

Additional legislative provisions to enable lawyers to perform best interests representation could address some of the barriers identified in this research. Specifically, information-sharing obligations could be strengthened to improve timely access to information for lawyers and cooperation from the Department and parents. This would establish the forensic function of best interests representation in the legislation. An obligation for lawyers to meet with a child represented on a best interests basis, with an exception for exceptional circumstances, would also give a clear duty to facilitate participation and provide justification for the Department and parents to enable children to meet with lawyers.

Many lawyers who participated in my study also supported the Inquiry's recommendations as a fair compromise, although some did prefer to retain direct representation for children based on the previous policy of seven years of age (Horsfall 2013). The Children's Court (2012b) agreed with the PVVC Inquiry recommendations for legal representation of children, and conceded that additional legal aid funding and more specialised lawyers would be needed to represent more children. Commensurate funding would also need to be given to lawyers to reflect additional expenses when performing best interests representation, and in meeting with children and young people off-site from the Court. Additional training for magistrates, judicial officers who conduct formal mediation and Department staff would also be advantageous in responding to participation of children under the proposed expanded provisions for legal representation.

### **Correcting fragmentation in the child protection legal system**

Fragmentation of the current system requires correcting to address misrecognition, misframing of children's participation rights, and injustice in the distribution of care. This research has identified two persistent problems with fragmentation in the child protection system that causes misrepresentation for children and young people. First, solutions to the problems children experience are misframed and dispersed across

multiple legal and administrative structures instead of being centralised at the point at which orders affecting their day-to-day care are made. Second, children do not have consistent access to the status and resources that are necessary to participate across the fragmented structure of the child protection system.

Correcting legal fragmentation is required to improve accountability and oversight to government child protection authorities for the quality of care and safety for children. Improving the problem of siblings being separated and not having regular contact is another benefit of reducing the legal fragmentation problem. Separation of siblings signifies another consequence of unstable care arrangements and breakup of a child's family (Hegar 2005; Shlonsky et al. 2005). There are weak legislative obligations upon the state to ensure siblings remain living together or maintain close contact, and the fragmentation problem restricts the Children's Court from making orders to that effect (2009 VChC 4; Hegar 2005). Two practical measures are recommended: centralising case plan appeals and enabling the Court to attach contact conditions to all protective orders.

*The Victorian Children's Court should be empowered to deal with case plan appeals*

A solution proposed by Masson and Winn Oakley (1999) to address case planning problems in the UK child protection system has merit for the Victorian system. They recommended that children's courts have power to oversee care plans, and that they should receive more information about care plans so as to bring effect to children's interests and views. The VLRC (2010, p.344) inquiry reached a similar recommendation in its review of the Victorian Children's Court, and noted there had been previous calls to review the case planning processes in Victoria.

The Commission considers that it would be highly desirable for the Children's Court to have concurrent jurisdiction in relation to hearing case plan reviews for reasons of both efficiency and accessibility for participants.... There is often substantial overlap between the issues raised in a protection application and those that inform the case plan following a protection order. In such circumstances, it is inefficient and undesirable to force participants to apply to a separate decision-making body for case plan review from the body (the Children's Court) that made the initial protection order.

Putting this recommendation into law would require a small amendment to section 333 of the CYFA, “to permit a child or a child’s parent to apply to the Court for review of a decision in a case plan or any decision made by the Secretary concerning the child” (VLRC 2010, p.344). Additional resources would be necessary for the Children’s Court to hear these appeals, and for Victoria Legal Aid to meet the cost of representation for children (and parents).

*Provision for contact conditions on all types of protective orders*

Enabling the Children’s Court to attach contact conditions to all types of protection orders and applicable for the duration of those orders, including Permanent Care Orders, is another simple legislative change that would reduce the extent of fragmentation in the child protection legal system for children. This would reflect and improve upon the Court’s functions prior to the *Permanent Care and Other Matters Amendment Act 2014* (Vic.), whereby it could regulate the minimum frequency of contact, if any, with a parent, sibling or family member, and provision for any supervision under most types of protective orders and Intervention Orders. This recommendation also accounts for contact conditions as a requirement for children’s safety and children’s emotional ties and identity when maintaining relationships with parents, siblings and other significant family members.

Empowering the Children’s Court to attach contact conditions to all protective orders would make the Court consistent with the operation of the federal *Family Law Act 1975* (Cth). In family law cases, the federal courts can assign parental responsibility to a single party, but still provide contact conditions consistent with what is considered to be in a child’s best interests. Such conditions can provide for minimum contact arrangements, supervision and children’s views to be respected in the absence of agreement between parties. In child protection, this would reflect the Department as having sole parental responsibility, but with the Children’s Court being able to order minimum contact conditions, including supervision with parents, siblings or other significant persons.

However, changes to the Victorian child protection since the completion of fieldwork for this research (dealt with in the following post-script) mean it is unlikely that the government will allow any of these recommendations to reduce fragmentation in the system for children. With this in mind, there are three simple reforms that could be applied immediately to improve the chances of justice for children in the Department's case planning, and to make VCAT appeals.

*Children have access to their lawyer for participation in case-planning or other conferencing with the Department*

First, children and young people could request, and be funded to have, support from their lawyer to participate in case-planning meetings or other decisions that fall under the Department's administrative powers.

Research with children and young people in Australia and internationally about their participation in out-of-home care decisions consistently finds that the experience ranges from mild satisfaction through to disempowerment and no participation (Bessant & Broadley 2014; Bessell 2011, 2015; McDowall 2013; van Bijleveld, Dedding & Bunders-Aelen 2013; Vis & Thomas 2009). McDowall's (2013) survey for the CREATE Foundation report card on out-of-home care in Australia illustrates just how poor the quality of participation within state departments can be for many children and young people. Less than one-third of 1,069 children and young people knew about the existence of their care plan, and far fewer had been involved in care planning decisions (McDowell 2013, p.87). Low levels of attendance and participation in Departmental case meetings were also revealed, and those who did attend reported moderate-to-low ratings of feeling heard (McDowell 2013, p.86).

Having support from their usual lawyer, with whom the child has an established relationship and who knows their case history, would be a practical way to empower their participation outside the Children's Court. Avoiding having to form yet another relationship with a professional, if such advocacy were otherwise to be provided by someone other than his or her lawyer, is an advantage of this recommendation for a child. Legal advice would also ensure the child or young person was appropriately

informed as to their rights and consequences of any decision. This would be a modified version of the negotiation practices that lawyers already perform outside the courtroom when representing children. Access to independent advice and choices about representation would correct participatory parity of children relative to the Department and parents. For example, a child could work out a plan with their lawyer as to how much the child would like to speak and form an agenda of issues concerning him or her.

Permitting children to be supported by their lawyer in this way is consistent with the increasing use of legally-assisted conferencing in the Children's Court, and with inter-professional practices in family law and domestic violence settings (Kaspiew et al. 2012; Kaspiew et al. 2013; Kirby & Laws 2010). This recommendation would also be cost effective for the State to establish, given that accreditation and specialisation are already in place for children's lawyers in Victoria. Proportionate legal aid funding would be necessary.

#### *Support from a lawyer for case plan appeals and VCAT*

Second, children and young people should have ready access to, and funding for, legal assistance to apply for a case plan review to the Department, prepare an appeal at VCAT and have representation for the hearing. This would go some way to correct the power imbalance between children and the Department in making case plan appeals. There is some indication that VLA is looking into making these changes, but funding remains a barrier.

#### *Specialisation of VCAT*

A third reform is to create specialisation within VCAT when hearing child protection case plan appeals. As explained in Chapter Two, VCAT is not a specialised jurisdiction for child protection decisions, and its officers have no expertise in child maltreatment, family violence or child protection law. Importantly, VCAT does not have access to evidence in case files. Nor does it have the expert support of the Children's Court Clinic, to which the Children's Court can refer for independent assessments when



making decisions about care and contact arrangements. Specialisation, including training in family violence, child abuse and out-of-home care standards, would benefit the quality of adjudication and decision-making conducted in VCAT.

### **An independent and effective complaints mechanism**

Victoria does not have a statutory feedback and complaints mechanism for children who experience child protection intervention at any level, including out-of-home care (CREATE Foundation 2010, 2011). This compounds the lack of independent monitoring of the Department's administrative decisions for children on a case-by-case basis.

The former Child Safety Commissioner, now Principal Commissioner for Children and Young People, does not provide individual oversight in child protection cases under the Department's administrative authority. It was only recently that the Commission became an independent body from the Department with broader powers to conduct inquiries relating to the safety or wellbeing of children, and systemic issues in services (*Commission for Children and Young People Act 2012 (Vic.)*). However, the Commission does not have powers, functions, or resources to receive and respond to individual complaints from children and young people (Berry Street 2015).

Doubts remain as to the effective operation of the Commission, and the independence of any inquiry or action the Commission might make in response to problems in out-of-home care (Bessant & Watts 2015; Oakes & Clark 2015). The Commission still reports to the same government minister who presides over the Department responsible for child protection, despite previous recommendations that this ministerial conflict of interest limited the independent scrutiny of the out-of-home care system (VLRC 2010; Victorian Ombudsman 2009, 2010). Furthermore, there is a clause within the *Commission for Children and Young People Act* (s.48) that restricts, and potentially censors, the Commission's investigation and reporting functions if it makes any adverse findings against a person or service (Bessant & Watts 2015). This clause includes the Department and its agencies.

Therefore, two conditions need to be addressed if an independent complaints mechanism for children living in out-of-home care were to come under the responsibility of the Commission for Children and Young people. First, the independence of the Commission and its functions to respond to complaints must be strengthened. For example, the Commission could be moved into the portfolio of the Attorney General, as was recommended by the VLRC (2010, p.421). Second, a dedicated role performed by a person with expertise in children's rights, with appropriate resourcing, could fulfil the functions of a Child Protection Commissioner. This would be similar to, and work in conjunction with, the new Commissioner for Aboriginal Children and Young People, who has specialised functions separate to the Principal Commissioner.

## **Conclusion**

Children's participation rights with legal representation have been found to be important for reaching decisions in the Children's Court that respond to their views and experiences of care with parents or the Department, safety and ongoing contact with parents or other family members. The evidence presented in this research shows how the law and professional practices in child protection legal proceedings construct participation of children and young people to the extent that parity of status and consistent implementation are possible, especially with direct representation. This exemplifies the utility of representation for mediating the relationship between children's best interests and participation rights. The importance of these findings is emphasised, given the potential exclusion of children and young people in decision-making processes about their best interests if they do not have access to legal representation.

The research is also important for understanding how participation with representation can strengthen children's safety when decisions are reached by negotiation outside the courtroom and judicial adjudication. Representation also has been shown to have significant value as a process of participation for children throughout child protection intervention, including when decisions are framed outside of the Children's Court's

powers and rest with the Department. However, the fragmented governance structure of the child protection legal system reflects the institutional powers of bureaucracy, thereby compromising the care and safety requirements of children and young people. This is despite the fact that the system is supposed be child-centred, focused on a child's best interests, and respectful of children's participation. Children and young people frequently enter the Victorian statutory child protection system with traumatic and complex family-life experiences. Unfortunately, the evidence in this research leads to a conclusion that some children and young people also have bleak experiences of care in this child protection system. This represents an injustice for children and young people when the state does not function as an adequate parent after intervening in families. The evidence presented from this research shows that the vulnerabilities experienced by children and young people, of all ages, whether living with their families or in the care of the state, are further justification for implementing their participation rights with representation during child protection proceedings. Even allowing for the limitations identified in this research, it can be understood that the Children's Court and the lawyers representing children were, and continue to be, a final bastion of justice for children and young people living with the consequences of child protection proceedings.

## **Post-Script**

### **Decline of participation rights for children and young people in Victorian child protection proceedings**

Substantial changes have been made to the statutory child protection system in Victoria since fieldwork for this research was completed. These have been the most significant changes in 30 years. Referring to the most substantive of all changes, being those of 2014, Dr Patricia Brown, the Director of the Children's Court Clinic, made the following poignant remarks as part of a public forum to raise awareness of the impact of such changes (Oakes 2015b):

From my perspective, this is the most retrograde development in the protection of children that I've seen for many decades. We could be facing a stolen generation of a different kind, one based on poverty and disadvantage. No-one intervened in time when Aboriginal children were taken. Let there be intervention in this instance.

Between March 2013 and May 2015, amendments to the CYFA have significantly reduced legal representation for children, the participation rights of all children and young people involved in statutory child protection, and the jurisdiction of the Children's Court. Therefore, the importance of the findings from this research is amplified because the legislative changes weaken the strengths and worsen the problems I have documented empirically.

The changes have been promoted as responding to the PVVC Inquiry (2012) so as to speed up Children's Court proceedings and expedite adoption and permanent care. The PVVC Inquiry (2012, p.20) reached its conclusions after extensive investigations, including 225 written submissions and 126 meetings. The government department responsible for child protection made in-confidence submissions and met with the panel. Amongst multiple terms of reference, the PVVC Inquiry (2012), and the preceding VLRC inquiry, investigated alternative approaches to managing child protection intervention without the Children's Court operating in its current form, and whether children should be permitted any type of legal representation. Both inquiries

endorsed the Children's Court despite strong objection to its ongoing operation by the Department and a group of agencies who are funded by the Department (Bessant, Emslie & Watts 2012; PVVC Inquiry 2012; VLRC 2010). Legal representation was also recommended for all children in child protection proceedings. However, the changes to Victoria's child protection system since then have departed from the recommendations of the PVVC Inquiry (2012) in important respects, as this post-script explains.

Three main Bills passed by the Victorian State Parliament are dealt with in this Post-script. Part one discusses the *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013* (Vic.). Part two addresses *The Children, Youth and Families Amendment Act 2013* (Vic.). Part three explains the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic.). All Bills passed through Parliament with bipartisan political support.

### **The Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013**

The *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013* (Vic.) reduced the provision of legal representation for children in child protection proceedings for the first time in 30 years. A presumption of incapacity to instruct a lawyer for children younger than 10 years old was introduced (CYFA s.524(1)(a)). The presumption was designed to override the practice in the Children's Court of children seven years and older, plus or minus one year, being assessed in terms of their capacity to provide instructions. Furthermore, the new limitation on the age of children who can be directly represented did not then mean a concomitant expansion of best interests representation. Rather, the exceptional circumstances criteria remain as the test to be satisfied before the Court will appoint a best interests lawyer for any child under 10 years, or for those who are over 10 years but assessed as unable to give instructions.

The *Justice Legislation Amendment* placed limitations on children and young people's ability to participate with partial instructions under the CYFA. As I have documented

through the ethnography and case file study, partial instructions meant children could instruct their lawyer about one or more, but not necessarily all, the issues being decided in a case. However, the *Justice Legislation Amendment* to the CYFA compels children to give instructions about “the primary issues in dispute” (s.524(1B)(a)). The Act also now contains a prerequisite about “the child’s ability to form and communicate the child’s own views” (s.524(1B)(b)). The *Justice Legislation Amendment* further weakened the obligations on magistrates to ensure children have opportunities for legal representation by allowing the Court to resume a hearing regardless of whether a child entitled to representation has obtained representation (s.524(4)(4A)). Cumulatively, the legal barriers to participation rights for children and young people have been significantly exacerbated and safety of children compromised as a result of the above changes. This will be discussed below.

The findings of this research indicate that the safety of children is likely to be more uncertain without effective, independent legal representation. As well as reproducing a fundamental power imbalance between children and the Department and parents, the lack of legal representation places children in a vulnerable and conflicted position. Children younger than 10 years old are thus effectively silenced, as the only conduits for their views and safety concerns are a parent or a Department child protection practitioner, neither of whom are independent nor bound to put their views in full to the Court.

The requirement that children and young people instruct on the primary matters in dispute potentially increases safety problems for them during child protection proceedings. This condition imposes an expectation that children instruct about matters that do not concern them, or matters they should not be required to deal with, such as satisfying protective grounds about a type of abuse for a protection order. Children withdrawing disclosures about sexual abuse, family violence and physical abuse, which I observed during the ethnography and reported in Chapters Five and Six, demonstrated the negative consequences when the Department and parents, overtly or inadvertently, pressured children to give instructions about protective grounds. This occurred despite the efforts of lawyers to circumvent that conflict, and despite advising children they did not have to instruct about all matters.

A requirement that children instruct about specific issues is not practical for lawyers to implement, and thereby undermines the potential for lawyers to support children and young people. Emphasising adult disputes to justify children's participation with legal representation also positions children unfairly as tiebreakers in a situation where they have little status or control (Rešetar & Emery 2008). Also, compelling children to instruct on primary legal matters in disputes potentially dismisses what issues might be important from a child's perspective. Both the ethnography and case file study documented how children's views can diverge from those of parents and the Department, and can raise different concerns about their safety, care and contact arrangements.

The conditions children now face in Victoria following the *Justice Legislation Amendment* in order to get legal representation meet Archard and Skivenes's (2009, p.10) criteria for judging a child against a standard of competence that most adults would fail:

... ask what kinds of reasons are advanced for doubting the maturity of a child who expresses views, and then ask whether they would also be reasons to doubt that an adult, in comparable circumstances, was competent.

It is unlikely that a parent would be denied instructions-based representation if he or she did not instruct on a matter disputed between the Department and the other parent. Moreover, imposing a vague ideal that a child form and communicate their own views subjects their participation to a higher scrutiny than adults would receive. For instance, the pressure placed on mothers to withdraw family violence allegations against fathers is a comparable situation that does not result in adults requiring best interests representation.

Overall, the *Justice Legislation Amendment* was introduced to overrule the case law for direct representation of children based on maturity and participation with partial instructions, as established by Aisha and Bree's appeal. As I reported in Chapter Five, Aisha and Bree made a successful appeal to the Victorian Supreme Court to have their direct representation reinstated after a magistrate ordered they have best interests representation, despite five months of proceedings and no evidence questioning their capacity to instruct a lawyer (Garde J 2012 VSC 589). The appeal judgment was the

first and only case law about children's legal representation in the history of the Children's Court. The Department's opposition in Aisha and Bree's appeal is consistent with the *Justice Legislation Amendment* generally.

Children who already had direct representation lost their existing participation rights if they had not turned 10 years old when the *Justice Legislation Amendment* received royal assent on 26<sup>th</sup> March, 2013. At least one-third of the 110 total children from my ethnography sample would have been affected in this way. The Government had full knowledge that it was removing legal representation from children who were already participating with a lawyer. This knowledge was conveyed by the Government identifying A and B (Aisha and Bree) as exceptions to the amendment (s.12(3) of the Bill). This meant Aisha and Bree were written into the legislation to stipulate they would not lose their legal representation when other children did, nor lose the right to participate with partial instructions. Victoria Legal Aid also cut eligibility for legal aid to children younger than 10 years old in January 2013, three months before the amendment took effect (Cook & Lee 2013). With the support of the President of the Children's Court, private practitioner lawyers continued to represent children on a pro-bono basis until royal assent prohibited this practice.

Reserve Magistrate Peter Power (2013, para.4.7.9) observed that the changes to children's legal representation "fly in the face" of the Government's own PVVC Inquiry recommendations for all children to have legal representation and be granted party status. As previously discussed in Chapter Nine, the PVVC Inquiry (2012) recommended that children 10 years and older have the right to instruct a lawyer, and all children younger than 10 years old have best interests representation. At the time the *Justice Legislation Amendment* Bill was before Parliament, the Government claimed that the change was to avoid delay in child protection proceedings because of children's legal representation (Parliament of Victoria Legislative Assembly 6th February 2013). The Government argued that the Department could adequately represent children's views, making legal representation unnecessary for young children. The Government also drew upon the UNCRC, Article 12, to argue that the lack of a prescriptive model for participation means that legal representation is not necessary for children's rights. A lack of "logic and reason in abstract decision-making" in children provided further justification for children younger than 10 years old not having legal representation in



the Government's view (Parliament of Victoria Legislative Assembly 6<sup>th</sup> February 2013, p.149).

Notwithstanding the factual inaccuracies in the Government's claims, this governmental approach illustrates how arguments about capacity and generational status can be levied to rationalise denying children participation rights. Similar to the concept of children's best interests being applied in political ways that do not actually benefit children, participation can also be interpreted in a way that fails to ensure appropriate enhancement of children's rights. The proportion of children in the Children's Court without legal representation has increased as a result, thereby bringing savings to the Government's legal aid and departmental budget. This is because almost three-quarters of all new protective orders now apply to children younger than 10 years old, following a rise in Victorian children admitted to child protection orders in 2013-2014 (AIHW 2015, p.86). Legal representation for these children has been cast as inconvenient, an unnecessary luxury that the State of Victoria cannot afford, and of no worthwhile benefit to children or decision-making.

### **The Children, Youth and Families Amendment Act 2013**

The *Children, Youth and Families Amendment Act 2013* (Vic.) formalised restrictions on children and young people attending the Children's Court for child protection proceedings, as well as altering a large number of other parts of the CYFA (not discussed here). In restricting children from attending Court unless they expressed a wish to do so, or where ordered to attend, this legislative change sought to protect children from the Children's Court environment. The Department practitioner thus now has the sole discretion as to whether to inform children and young people of their right to be present and participate at the Children's Court, unless a lawyer has already been appointed who can explain this.

This change has likely further excluded children from participation in the proceedings and increased the gatekeeping of the Department, rather than spending money to improve the child-friendliness of the Court's facilities. Anecdotal feedback from lawyers confirms these problems. For example, the Department still relies on

emergency removal, and the child or young person is not easily available to meet in-person with their lawyer. This disrupts the relationship between lawyers and children, and limits effective participation in the multilateral negotiations that unfold with a hearing, which I documented in Chapter Six. To date, no measures have been taken to improve child-friendly spaces at the Court for children and young people who do insist on attending, for example having a safe space for children to play outdoors, or a private waiting room for children and young people.

### **The Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014**

The *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic.) essentially rewrote the CYFA. It introduced new types of protection orders that give the Department guardianship for all children placed in out-of-home care. It creates a mandatory 12-month time limit on reunification between a child placed in out-of-home care and a parent, extended to 24 months in exceptional circumstances (Family Reunification Orders). However, time in out-of-home care is calculated cumulatively and retrospectively, not consecutively. The *Permanent Care Amendment* also dictates that adoption must be the first preference for all children in out-of-home care, including Aboriginal children. The Victorian Government introduced a small Bill making a minor change to the *Permanent Care Amendment*. The *Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* (Vic.) re-inserts a condition into the CYFA (s.276). This reinstates a requirement that the Children's Court must be satisfied the Department has taken all reasonable steps to provide services in the best interests of a child prior to making a protection order. However, the Bill does not go further to address the fundamental problems in the legislation (Children's Court of Victoria 2015a; see all submissions to Parliament of Victoria Legal and Social Issues Committee 2015).

Fragmentation of the child protection legal system has increased substantially as a result of the *Permanent Care Amendment*. The amendment increased fragmentation in favour of moving further powers to the Department. Under the new protective orders, children

have fewer opportunities to meet with a lawyer over time, to participate with legal representation in a range of decisions about their care and contact arrangements, and to have their out-of-home care periodically reviewed by the Children's Court. In particular, children who have legal representation have *lost* the right to participate with their lawyer in decisions about their contact arrangements and conditions on protective orders, where previously they had this right under Custody to Secretary Orders and Supervised Custody Orders. Those children subject to Custody to Secretary Orders constitute the majority of secondary protection orders for children in out-of-home care in Victoria. The Department now has authority for these decisions and may self-administer periodic reviews.

A reduction in the powers of the Children's Court has occurred in a number of ways through the *Permanent Care Amendment*. The Court is prohibited from making Interim Accommodation Orders in circumstances where it could previously have done so. The Court is also prohibited from determining contact arrangements for children who have been out of a parent's care after 12 months (or 24 months in exceptional circumstances). Furthermore, the Department has gained authority to change some types of orders without the case having to be put before the Court, and where a child or young person could otherwise have participated with their lawyer. Effectively this means that many complex decisions previously made by the independent, specialist magistrates of the Children's Court are now conferred on the Department's child protection practitioners, who are often inexperienced, and are not experts in the careful analysis of evidence and in balancing competing rights. Child protection practitioners may have only a diploma-level education at a minimum.

The substantial changes brought about by the *Permanent Care Amendment* are contrary to the Government's own PVVC Inquiry (2012) recommendations. Specifically, the PVVC Inquiry rejected the Department's preferred model of protective orders and desire to reduce the Court's powers to decide contact arrangements, which are now enshrined in the *Permanent Care Amendment*. The Children's Court has acknowledged that these changes mean it will not be able to make decisions consistent with the circumstances of each individual child and the best interests principles of the CYFA (Children's Court of Victoria 2015a, 2015b). The Court anticipates contested hearings will increase substantially, particularly with parties unable to reach agreements about

care arrangements and conditions on protective orders. The changes also limit the functions of the Court's new Family Drug Treatment Court, particularly without the same range of protection orders that allowed the Court to make conditions for parental drug and alcohol treatment and contact arrangements. These concerns add further doubt about the effectiveness of the legislation for decisions about children's care and safety.

The *Permanent Care Amendment* has been promoted as creating permanency within a shorter timeframe for children who experience out-of-home care. Overlooking the importance of periodic judicial reviews and contact conditions for the safety of children on protection orders, court hearings were characterised by the Department as unwarranted opportunities for reunification when justifying the *Permanent Care Amendment*. The Government claimed a parent should have no more than 12 months to "get their act together", after which permanent care or adoption should be mandated (Parliament of Victoria Legislative Assembly 7th August 2014; Parliament of Victoria Legislative Council 2nd September 2014, p.2777).

However, the actual barriers to permanency – be it with a parent or carer – such as early intervention, stability of out-of-home care and service provision within the Department are not addressed by the new legislation (Bessant & Watts 2015; see submissions to Parliament of Victoria Legal and Social Issues Committee 2015; Victorian Auditor-General's Office 2015). For example, the PVVC Inquiry (2012) assessment shows that timelines for permanency were not simply about court proceedings, but instead dated back to the Department's processes of investigation, timeliness of applications to the Court, service provision to families, case planning, and delay in complying with statutory obligations. Another long-term barrier to adoption and permanent care is that foster and kinship carers have limited access to therapeutic services, financial support and services to supervise and manage contact with birth families when they become permanent carers or adopt (Berry Street 2015; Parliament of Australia 2015; PVVC Inquiry 2012). Furthermore, the new legislative emphasis on adoption undermines familial relationships generally, but most specifically for kinship carers and Aboriginal families. The use of adoption in kinship care disrupts intergenerational relations, such as legally making a child's parent their sibling if adopted by a grandparent. It also replicates previous trauma for Aboriginal families, particularly given the legacy of the Stolen Generation (Cuthbert 2010; Human Rights and Equal Opportunity Commission

1997). These complications are likely the reason why the State of New South Wales prioritised guardianship with kinship care over adoption in its child protection legislation (*Children And Young Persons (Care And Protection) Act 1998* (NSW), s.10A).

Many children and young people are once again becoming Wards of the State as a result of their guardianship transferring to the Department, which was the situation prior to the *Child Welfare Practice and Legislation Review (1982-1984)* (Carney 2015). The Department can place a child under its guardianship for adoption at any time, and apply to dispense with parental consent. Children and young people do not have access to specialised legal representation on a direct or best interests basis to participate in decisions about adoption, because the Department makes these applications to the County Court of Victoria, not the Children's Court. Paradoxically, the increasing fragmentation of the child protection system following the *Permanent Care Amendment* means children's formal participation with legal representation diminishes as statutory intervention intensifies.

Overall, these changes have reduced the separation of powers between the State Legislature and the executive (the Department), even though this is a fundamental democratic and legal principle in Australian law (Bessant & Watts 2015). Such changes are equivalent to the Department of Public Prosecutions being able to change a court order arbitrarily without judicial review in relation to someone convicted of a crime. Furthermore, decision-making and provision of state care is being further removed from judicial accountability and oversight in the Children's Court. Such accountability and oversight is a basis for public confidence in justice systems.

In Chapters Six and Eight, I recorded ethnographic cases and case file judgments where the Court applied its powers to refuse the Department's application for guardianship, ordering gradual reunification or an alternative order instead. In some circumstances the child had been in out-of-home care for longer than a year, already subject to guardianship with the Department, or experienced harm while in out-of-home care. These examples included reunification between parents and children (e.g., Justin, Suzie) and reunification between siblings and their long-term foster carer (e.g., the Green siblings). The Court also refused the Department's application for guardianship in some

instances where the magistrate determined it was not in a child's best interests (e.g. Scott). The more recent cases of the K siblings, who were Aboriginal children reunified with an extended family member (Chapter Eight), and the children whose experiences of sexual abuse in a residential unit were described at the beginning of this thesis (Chapter One), are also examples where the Court exercised these powers. The remedies used in all of those cases to address children's care and safety are no longer available to the Children's Court since the *Permanent Care Amendment*. There are no equivalent alternatives in the legislation to enable the same outcomes to be reached.

Henceforth, the legislative changes stand to increase the vulnerability of children living under the child protection system because of reducing their participation with legal representation and reducing the independent oversight and accountability functions that the Victorian Children's Court provide to parents and the state. Fraser's (2009, p.57) explanation of the growing difficulty to address injustice applies to children who experience child protection proceedings: these are "abnormal times" for growing contestation about justice claims, but at the very time when there are "reduced means for corroborating and redressing injustice".

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## Appendix A

### Types of Protective orders

Table A.1. Presents the types of protective orders available in the CYFA for a child's care and guardianship at the time of fieldwork for this research.

Table A.1. Protective orders for a child's care and guardianship

Order	CYFA	Custody (day-to-day care)	Guardianship (parental responsibility)
Undertaking-Protection Order	s.278	One or both parents or existing guardian	Existing guardianship not effected
Interim Accommodation Order	s.262	One or both parents, existing guardian, or DHS	Existing guardianship not effected
Interim Protection Order	s.291	One or both parents or out-of-home care	Existing guardianship not effected
Supervision Order	s.280	One or both parents or existing guardian	Existing guardianship not effected
Custody to Third Party Order	s.283	Nominated person, other than a parent and not Secretary of DHS	Existing guardianship not effected
Supervised Custody Order	s.284	Nominated person, other than a parent and not Secretary of DHS	Existing guardianship not effected
Custody to Secretary Order	s.287	Secretary of the DHS	Existing guardianship not effected
Guardianship to Secretary Order	s.289	Secretary of the DHS	Secretary of the DHS
Long-term Guardianship to Secretary Order	s.290	Secretary of the DHS	Secretary of the DHS, until 18yrs old
Permanent Care Order	s.321	Nominated person other than a parent and not Secretary of DHS (i.e., carer)	Nominated person other than a parent and not Secretary of DHS (i.e., carer), until 18yrs old

Two additional types of orders made for children in this study did not come under either Interim or Protection Orders (s.275, s.262): Therapeutic Treatment Orders and family violence Intervention Orders.

A Therapeutic Treatment Order (s.249) required a child, aged between 10 and 15 years old, to participate in therapeutic treatment for sexually abusive behaviours. It did not affect custody or guardianship.

The Children's Court could make Intervention Orders under powers derived from the *Family Violence Protection Act 2008* (Vic.) and *Personal Safety Intervention Orders Act 2010* (Vic.) (Power 2013). Intervention Orders functioned to protect victims of family and domestic violence by imposing "prohibitions, restrictions, or other obligations on a person (the respondent)" considered to be the perpetrator (Power 2013). Respondents can include young people less than 18 years of age. Custody of a child may be affected through conditions on an Intervention Order excluding a respondent from the protected persons' residence, including a parent or respondent less than 18 years old (Power 2013).

## **Appendix B**

### **Best Interests Principles of the CYFA (s.10)**

The following extract is of the CYFA (s10) as it applied before the commencement of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic.).

- (1) For the purposes of this Act the best interests of the child must always be paramount.
- (2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.
- (3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—
  - (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;
  - (b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;
  - (c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;

- (d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;
- (e) the effects of cumulative patterns of harm on a child's safety and development;
- (f) the desirability of continuity and stability in the child's care;
- (g) 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;
- (h) if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child, before any other placement option is considered;
- (i) the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;
- (j) the capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child;
- (k) access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child;
- (l) the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;
- (m) where a child with a particular cultural identity is placed in out of home care with a care giver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture;
- (n) the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;

(o) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;

(p) the possible harmful effect of delay in making the decision or taking the action;

(q) the desirability of siblings being placed together when they are placed in out of home care;


(r) any other relevant consideration.



## Appendix C

### Human Research Ethics Approvals

The following attachments are evidence of human research ethics approval granted for the duration of the fieldwork. Annual and completion reports have been submitted to each committee.



**Department of Justice**  
Human Research Ethics Committee

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16 February 2011 Reference: CF/11/1047

Dr Deborah Dempsey  
Swinburne University of Technology

**Re: Children's Voices in Decisions About Their Best Interests: The Children's Court Context**

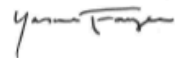
Dear Dr Deb Dempsey,

I am happy to inform you that the Department of Justice Human Research Ethics Committee (JHREC) considered your response to the issues raised in relation to the project *Children's Voices in Decisions About Their Best Interests: The Children's Court Context* and granted **full approval** for the duration of the investigation. The Department of Justice reference number for this project is CF/11/1047. Please note the following requirements:


- To confirm JHREC approval sign the Undertaking form attached and provide both an electronic and hardcopy version within ten business days.
- The JHREC is to be notified immediately of any matter that arises that may affect the conduct or continuation of the approved project.
- You are required to provide an Annual Report every 12 months (if applicable) and to provide a completion report at the end of the project (see the Department of Justice Website for the forms).
- Note that for long term/ongoing projects approval is only granted for three years, after which time a completion report is to be submitted and the project renewed with a new application.
- The Department of Justice would also appreciate receiving copies of any relevant publications, papers, theses, conferences presentations or audiovisual materials that result from this research.
- All future correspondence regarding this project must be sent electronically to [ethics@justice.vic.gov.au](mailto:ethics@justice.vic.gov.au) and include the reference number and the project title. Hard copies of signed documents or original correspondence are to be sent to The Secretary, JHREC, Level 21, 121 Exhibition St, Melbourne, VIC 3000.

If you have any queries regarding this application you are welcome to contact me on (03) 8684 1514 or email: [ethics@justice.vic.gov.au](mailto:ethics@justice.vic.gov.au).

Yours sincerely,



Dr Yasmine Fauzee  
Secretary,  
Department of Justice Human Research Ethics Committee





Swinburne University of Technology  
**Human Research Ethics Committee (SUHREC)**  
**Certificate of Ethics Clearance**

**SUHREC Project 2010/294**

**Children's voices in decisions about their best interests: the Children's Court context**

Chief Investigator/Supervisor: Dr Deborah Dempsey  
Co-Investigator(s): Student Researcher: Ms Briony Horsfall  
Assoc Prof Karen Farquharson  
Dr Rae Kaspiev (Aust Inst Family Studies)

Duration Approved: 22/02/2011 To 14/04/2013

This is to certify that the above project has been given ethics clearance in accordance with the current *National Statement on Ethical Conduct in Human Research*. The standard conditions and any special conditions for on-going ethics clearance are here printed.

All human research activity undertaken under Swinburne auspices must conform to Swinburne and external regulatory standards, including the above-mentioned *National Statement* and with respect to secure data use, retention and disposal.

The named Swinburne Chief Investigator/Supervisor remains responsible for any personnel appointed to or associated with the project being made aware of ethics clearance conditions, including research and consent procedures or instruments approved. Any change in chief investigator/supervisor requires timely notification and SUHREC endorsement.

The above project has been approved as submitted to date for ethical review by or on behalf of SUHREC. Amendments to approved procedures or instruments ordinarily require prior ethical appraisal/clearance. SUHREC must be notified immediately or as soon as possible thereafter of (a) any serious or unexpected adverse effects on participants and any redress measures; (b) proposed changes in protocols; and (c) unforeseen events which might affect continued ethical acceptability of the project.

At a minimum, an annual report on the progress of the project is required as well as at the conclusion (or abandonment) of the project.

A duly authorised external or internal audit of the project may be undertaken at any time.

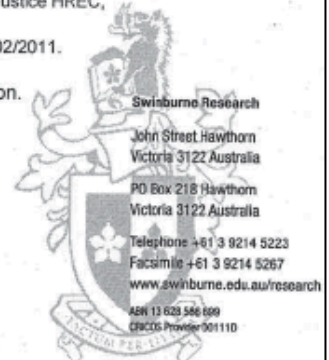
**Additional Note:**

Project subject to separate ethics clearance conditions set by Department of Justice HREC, including monitoring requirements.

See also email clearances issued by Swinburne Research 6/01/2011 and 16/02/2011.

The SUHREC project number and title should be cited in any communication.

  
Keith Wilkins  
Secretary, SUHREC and Research Ethics Officer  
17/02/2011



## **Appendix D**

### **Participant Information and Consent Statements**

#### **Plain Language Information and Consent Statement for Lawyers**



SWINBURNE  
UNIVERSITY OF  
TECHNOLOGY

### **SWINBURNE UNIVERSITY OF TECHNOLOGY**

#### **Information and Consent Statement**

**Project Name:**

Children's Voices in Decisions About Their Best Interests: The Children's Court  
Context

**Investigators:**

Briony Horsfall (PhD candidate in Sociology)

**Supervisors:**

Dr. Deborah Dempsey (Principal Researcher & Principal Supervisor)

Associate Professor Karen Farquharson (Associate Supervisor)

Dr Rae Kaspiew (Associate Supervisor)

### **Introduction to Project and Invitation to Participate in Observation Research:**

Participant observation is the first phase of a two phase ethnographic research project. The research project aims to provide empirical evidence about the meanings of children's 'best interests' and how children's voices feature in child protection proceedings. This research will help improve our understanding of the role of legal representation in facilitating children's participation in child protection proceedings, particularly in relation to the question of how the construction of 'best interests' responds to their views and needs.

The observational research is intended to develop understanding of how the legal representation of children operates in child protection proceedings. The results will also inform the last stage of the research, individual interviews with lawyers.

#### **Project interests:**

This research is being conducted by Briony Horsfall as part of the requirements for completion of a Doctorate of Philosophy in Sociology. This research is being conducted independently. Neither Victoria Legal Aid nor the Children's Court of Victoria has any interests in this project. While these organisations have agreed to support this project by facilitating access to resources and personnel, neither organisation has a direct involvement in the development of the project through provision of funding or influence on methodology.

#### **What your participation will involve**

Your participation will involve allowing Briony to observe your work as a lawyer in the Family Division of the Children's Court of Victoria. Observation may include (but is not limited to) such things as Briony witnessing your preparation of a case, sitting in on meetings, observing discussions with children, accompanying you to the Children's Court and observing proceedings in the Children's Court. The activities to be observed and the period of time for observation are at your discretion.

You can decide if observation of your work with children is appropriate or not on a case-by-case basis. The researcher will respect your decision. A process for recruitment of children to participate in observation has been developed. This involves you initially meeting with the child without Briony present. If you determine that observation may be appropriate, you can explain the following:

“There is a university student working with us at the moment who would like to sit in on our meeting to see us talking together. Her name is Briony. She is interested in learning about what happens when children come to the Court. Briony's project will not have any effect on your case. You can tell her to leave at any time. You don't have to say yes. Would it be ok with you for Briony to

come in and tell you more about what she is doing?”

Should the child refuse, participant observation of the case will be suspended until you are no longer in the company of the child. If the child agrees, you can bring me into the room or otherwise indicate for me to approach you both. A child-friendly Information and Consent Form will be verbally read to the child by the researcher. The child will have time to look at the form and ask any questions they might have. If the child agrees, their verbal agreement will be recorded in Briony’s written field notes by noting the day, time and your presence. Children who agree to participate in the observation will be provided a copy of the Children’s Information and Consent Form and contact details for Kids Helpline.

Participation in this research is voluntary. You have the right to refuse any question asked of you in the course of the research. You can suspend the observation at any time and later resume or discontinue your participation.

With your permission, handwritten notes will be recorded by the researcher and transcribed into a word document.

#### **Participant rights and interests: Risks and benefits**

Participant observation is not intended to interfere with your work, influence events or involve interaction with the children you represent (other than for the purposes of recruitment and consent). If it comes to the attention of the researcher, yourself or the management of Victoria Legal Aid that the research is causing interference with proceedings or otherwise affecting the outcome, this stage of the research will be terminated.

The researchers are aware of their legal obligations under the *Children, Youth and Families Act 2005* section 534 to not identify the particular venue of the Court proceedings, a child or any party to the proceedings and witnesses to proceedings. Every effort will be undertaken to uphold this obligation.

Participation in this research is based on your professional experiences as a lawyer and does not require you to disclose personal or sensitive information about yourself or others. If discussing your experience of a particular case, we ask that you not use names or other identifying information about parties.

If you experience any personal discomfort arising from participation in this research, you can use the following services.

Swinburne University Psychology Clinic: Tel (03) 9214 8653 or email [psychclinic@swin.edu.au](mailto:psychclinic@swin.edu.au) (This is a low-cost counselling service, open to the public and no referral is required).

Lifeline: Tel 13 11 14. This is a free telephone emergency counselling.

There is unlikely to be any significant direct benefit for you from participating in this research. However your experience will be one of working with a genuinely interested listener who values and respects the work that you do. This research may improve the experiences of clients and professionals in the child

protection system.

**Participant rights and interests: Freedom to consent/withdraw from participation**

Participation and disclosure of information in this research is voluntary. You have the right to refuse any question asked of you in the course of the research. You can suspend the observation or discontinue your participation at any time. There are no laws that require you to provide information for the purpose of this research. There are no consequences if you elect not to participate.

In order for your consent to participate in the study to be valid, you will be asked to read the attached **consent statement** and verbally agree to participate. Your agreement will be recorded by the researcher in her written notes, noting the date and time. The researchers have elected to use verbal consent as an additional measure to protect participant confidentiality by not retaining identifiable documentation that connects you to the research.

Upon completion of the observation period, a copy of the transcribed notes will be provided to as soon as possible so you can amend or withdraw any observations made, in part or whole. Should you decide to withdraw part or all of the information, we ask that you do so within two weeks from receipt of the transcript by notifying Briony. After this time, de-identification will be completed to ensure data cannot be attributed to individuals.

**Participant rights and interests: Confidentiality**

The following steps will be taken to ensure all data collected during the course of your participation in the observational research are confidential. The data collected from you will be reported in a way that protects your identity. Any references to personal, identifiable details that might allow someone to guess your identity will be removed. For instance, your name will be replaced by a pseudonym and the names of people you talk about in the interview will be changed. The hand-written notes record during the observational research will be destroyed once they have been transcribed, de-identified and the transcript checked. The original notes will be destroyed in accordance with the Swinburne University Policy and Procedure for Conduct of Research. Transcripts will be stored in a locked cabinet and in a password-protected computer file and they are accessible only to Briony Horsfall and the supervisors of the PhD.

**Research Output:**

The results of this PhD are intended to be published in academic journals and presented at conferences. No participant will be identifiable in the research output. Confidentiality of participants will be upheld at all times.

**Further information about the project: who to contact**

Please retain this consent information statement and your copy of the consent form that you have verbally agreed to.

Should you require any further information, or have any concerns, please do not hesitate to contact the investigators:

Briony Horsfall (PhD candidate): 0438 857515, [bhorsfall@swin.edu.au](mailto:bhorsfall@swin.edu.au) or

Dr Deborah Dempsey (Principal supervisor): (03) 92144374, [ddempsey@swin.edu.au](mailto:ddempsey@swin.edu.au)

This project has been approved by or on behalf of Swinburne's Human Research Ethics Committee (SUHREC) in line with the *National Statement on Ethical Conduct in Human Research*. If you have any concerns or complaints about the conduct of this project, you can contact:

Research Ethics Officer, Swinburne Research (H68),

Swinburne University of Technology, P O Box 218, HAWTHORN VIC 3122.

Tel (03) 9214 5218 or +61 3 9214 5218 or [resethics@swin.edu.au](mailto:resethics@swin.edu.au)

This project has also been approved by the Department of Justice Human Research Ethics Committee (JHREC). If you have any concerns or complaints about the conduct of this project, you can contact:

The Secretary

Department of Justice Human Research Ethics Committee

Level 21, 121 Exhibition Street, MELBOURNE, 3000.

Tel (03) 86841415 or Fax (03) 8684 1525 or [ethics@justice.vic.gov.au](mailto:ethics@justice.vic.gov.au)

## Verbal consent statement for participant observation with lawyers



SWINBURNE  
UNIVERSITY OF  
TECHNOLOGY

SWINBURNE UNIVERSITY OF TECHNOLOGY

### Consent Statement: Participant Observation

#### Project Name:

Children's Voices in Decisions About Their Best Interests: The Children's Court Context

#### Principal Investigators:

Briony Horsfall (PhD candidate in Sociology)

Dr. Deborah Dempsey (Principal Researcher & Principal Supervisor)

1. **I consent to participate in the project named above.** I have been provided a copy of the information and consent statement to which this consent form relates. Any questions I have asked have been answered to my satisfaction.

#### 2. In relation to this project:

- I agree to the participant observation
- I agree to allow the participant observation to be recorded by the researcher



using handwritten notes that will be transcribed into a word document

- I agree to make myself available for further information if required

**3. I acknowledge that:**

- (a) My participation is voluntary and that I am free to withdraw from the project at any time without explanation;
- (b) A copy of the transcribed notes will be provided to me so I can amend or withdraw any information, in part or whole. I will have two weeks from receipt of the transcript to notifying Briony of any changes I wish to make to the information.
- (b) The Swinburne project is for the purpose of research and not for profit;
- (c) I understand that the project may not be of direct benefit to me;
- (d) Any potentially identifiable information about me which is gathered in the course of and as the result of my participating in this project will be (i) collected and retained for the purpose of this project and (ii) accessed and analysed by the researcher(s) for the purpose of conducting this project. The information will be kept for 5 years and then destroyed in accordance with Swinburne Policy requirements; and
- (e) My confidentiality is preserved and I will not be identified in publications or otherwise without my express written consent.

**Having read this document and verbally confirming my agreement I agree to participate in this project.**

## **Verbal Plain Language Statement for participant observation with children and young people**



### **SWINBURNE UNIVERSITY OF TECHNOLOGY**

#### **Information and Consent Statement**

Hello! My name is Briony Horsfall.

I am a student at Swinburne University of Technology. I am doing a project to find out how the Court understands what children need and want and what happens when children come to the Court. I hope this project will help children who come to the Court in the future. When I finish my project it will be a book for my degree called a "PhD". My teacher, Deb Dempsey, helps me with my project.

If you decide you want to take part, this will involve me sitting in on your meeting with your lawyer. During the meeting, I will be sitting quietly and writing in my notebook. You don't have to say or do anything else with me. I will not be asking you any questions. It is ok if you change your mind about taking part after we start. You can

stop by telling me to leave anytime. You don't have to give a reason. Your lawyer can also tell me to leave. Only me, your lawyer and my teacher will see my notebook. I will not speak to anyone about what you say or tell anyone who you are.

This project will not have any effect on what happens in the Court today.

I will give you a card for Kids Helpline. Kids Helpline is a free service that you can call any time of the day or night if you want to talk to someone about something that is worrying you.

Do you have any questions about my project?

Would you like to take part in my project by giving me permission to see your meeting with your lawyer today? You can say yes or no and I will respect your decision.

Copy of Kids Helpline card:



## Appendix E

### Ethnography case form

<b>Observation/Case study:</b>	<b>Case ID</b>
<b>Date &amp; time of first observation:</b>	<b>Fieldwork Book:</b>
<b>Lawyer:</b>	
<b>Example of:</b>	
<b><u>Case information:</u></b>	
Child (c)	Young person (yp)
<b>Age:</b>	
<b>Family configuration &amp; recent history:</b>	
<b>Legal representation:</b>	
<b>Approximate month/year c or yp first subject to child protection proceedings:</b>	
<b>Grounds found proven previously (if any &amp; when):</b>	
<b>Current protective concern &amp; issues:</b>	
<b>Current residential arrangement:</b>	

**Current guardianship arrangement:**

**Current matter in these proceedings:**

**Outcome of these proceedings**

**Grounds proven in this matter (if any):**

**Order/s made:**

**Conditions of order/s noted (if available):**

**Residential arrangement changes:**

**Guardianship changes:**

**Record of observation**

**Subsequent court events &/or observations**

## Appendix F

### De-identified participants and cases

Table F.1 Lawyers who participated in the ethnography

Pseudonym	Solicitor or Barrister	Observed with one or more children	Case study, other participation, or court observation
Adam	Solicitor	X	
Alison	Solicitor	X	
Amanda	Solicitor	X	X
Bianca	Solicitor	X	
Cameron	Barrister		X
Catherine	Solicitor	X	
Claire	Solicitor	X	X
Daniel	Barrister		X
Emma	Solicitor	X	X
Eric	Barrister		X
Heather	Solicitor	X	X
Jane	Solicitor	X	X
John	Solicitor		X
Joshua	Solicitor		X
Julie	Barrister	X	
Kate	Solicitor	X	X
Kelly	Solicitor	X	
Lauren	Solicitor		X
Linda	Barrister	X	X
Louise	Solicitor	X	
Malcolm	Solicitor		X
Maria	Solicitor	X	
Monica	Barrister		X
Natalie	Solicitor	X	X
Natasha	Solicitor	X	

Patrick	Solicitor	X	
Pauline	Solicitor		X
Peter	Solicitor	X	X
Philip	Barrister	X	
Rachel	Solicitor	X	X
Rebecca	Solicitor	X	X
Robert	Solicitor	X	
Shaun	Barrister	X	
Simon	Solicitor		X
Stacey	Solicitor	X	
Stephen	Solicitor		X
Vanessa	Solicitor	X	X

- Total number of lawyers = 37
- Total solicitors = 29
- Total barristers = 8
- Total observed with one or more children = 26
- Total lawyers who contributed a case study, other participation or in a court observation = 23
  - Number of lawyers who only participated via case study, other participation, or observed in court (i.e., not observed with a child) = 11



Table F.2 Children and young people in the ethnography sample

Random Case ID	Pseudonym	N children subject to DHS application	Age group/s	At least one child observed for instructions	Other observation &/or case study*
106	Millie, Paul & Campbell	3	6-9yrs, 6-9yrs, 5yrs & younger		X
134	Emily, Harry & sibling	3	10-13yrs, 6-9yrs, 5yrs & younger	X	
134	Luke & sibling	2	10-13yrs, 6-9yrs	X	
143	Sam	1	14yrs & older	X	
156	Nick & Samantha	2	both 14yrs & older	X	
157	Danielle	1	14yrs & older	X	
159	Charlotte & sibling	2	6-9yrs, 5yrs & younger	X	
166	Erin	1	10-13yrs		X
172	Green siblings: Cooper, Fred, Frances & Jackson	4	2 children 10-13yrs & 2 children 6-9yrs		X
176	Tina, Melissa & sibling	3	both 14yrs & older, sibling 10-13yrs		X
190	Zoe	1	14yrs & older	X	
204	Chloe	1	14yrs & older	X	
219	Isabelle, Travis & Ethan	3	10-13yrs, 2 children 6-9yrs	X	
228	Anna & 3 siblings	4	10-13yrs, 3 siblings 5yrs & younger	X	
229	Connor	1	6-9yrs		X
240	Jessica	1	10-13yrs	X	
248	Thomas	1	10-13yrs	X	
260	Josie	1	14yrs & older	X	
260	Cory	1	14yrs & older	X	
275	Aisha & Bree	2	10-13yrs, 6-9yrs		X
278	Holly & sibling	2	14yrs & older, 5yrs & younger	X	
281	Ryan & 2 siblings	3	10-13yrs, 2 siblings 5yrs &	X	

			younger	
287	Tiffany	1	14yrs & older	X
289	Riley	1	14yrs & older	X
294	Madison, David & sibling	3	10-13yrs, 6-9yrs, sibling 10-13yrs	X
303	Samuel, Jamie & sibling	3	14yrs & older, 10-13yrs, sibling 10-13yrs	X
306	Becca	1	10-13yrs	X
318	William, Sophie & 4 siblings	6	both 6-9yrs, 4 siblings 5yrs & younger	X
327	Sarah	1	14yrs & older	X
328	Meghan	1	6-9yrs	X
330	Mathew, Alice & Jacob	3	10-13yrs, 6-9yrs, 6-9yrs	X
331	Mari, Dean & 3 siblings	5	6-9yrs, 5yrs & younger, 3 siblings 5yrs & younger	X
332	Amber	1	14yrs & older	X
336	Jason & 3 siblings	4	10-13yrs, 1 sibling 6-9yrs, 2 siblings 5yrs & younger	X
340	Tristan, Cody, Lucy, & Phoebe & sibling	5	10-13yrs, 3 siblings 6-9yrs, 1 sibling 14yrs & older	X
343	Brendon	1	14yrs & older	X
351	Brooke & Jay	2	both 6-9yrs	X
352	Joey	1	14yrs & older	X
357	Griffith siblings	4	3 siblings 10- 13yrs, 1 sibling 6-9yrs	X
400	Ben	1	14yrs & older	X
404	Chris	1	10-13yrs	X
429	Amy & Brody	2	both 6-9yrs	X
442	Stephanie	1	14yrs & older	X
442	Jordan, Kayla & Joel	3	all 10-13yrs	X
466	Andy	1	5yrs & younger	X

474	Brittany, Liam & 2 siblings	4	14yrs & older, 10-13yrs, siblings 10- 13yrs, 5yrs & younger	X
490	Tara & 2 siblings	3	6-9yrs, siblings 5yrs & younger	X
494	Carly & 3 siblings	4	6-9yrs, siblings 10-13yrs, 6-9yrs, 5yrs & younger	X
495	Ashleigh & Alex	2	14yrs & older, 6- 9yrs	X
496	Olivia & sibling	2	6-9yrs, 5yrs & younger	X

\*Other observation or case study means the lawyer and child were observed in situations other than for the instructions process, or the case was observed with the lawyer in negotiations, inside court or as a case study only.

Table F.3 Children and young people in the case file sample

Random case number	Pseudonym	N children subject to DHS application	Age group/s	Written decision available
121	Davey, Michelle	2	10-13yrs, 6-9yrs	
128	Debra	1	5yrs & younger	X
135	Elizabeth, Kimberly	2	10-13yrs, 6-9yrs	X
138	Julia, Morris	2	6-9yrs, 5yrs & younger	X
155	Keith, Nina	2	14yrs & older, 10-13yrs	X
160	Ruth, Teresa	2	14yrs & older, 10-13yrs	X
162	Janice	1	5yrs & younger	
195	Jeffery, Joan, Wanda	3	14yrs & older, 2 siblings 10-13yrs	X
224	Flores	1	5yrs & younger	
232	Ross	1	14yrs & older	X
236	Gary	1	10-13yrs	X
245	Jean, Murphy, Christine	3	10-13yrs, 6-9yrs, 5yrs & younger	X
245	Connor*	1	6-9yrs	X
250	Morgan	1	5yrs & younger	X
255	Phyllis, Craig	2	10-13yrs, 6-9yrs	X
259	Bryce	1	5yrs & younger	X
267	Suzie	1	10-13yrs	X
273	Justin	1	14yrs & older	X
278	Laura	1	5yrs & younger	X
280	Collin	1	6-9yrs	
281	Mark	1	6-9yrs	X
288	Douglas & Zara	2	both 5yrs & younger	X
294	Evan	1	5yrs & younger	X
296	Allen, Roger, Luke	3	14yrs & older, 2 sibling 10-13yrs	
299	Edward, Martin	2	both 10-13yrs	X
302	Jeremy, Mitchel, Debbie	3	2 siblings 6-9yrs, younger sibling 5yrs & younger	X
306	Cynthia	1	14yrs & older	X

315	Dorothy	1	6-9yrs	X
315	Josie	1	14yrs & older	X
325	Shirley	1	14yrs & older	
335	Kharla, Eli	2	both 5yrs & younger	
344	Frank, Kathleen	2	both 5yrs & younger	X
351	Ronald	1	5yrs & younger	
354	Kenny	1	5yrs & younger	X
357	Taylor, Billy	2	both 5yrs & younger	X
369	Philip, Richard, Donna	3	14yrs & older, 6-9yrs, 5yrs & younger	
389	Ruby, Lawrence, Jennifer	3	all 5yrs & younger	X
413	Roger	1	5yrs & younger	
420	Marilyn	1	5yrs & younger	X
422	Victor, Lewis	2	6-9yrs, 5yrs & younger	X
424	Wayne, Bryon	2	14yrs & older, 10-13yrs	X
426	Dennis, Annie	2	6-9yrs, 5yrs & younger 14yrs & older, 2 sibling	X
435	Kelly, Clark, Bailey	3	10-13yrs	X
444	Nicole, Stewart	2	6-9yrs, 5yrs & younger	X
447	Parker, Lola, Raymond, Bobby	4	2 siblings 14yrs & older, 2 siblings 10- 13yrs	
452	Steven, Eddie	2	6-9yrs, 5yrs & younger	X
459	Carlos	1	14yrs & older	X
465	Scott	1	10-13yrs	X
475	Lee, Richard	2	both 10-13yrs	X
483	Denise	1	5yrs & younger	X

## **Appendix G**

### **Ethnography and Case File Samples**

#### **Protective concerns and types of child maltreatment**

I recorded the types of child maltreatment alleged in the form of protective grounds nominated by the Department when it made its application to the Children's Court. Protective grounds are treated as allegations at the application stage because they would not yet have been found proven on the balance of probabilities by the Court. Typically the Department's application or subsequent reports also outlined the protective concerns and other relevant events in the family that formed the basis for the types of protective grounds alleged. For example, children's physical harm experienced because of family violence or experiences of emotional abuse attributed to parental alcohol and other substances misuse and mental health problems.

#### **Protective concerns**

Data about protective concerns were available for a maximum of 74 children from the case file sample and 48 ethnography cases.

There were missing data about the protective concerns for 10 children in the case file sample. These children did not have a copy of the written judgement in the file and further information was available from the court file either. These were also duplicate files that did not have copies of original reports. Instead, I relied on information from the court computer system and copies of the order in the file.

Missing data also occurred in two of the 50 ethnography cases. These cases each involved a young person who had been subject to child protection intervention for some years and the original protective concerns could not be located. There was partial data for one of these young people about running away from home but no further data available.

Protective concerns alleged by the Department are collated below in Table G.1. These data represent proportions of children in the case file sample and proportions of ethnography cases. To assist comparisons, only the valid percent is reported to account for different sample sizes and missing data.

Table G.1. Proportions of protective concerns alleged per child in case file sample and per case in ethnography sample

Protective concern alleged	Case file % of total children*	Ethnography % of total cases**
Family violence or domestic violence	77.6	64.5
Mental health of parent/s	69.4	37.5
Alcohol and/or other substance use of parent or carer	60.3	41.7
Parental capacity of parent or carer	60.0	20.8
Child's mental or physical health concern	51.4	37.5
Unstable or unsuitable housing	47.9	16.7
Parent/s not cooperating with DHS	35.7	8.3
Person of concern to have no contact or not be left with child (other than parent)	31.9	12.5
Criminal history of parent or carer	30.2	18.8
Child's schooling or education risk	28.2	20.8
Condition on court order prohibiting hit or hurt child	23.8	18.8
Sexual abuse related harm or risk, or sexualised behaviour concerns for one or more children in family	23.6	22.9
Disability of parent/s	18.8	0.0
Child absconding from residence	13.0	18.4
Child engaging in criminal activity	9.6	10.4

\*N maximum=74 children. \*\*N=48 except 'Child absconding from residence' N=49.

Table G.1 shows family and domestic violence, parental mental health problems, and parental alcohol or substance problems were the three most frequent protective concerns alleged across both samples. Family and domestic violence was most pervasive, affecting almost 78% of children in case files, including up to 83% of those five years and younger, and virtually 65% of families in the ethnography sample. Delfabbro, Fernandez, McCormick, & Ketter (2015) recently reported similar multiple protective concerns in a large sample of case files and caseworker interviews from Tasmania, Victoria, and South Australia ( $N=1,337$ , family violence 58%, parental substance abuse 78%, parental mental health issues 56%).

Additional protective concerns are notable in Table G.1. Concerns about parenting capacity were widespread in the case file sample, including allegations of supervisory neglect. Almost half of all children in the case file sample and eight ethnography cases involved concerns about parents' unstable or unsuitable housing. Sexual abuse related harm or risk for one or more children in a family occurred at a similar frequency in both samples, affecting approximately a quarter of children in the case files and families in the ethnography.

Multiple protective concerns featured for children across both samples, although these featured at a somewhat higher frequency in the case files. However there are two aspects to keep in mind regarding this difference. First, there was often more detailed information available about alleged protective concerns in the case file sample because of my access to reports and written judgements. Second, the higher proportions of multiple protective concerns in the contest sample may be indicative of the greater complexity and contentious character of proceedings that reach a finalised decision. Approximately one-fifth of the case file sample had a history of multiple contests within a three-year period. Not only does the case file sample represent difficult factual or legal disputes and complexity of protective concerns, but also there is an ongoing dynamic of conflict between the Department and some families. This is illustrated in the Department alleging one-third of parents not cooperating in the case file sample. Overall the presence of multiple protective concerns is indicative of the highly complex character of child protection cases more broadly and the increasing complexity of those cases reaching contested proceedings.



## Protective grounds

Table G.2 shows the frequency and proportion of each type of maltreatment alleged as a protective ground by the Department across the case file sample of children and ethnography sample of cases. The valid percent is reported here to assist comparisons between samples.

Table G.2 Frequency and proportion of DHS protective grounds applied per child in case file sample and per case in ethnography sample

Protective ground applied	Case file sample		Ethnography sample	
	Total Children (N=84)	% Children	Total cases (N=48)*	% Cases
Abandonment (a)	3	3.6	2	4.2
Parents dead or incapacitated (b)	1	1.2	2	4.2
Physical abuse (c)	73	86.9	36	75.0
Sexual abuse (d)	14	16.7	6	12.5
Emotional abuse (e)	82	97.6	47	97.9
Physical health or development (neglect) (f)	22	26.2	8	16.7
Total grounds applied	195	-	102	-

\* For N=50 one case Intervention Order against young person and one case Intervention Order against young person with concurrent Interim Accommodation Order but missing application data.

Emotional abuse was alleged for almost all children in both the case file and ethnography samples shown in Table G.2. Physical abuse was the second most frequent protective ground, applied in three-quarters of ethnography cases and just over 85% of children in the contest sample. Applications less frequently concerned physical health or development (neglect) and sexual abuse, while protective grounds of abandonment and parents dead or incapacitated were rare.

The frequencies in each sample mean that the Department usually applied for multiple protective grounds. There were 2.3 types of protective grounds applied on average per child in the case file sample and 2.1 applied per case in the ethnography sample. The pattern of protective grounds applied by the DHS is considerably similar in both samples, providing some confidence when comparing the two different data sets.

Once child protection proceedings have been initiated and the Children's Court deems there is sufficient evidence about protective concerns and grounds for intervention, decisions are then made about where children will live and under what type of order. The next part describes the frequencies of court orders and care arrangements for children.

## **Children's court orders and care arrangements**

### **Children's Court Orders**

In Chapter Two I explained how a range of orders effecting custody (day-to-day care) and guardianship (parental responsibility) were available to the Children's Court under the CYFA at the time of conducting this research (see Appendix A for a definition of each type of order). The court orders for children in this study are reported below in Table G.3. Orders are distinguished before and after the contest decision for children in the case file sample and between the beginning and end of the observation period for children in the ethnography sample. Order status is reported for each child because some children within a family were on different court orders.

Table G.3. Order status of children in case file and ethnography samples

Order status	Case file sample (N=84 children)		Ethnography sample (N=110 children)	
	Before decision	After decision	Beginning observation	End observation
No current order*	1	1	27	8
Interim Accommodation Order	42	9	47	45
Interim Protection Order	0	4	0	1
Supervision Order	6	12	13	23
Supervised Custody Order	2	0	0	0
Custody to Secretary Order	31	47	17	15
Guardianship Order	2	5	4	3
Long-term Guardianship Order	0	1	0	2
Permanent Care Order	0	5	2	5
Undertaking	0	0	0	6
Therapeutic Treatment Order	0	0	0	1
Intervention Order**	n/a	n/a	n/a	23

Proportions not used due to low numbers in more than half of all cells.

\* No current order includes children without any order because of applications made by safe custody in previous 24 hours and because of applications dismissed and withdrawn. \*\*Family violence Intervention Orders available for ethnography sample only. Data on Intervention Orders not available for contest data or beginning of ethnography data due to limitations of the Children's Court LEX computer records system.

For the case file sample, Table G.3 shows half of all children were on an Interim Accommodation Order before the contest decision. Most of these children moved to secondary protection orders as a result of the decision, especially Custody to Secretary Orders for out-of-home care and, to a lesser extent, Supervision Orders with a parent. Custody to Secretary Orders were the most common type of order after the contest decision for 56% of all children in the case file sample. A modest number of children experienced an increase in intervention with the Secretary of DHS (Guardianship Orders) or carers (Permanent Care Order) having parental responsibility.

Table G.3 also shows a quarter of children in the ethnography sample had no current order at the beginning of observation. Interim Accommodation Orders were most frequent for children in the ethnography sample, both at the beginning (43%) and end of observations (41%). The frequencies of no order and Interim Accommodation Orders are a reflection of cases having recently commenced at the time of observation. In terms of secondary orders, somewhat more children were on a Supervision Order to one or both parents at the end (21%) of observations than beginning (12%). Custody to Secretary Orders were the third most frequent type of protection order whereas this was the most common type of order following decisions in the case file sample. The difference in Custody to Secretary Orders in the samples is indicative of the higher level of child protection intervention and complexity of matters in the case file sample than the ethnography sample, as evidenced further when comparing their residential arrangements.

### **Children's care arrangements**

The court orders made under child protection intervention may result in children not residing with one or both parents in the short or long term. Table G.4 presents the proportions of children's main type of care arrangement. Changes in residence are distinguished according to before and after the decision for the case file sample and beginning and end of observation for the ethnography sample.

Table G.4. Proportions of children's types of care arrangements in case file and ethnography samples

Main residence	Case file sample (N=84 children)		Ethnography sample (N=110 children*)	
	Before decision %	After decision %	Beginning observation %	End observation %
<i>One or both parents</i>	21.4	21.4	52.7	61.8
Mother primary carer	66.7	61.1	37.9	60.3
Father primary carer	33.3	33.3	22.4	17.6
Both parents	0	5.6	39.7	22.1
Total one or both parents	100.0	100.0	100.0	100.0
<i>Out-of-home care</i>	78.6	78.6	47.3	38.2
Foster care	59.1	53.0	50.0	52.4
Kinship care – maternal grandparent/s	12.1	12.1	15.4	14.3
Kinship care – paternal grandparent/s	4.5	7.6	5.8	7.1
Kinship care – other family member	12.1	13.7	11.5	16.7
Residential unit	12.1	13.6	13.5	7.1
Secure welfare	0.0	0.0	3.8	2.4
Total out-of-home care	100.0	100.0	100.0	100.0

\*N children used instead of case because siblings within a case could have different residential arrangements.

Table G.4 shows less than a quarter of children resided with one or more parents in the case file sample, both before and after the contest decision. Those children who did reside with a parent were more likely to be with their mother as primary carer (n=12/18). More than three-quarters of all children in the case file sample resided in out-of-home care before and after the decision (n=66/84). Just over half of these

children were placed in foster care and approximately one-third experienced kinship care.

For children and young people in the ethnography sample, Table G.4 shows they were more likely to reside with one or both parents than the contest sample. This was especially evident with an increase in children living with their mother as primary carer at the end of observing. The reason for this increase was because of Intervention Orders against fathers requiring them to no longer reside with children because of family violence allegations (n=21/23 children with an IVO). Half of children who experienced out-of-home care in the ethnography sample were placed in foster care, both before and after observations.

### **Changes in residence**

The overall comparison between residence arrangements before and after in the case file sample and beginning and end of the ethnography sample does not capture changes experienced by individual children. The stability of residence before and after the contest decision is notable for children in the case file sample. Eighty-two percent of children stayed in the same residential arrangement (parental care or out-of-home care). This meant only 15 out of 84 had any residential changes associated with the outcome of the decisions, including moving between separated parents and changing types of out-of-home care.

Compared to the single contest decision, decision Ethnography cases were tracked for up to eight months each, meaning there was greater opportunity to observe changes in care occurring over time. Children and young people in the ethnography sample experienced markedly more residential moves over time. Almost half of all children and young people in the ethnography sample (n=54, 49%) experienced one or more changes in residence, averaging 1.7 changes per child. In terms of types of residence, these changes were:

- 27 children entering out-of-home care at least once (including overnight emergency removal by the Department);

- 24 children exiting out-of-home care and returning to live with one or both parents;
- 27 children who resided in out-of-home care having more than one placement type under the administration of the Department; and
- 21 children in the primary care of their mother when their father was ordered out of the home because of an IVO.

### **Sibling residential arrangements**

Both sets of data were examined for patterns of sibling residence. The reference child used for the analyses was the eldest child in the sibling group for the case file data (N=50 families) and the eldest child observed in the ethnography data (N=50 families). Excluded from sibling analyses were families with only one child (n=8 case file sample, n=15 ethnography sample) and missing data (n=2 case file sample, n=1 ethnography data).

There was a high level of separation of siblings, especially for children and young people in the case file sample. Eighty-percent of eldest children in the case file sample and just over one-third of eldest children in the ethnography sample were separated from one or more siblings.

### **Contested matters in the case file sample**

Additional data were available for the case file sample about contested matters between the Department and parents and children. These matters covered the type and length of order the Department applied for and contact arrangements ordered by the magistrate.

### **Type and length of protection order**

The type of order made by the magistrate was consistent with the Department's application for 91% of children in the contest sample. Therefore, the Court grants the Department's application in the large majority of cases.

The length of order proposed by the Department was a contested matter in over a quarter of the case file sample; the second most frequent matter contested after access time between parents and children who did not reside together. The Department's tendency to seek the longest possible length of time on an order was an underlying pattern, with magistrates then determining an appropriate order length according to what he or she decided was in the best interests of the child. The length of the order was equivalent to the Department's application for 76% of children. When it was shorter than the DHS application, the time tended to be a compromise of less than the DHS application but longer than the parents' position (n=11 children), rather than equivalent to the parents' application (n=1 child).

### **Contact arrangements between parents and children**

Children's residential arrangements indicated they were separated from one or both parents either because they lived in out-of-home care (n=66/84) or resided with one parent as primary caregiver (n=17). Just one young person experienced reunification as a result of the contest decision with both parents who were together.

Contested contact arrangements between the Department, non-resident parents, and children were complex to draw out clearly from the data. The language on court orders varied broadly, specifying the number of occasions per week, fortnight, month or year, to number of hours, simply "as agreed" between parties, or no contact provisions because the Department held guardianship for a child. Although it means there is missing data, this reflects the necessity of arrangements being ordered by the court according to each individual child's case. Consequently, to facilitate the data analysis, contact arrangements were categorised as seeking an increase, the same, or reduction in time with the parents' position as the point of reference compared to the Department.



Contact was the most frequent matter contested between parents and the Department. Contact time was contested by around half of parents who were parties to the proceedings (49% of mothers, 52% fathers). Parents were usually seeking an increase in contact or opposing DHS plans to reduce contact. Instating, continuing or removing supervision of access was a secondary matter contested (21% mothers, 30% fathers).

Table G.5 shows the outcome for contact conditions ordered following the contest hearing.

Table G.5. Case file sample contact time outcomes for mothers and fathers

Contact time	Mothers		Fathers	
	n	%	n	%
Reduced	23	44.2	18	39.1
Kept the same	15	28.8	22	47.8
Increased	14	26.9	6	13.0
Total children*	52	100.0	46	100.0

\*Valid percent to account for missing data. Missing data: n=16 children for mothers, n=10 for fathers. Not applicable: n=16 children for mothers, n=28 children for fathers.

Even though a slightly larger proportion of children had contact time reduced with mothers than with fathers, their time with mothers was somewhat more likely to increase overall. In contrast, contact time with fathers remained the same for almost half of all children.

A comparison is shown in Table G.6 between the outcome for children's contact time and the Department position recorded in the magistrate's written judgment, where this information was available.

Table G.6. Case file sample contact time outcomes compared to DHS position

Decision compared to DHS position	Mothers		Fathers	
	n	%	n	%
Equivalent to DHS position	20	44.4	20	58.8
Reduced but not by as much as DHS position	7	15.6	3	8.8
Kept the same or increased (more than DHS position)	18	40.0	11	32.4
Total children*	45	100.0	34	100.0

\*Valid percent. Missing data: n=23 children for mothers, n=18 for fathers. Not applicable: n=16 children for mothers, n=28 children for fathers.

Accounting for relative proportions, the overall outcome of contact time was most frequently the same as the Department's position and somewhat more so for children's contact with fathers than mothers.

Supervision is a safety condition of contact between some parents and children. The outcomes for supervision of contact from the case file decisions are presented in Table G.7, accounting for all children where data were available and includes where supervision was agreed by consent between the Department and parents.

Table G.7: Case file sample supervision of contact outcome for mothers and fathers

Supervision of contact after decision	Mothers		Fathers	
	n	%	n	%
Instated	2	3.8	6	15.4
Continued	31	59.6	25	64.1
Not instated	13	25.0	5	12.8
Removed	6	11.5	3	7.7
Total*	52	100.0	39	100.0

\* Valid percent. Missing data for children: n=6 mothers, n=7 fathers. Not applicable for children: n=26 mothers, n=38 fathers. Totals may not equal 100% due to rounding.

Supervision of contact was considerably high across the contest sample. It was often instated or continued with fathers, cumulatively affecting up to 80% of the 39 children for whom data were available. More than half of the children had supervised contact instated or continuing with their mothers (63%, n=33/52). It was rare for supervision to be removed as a result of the magistrate's decision.

## List of publications produced from the research

### *Journal articles (peer reviewed)*

Horsfall, B. (2013). Breathing Life Into Children's Participation: Empirical Observations of Lawyer-Child Relations in Child Protection Proceedings, *New Zealand Law Review*, 3, 429-444.

### *Journal Articles (non-peer reviewed)*

Horsfall, B. (2016) Current status of children's participation rights in child protection proceedings, Victoria, Australia, *IAYFJM Chronicle* (Journal of the International Association of Youth and Family Judges and Magistrates, with English, French, and Spanish translations).

### *Conference papers*

Horsfall, B. (2015). Redistributing care from the perspectives of children and young people and their (mis)recognition by magistrates in contested child protection cases, *12<sup>th</sup> Conference of the European Sociology Association 2015*, Prague, 25-28 August.

Horsfall, B. (2013). "A lawyer is an angel with wings and fists for fighting": Legal Representation and Children's Participation Rights in Child Protection Proceedings, *Listening to Children's Voices Symposium*, 25th March 2013, University of Auckland, New Zealand.

Horsfall, B. (2013). "A lawyer is an angel with wings and fists for fighting": Legal Representation and Children's Participation Rights in Child Protection Proceedings, *World Congress on Family Law and Children's Rights*, 17-20th March 2013, Sydney.

Horsfall, B. (2012). "A lawyer is an angel with wings and fists for fighting": Lawyers representing children and young people in child protection proceedings in Victoria, *Australian Institute of Family Studies Bi-Annual Conference*, 25-27th July 2012, Melbourne.

Horsfall, B. (2011). The United Nations Convention on the Rights of the Child: Children's best interests in child protection proceedings, *Child Protection in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference for the Australian Institute of Judicial Administration*, 5 – 7 May 2011, Brisbane.