

Achieving safe and certain homes for children

Recommendations to improve the permanency amendments to the *Children, Youth and Families Act 2005* based on the experience of our clients

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Written requests should be directed to Victoria Legal Aid, Strategic Communications, 570 Bourke St, Melbourne Vic 3000.

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Victoria Legal Aid operates on Aboriginal country throughout Victoria; we acknowledge the traditional custodians of the land and respect their continuing connections to land, sea and community. We pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of all First Nations people who today are still involved in the child protection system at rates far higher than other Australians.

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About Victoria Legal Aid

Victoria Legal Aid (VLA) is a Victorian statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018-19, VLA provided assistance to over 100,000 unique clients from our 14 offices across Victoria. Our clients are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds.

VLA provides:

- Free legal information through our website, our Legal Help line, community legal education, publications and other resources.
- Legal advice through our Legal Help telephone line and free clinics on specific legal issues.
- Grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer.
- Support to people in the mental health system through non-legal advocates in the Independent Mental Health Advocacy service.
- Support to people in the early stages of child protection involvement through non-legal advocates in our pilot Independent Family Advocacy and Support service.
- Family dispute resolution services to help families make decisions about family law disputes away from court.
- Funding to 43 community legal centres, Djirra, the Victorian Aboriginal Legal Service and the Federation of Community Legal Centres, and support for the operation of the community legal sector.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account.

Our child protection practice

VLA has a significant presence in the Family Division of the Children's Court, providing legal advice and representation services to Victorians who are involved in matters before the court. VLA's Child Protection Program is the largest within VLA's Family, Youth and Children's Law Directorate. Through our practice, VLA continues to see an increase in demand for child protection legal assistance across Victoria:

- Child protection duty lawyer services have increased by 30 percent from 2016-17 to the 2018-19 financial year.
- Grants of assistance to child protection clients totalled 9,626 in 2018-19, an increase of 8 percent on the previous year.
- Protection applications (both primary and secondary) in the Children's Court totalled 18,722 in 2018-19, more than 6 percent higher than the previous year, and over 25 percent higher than four years earlier.

Executive Summary

In August 2014, the Victorian Government passed the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014* (**the permanency amendments**) in an effort to ensure that decisions about the care of children are made in a timely way, and that decisions promote permanency of care.

Four years since the permanency amendments came into effect, Victoria Legal Aid (**VLA**) has undertaken a comprehensive review of our data to understand the impact of the permanency amendments for our clients.

VLA has a significant presence in the Family Division of the Children's Court (**court**), providing legal advice and representation services to Victorians who are involved in matters before the court. In 2018-19, VLA provided 9,626 grants of assistance to child protection clients.

This report makes five key findings showing that the intention of the amendments – timely, safe, permanent homes for children who need state intervention and prompt support for families at risk – are not being achieved. It also finds that necessary public health measures responding to the COVID-19 pandemic have exacerbated existing challenges for parents seeking reunification with their children.

We make four overarching recommendations and most urgently call for an amendment to the reunification timeframes to provide the court with greater discretion to make reunification decisions including but not only for delays caused by COVID-19 service reduction or hearing delays and in the best interests of the child recognised in the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020*.

VLA has been engaging in the government's longitudinal study into the impacts of the permanency amendments. We have prepared this report to contribute to the important public policy discussion on the legislative, policy, practice and resourcing changes necessary to

enable the amendments to operate in a way that will provide the best outcomes for children and not unfairly disadvantage families.

Key Findings

Permanency in law is not the same as a permanent home

The permanency amendments are not achieving their objective of certain, permanent homes as quickly as possible for children in the child protection system. Four years since the amendments were introduced, there has only been a slight increase, at best, in the use of child protection orders that place children on a pathway to remaining or returning to the care of their parents or, for those children who cannot be safely cared for at home, facilitate a permanent care arrangement as soon as practicable.

At the same time, there has been an increase of approximately 50 percent in the proportion of care by Secretary orders made despite this being the least certain and permanent outcome for a child.

Rigid timeframes may prevent family reunification, contrary to the intent of the legislation and best interests of the child

The limited time family reunification orders place on a parent to address protective concerns (refer to page 10 for further details) and be reunified with a child is not working as intended to minimise the time that a child is in out-of-home care, and may be unfairly penalising parents for circumstances outside of their control.

Where parents are provided with early and ongoing support from child protection practitioners, we see consistently better

outcomes for children and families. However, in our experience, long wait times, costs, limited services near to a parent's home or lack of other services such as public housing are causing significant barriers to parents addressing protective concerns within the timeframe.

For parents who may need additional or more intensive supports – such as those with a disability, experiencing a mental health issue or family violence – a lack of availability, delay or challenge in accessing services can be more acute and our data shows they are at an increased risk of having their children removed from their care.

Initiatives that support connection to community and culture are showing positive results, where complied with, but Aboriginal and Torres Strait Islander families remain overrepresented

Where used and complied with, new initiatives and legislative amendments including the requirement to adhere to existing initiatives aimed at improving connection to community and culture, provide culturally appropriate court processes that facilitate greater family participation and support the right to self-determination are contributing to improved outcomes for Aboriginal and Torres Strait Islander children. Four years later, the proportion of Aboriginal and Torres Strait Islander children in out-of-home care has reduced by approximately 14 percent. However, Aboriginal and Torres Strait Islander children remain over-represented in the child protection system and including on care by Secretary orders.

For the period 2016-2020, of all final orders made, the proportion of Aboriginal and Torres Strait Islander children on care by Secretary orders was an average of 22 percent compared to an average of 17 percent of non-Indigenous children on the same order.

At the same time, significant delays in the planning and finalisation of cultural support

plans is contributing to connection to culture and community for Aboriginal and Torres Strait Islander children being impeded.

Reduced court oversight limits opportunity for review of decisions to ensure they are in the best interests of the child

The court's reduced level of decision-making oversight and discretion as a result of the permanency amendments may be leading to outcomes that are not always in the best interests of the child and inadvertently prolonging court proceedings.

We see examples where children would benefit from maintaining an ongoing relationship with their parents despite living in out-of-home care but the court is unable to make conditions on protection orders to support this if the child is unlikely to be reunified with their parents.

A child can also be moved between different placements on several order types without any independent court oversight of the frequency or reason that a child is being moved. Recent reports¹ have shown that some children are at more risk than others of experiencing placement changes, causing significant and potentially ongoing instability and uncertainty in their lives.

While administrative review avenues were introduced to provide children and families the opportunity to seek case plan reviews of decisions made by Department of Health and Human Services (**DHHS**), we have observed a lack of clarity about the process for conducting a review and obligation for DHHS to do so when there are concurrent court proceedings, uncertainty about the length of time before an outcome to an internal review should be provided and whether VCAT has jurisdiction to conduct an external review before, or if, an internal review has not been completed (but significant time has lapsed since the internal review was sought).

¹ Sentencing Advisory Council 2019, 'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 1: Children who are known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court, accessed 13 September 2020 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf> 69- 72.

COVID-19 has exacerbated existing challenges to family reunification

At time of writing, it has been over six months since Victorians have experienced a range of public health measures responding to COVID-19. VLA's experience indicates that there are many parents for whom existing challenges to meeting reunification such as barriers to service access and availability have been exacerbated. Families are experiencing reduced or temporary cessation of services, restrictions on movement and social distancing measures preventing face-to-face contact with children, and court adjournments and backlog.

We are pleased to see the government's recognition of the risk COVID-19 measures present for many parents to meet reunification timeframes in the extension of the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020*.² However, we are concerned that this amendment only allows for a maximum of six months longer on a family reunification order, when service reduction and delays in court hearings have already affected families for six months and are likely to continue to do so for some time yet.

Further, COVID-19 has highlighted an existing challenge with the rigidity of the current timeframes. We continue to encourage the government to amend the timeframes for exceptional circumstances, including but not only for delays caused by COVID-19 service reduction or hearing delays and where it is in the best interests of the child.

What is this report about?

In August 2014, the Victorian Government passed the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014*. The permanency amendments introduced a range of changes to simplify court orders, focus the role of the court on a narrower range of matters, and to strengthen case planning processes.³ The intended objective of these changes was to ensure that decisions about the care of children are made in a timely way, and that decisions promote permanency of care.

The permanency amendments responded to findings made by the Protecting Victoria's Vulnerable Children Inquiry⁴ and the Stability Planning and Permanent Care Project⁵ undertaken by the DHHS. Both reviews found permanent care arrangements for children and young people were taking too long to achieve and there needed to be changes to policy, practice, and legislation to mitigate barriers to achieving permanency for children. Both reviews recommended the introduction of a new set of protection orders, and improvements to support and planning for Aboriginal and Torres Strait Islander children and families involved in the child protection system. The Stability Planning and Permanent Care Project also recommended that a time-limit was placed on family reunification.⁶

The former Minister for Community Services, the Hon. Mary Wooldridge, in her second reading speech for the permanency amendments, outlined the objectives of the permanency amendments:

2 COVID-19 Omnibus (Emergency Measures) and other Acts Amendment Act 2020, accessed 21 September 2020 <https://content.legislation.vic.gov.au/sites/default/files/bills/591238bi1.pdf>

3 The Commission for Children and Young People 2017 '...safe and wanted...: Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014' accessed on 20 March 2020 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/201712/Safe%20and%20wanted%20inquiry%20into%20permanency%20arrangements%20report%20June%202017.pdf>> 37.

4 The Honourable Phillip Cummins, Emeritus Professor Dorothy Scott OAM and Mr Bill Scales, published by the Department of Premier and Cabinet 2012 'Report of the Protecting Victoria's Vulnerable Children Inquiry' accessed on 11 September 2020 <<http://childprotectioninquiry.vic.gov.au/images/stories/inquiry/consolidated%20%20protecting%20victorias%20vulnerable%20children%20inquiry%20report%2027%20january%202012.pdf>>.

5 The Department of Health and Human Services 2014 'Stability Planning and Permanent Care Project 2013-14' (Final Report) accessed on 11 September 2020 <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Children_Youth_Families_Bill/Stability-planning-and-permanent-care-project-2013-14.pdf>.

6 CCYP 2017, '...safe and wanted...': Inquiry (n3) 37-38.

*'care arrangements for vulnerable children need to be settled as quickly as possible. Ideally, permanency will be provided by the child's own parents. Where this is not possible, within a reasonable timeframe, it is critical for the child's stability that an alternate permanent carer is identified to care for them until adulthood, while maintaining the child's relationship and connection with their birth family and culture.'*⁷

The permanency amendments came into effect on 1 March 2016. Throughout the drafting process of the amendments, concerns were raised by stakeholders about the short timeframe in which the amendments were drafted and passed, limiting the extent and depth of consultation. Stakeholders, including VLA, also expressed concerns about the fairness of some of the amendments such as the introduction of reunification timeframes and the reduction of court oversight.

Shortly after the amendments were introduced, a changed Government requested that the Commission for Children and Young People (CCYP) conduct a review to ascertain whether the amendments were meeting their intended objectives and if there had been any unintended consequences arising from the reforms. This review was conducted six months after the amendments were introduced.

In VLA's submission to the CCYP review we expressed support for the objectives of the permanency amendments in principle but expressed concerns about how the provisions could impact on fairness and outcomes.⁸ Our submission included an assessment of the impact of the permanency amendments on our clients in the first six months of operation. At that early stage, it was difficult to assess the full impacts that the amendments were having

on outcomes for clients. We recommended that a further review of the amendments be conducted after 24 months of operation. CCYP in their final report also recommended a detailed review of the amendments be conducted in 24 months.

In response, the Victorian Government funded a two-year longitudinal study to understand the impacts of the permanency amendments on child protection practices.⁹ This study is now nearing completion and a final report containing recommendations is due to be delivered to DHHS in early 2021.

Four years on, we have undertaken a comprehensive review of VLA data to understand the impact of the permanency amendments for our clients.

Methodology

We analysed the data of all legally-aided child protection grant files from 2014-15 to 2019-20, including where we represented children and where we represented parents. We looked at substantive grants of aid issued for primary and secondary applications, in-house and private practitioner duty lawyer services (grouped by application type). To understand client experiences pre-amendments, we analysed the average length of a grant file from first approval to closure of the file, file outcomes recorded at the closure of the grant file, and the relationship of the grant applicant to the child and child protection grant extensions. We also looked at the correlation between client demographics such as whether a client identifies as Aboriginal and Torres Strait Islander, has a disability, is experiencing a mental health issue, family violence or homelessness.

Where possible, we verified our data and findings with the Children's Court 2014-2019

7 Ibid.

8 Victoria Legal Aid 2016 'Submission to the CCYP Child Protection Permanency Amendments Inquiry' accessed on 20 Feb 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/submission-to-the-child-protection-permanency-amendments-inquiry.docx>>.

9 Department of Health and Human Services 2018 'safe and wanted – an inquiry into the implementation of the permanency arrangements' (webpage) accessed on 10 August 2020 <<https://www.dhhs.vic.gov.au/publications/safe-and-wanted-inquiry-implementation-permanency-arrangements>>.

annual reports,¹⁰ DHHS quarterly reporting,¹¹ and findings of CCYP Inquiries: In our own words, Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system (2019) and Safe and Wanted – an inquiry into the implementation of the permanency arrangements (2014).¹²

We also conducted interviews with VLA lawyers to hear their reflections on the effect of the permanency amendments and whether our data reflected their clients' experiences. We have included several individual client experiences throughout this report.

A note on our data

The data used in this report has been de-identified and cannot be used to determine the outcomes of individual legal matters. Unless otherwise specified, all data is presented by financial year.

Limitations to our data:

- Our data reflects file outcomes recorded at the close of a grant of aid file. This does not reflect the final order or outcome of a child protection legal matter. It reflects the order that was in place when a legal aid lawyer

closed the grant file.

- There can be multiple grants of aid provided for one legal matter (for example, if there are multiple clients involved in the proceedings or if there is a secondary application made), therefore each VLA grant does not represent one legal matter, this can result in our data showing a higher overall number of legal matters than would have been concluded by the court in a year.
- There are limitations to our ability to draw conclusions on the length of a child's legal proceedings or to differentiate how long children, on average, are spending in out-of-home care on any one order because our data is based on close of grant file.
- Our data on client demographics is dependent on a client disclosing this information, thus it is likely to be under-reported.

Client stories used in this report

Client consent has been obtained to include each client story. Given this, client stories featured throughout this submission may not reflect the full diversity of clients that VLA

10 Children's Court of Victoria 2015 'Annual Report 2014-2015' accessed on 13 September 2020 https://www.childrenscourt.vic.gov.au/sites/default/files/LIQ4183%20-%20CCV%20-%20Annual%20Report%202014-15%20%28Web%20Ready%29_R2.pdf.

Children's Court of Victoria 2016 'Annual Report 2015-2016' accessed on 13 September 2020 <<https://www.childrenscourt.vic.gov.au/sites/default/files/Children%27s%20Court%20Annual%20Report%202015-2016.pdf>>.

Children's Court of Victoria 2017 'Annual Report 2016-2017' accessed on 13 September 2020 <<https://www.childrenscourt.vic.gov.au/sites/default/files/Annual%20Report%202016%202017%20%28web%29.pdf>>.

Children's Court of Victoria 2018 'Annual Report 2017-2018' accessed on 13 September 2020 <https://www.childrenscourt.vic.gov.au/sites/default/files/Childrens%20Court%20of%20Victoria%20Annual%20Report_%C6%92_WEB%20%28final%29.pdf>

and Children's Court of Victoria 2018 'Annual Report 2018-2019' accessed on 13 September 2020 <https://www.childrenscourt.vic.gov.au/sites/default/files/191114%20Childrens%20Court%20of%20Victoria%20Annual%20Report%20A4%202018_19_WEB.pdf>.

11 Department of Health and Human Services 2020 'Child Protection and Family Services quarterly incident reporting data 2015-2016 to 2019-2020' accessed on 13 September 2020 <<https://www.dhhs.vic.gov.au/publications/quarterly-incident-data>>.

12 Commission for Children and Young People 2017 '...safe and wanted...: Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014' accessed on 20 March 2020 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/201712/Safe%20and%20wanted%20inquiry%20into%20permanency%20arrangements%20report%20June%202017.pdf>>

Commission for Children and Young People 2019 'In our own words: systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system' accessed on 20 March 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf>>

Commission for Children and Young People 2016 'Always was always will be Koori children: systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria' accessed on 13 September 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>>

and Commission for Children and Young People 2016 'In the Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria' accessed on 13 September 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf>>.

provides services to. The material procedural aspects have been retained for the client story however to protect clients' anonymity, names have been changed and other identifying details including age, gender or location may have been changed.

A note on language used in this report

- We have used 'children' throughout the report to refer to children and young people under 18 years of age.
- Where talking about Aboriginal and Torres Strait Islander people we have occasionally used 'Aboriginal' or 'Indigenous' including where we cite a report or quotation from another source.

What were the permanency amendments?

The permanency amendments introduced significant changes to the *Children, Youth and Families Act 2005* including:

Changes to the best interests principles

- One of the considerations that informs what is in the 'best interests' of the child (the paramount consideration for decision-makers such as the DHHS and the court under the legislation) is to consider 'continuity and permanency' in the child's care instead of 'continuity and stability'.

Earlier case planning

- It is a requirement that a case plan must be prepared for all children identified as needing protection at the point of substantiation (previously a case plan did not need to be prepared unless and until after a final court order was made). A case plan sets out the objective of the DHHS intervention and significant decisions made or intended for the care and wellbeing of the child, including where the child will live and who will have contact with the child.

Introduction of a hierarchy of permanency

- All case plans must include a permanency objective to be considered in the following order of preference, depending on the best interests of the child: family preservation; family reunification; adoption; permanent care; long-term out-of-home care.

Aboriginal and Torres Strait Islander children

- The DHHS must provide all Aboriginal and Torres Strait Islander children placed in out-of-home care with a cultural support plan that aligns with their case plan.
- Case plans are required to reflect and be consistent with the child's cultural support needs, maintain and develop the child's Aboriginal and Torres Strait Islander identity, and encourage the child's connection to their Aboriginal community and culture.
- A permanent care order for an Aboriginal and Torres Strait Islander child cannot be made unless a cultural support plan has been prepared.

Removal of orders

- Removal of the court's powers to make interim protection orders, supervised custody orders and custody to third party orders.

Language changes made to the *Children, Youth and Families Act 2005*

- Replacement of the language of 'custody' and 'guardianship' throughout the *Children, Youth and Families Act 2005* with 'parental responsibility.'

See also Appendix A for a glossary of changes to protection orders that were introduced to the *Children, Youth and Families Act 2005* by the permanency amendments.

Findings

Finding One: Permanency in law is not the same as a permanent home

The introduction of a hierarchy of permanency sought to support the objective of children staying or returning safely and securely to the family home in the shortest possible time or providing certainty and long-term permanency for children and young people in out-of-home care.

For the permanency amendments to be achieving the intended objective four years on, VLA would expect to see a combination of the following:

- an increase in the proportion of family preservation orders to suggest more children are remaining with their parents; or
- an increase in the proportion of family reunification orders to give children the best prospect of being reunified with their parents at the end of a family reunification order; or
- an increase in the proportion of children in out-of-home care on long term or permanent care orders.

Were the above occurring we would therefore expect to see sparing use of orders such as care by Secretary orders and a decrease in the length of time a child spends on a care by Secretary order because such an order provides children with the least certainty and permanency.

What our data tells us:

Our data shows mixed results since the introduction of the amendments. Family preservation orders have increased slightly to 50 percent of all orders made (graph 1) while the proportion of family reunification orders

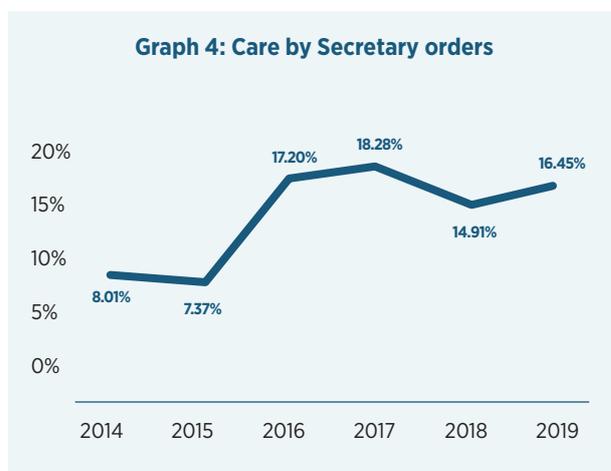
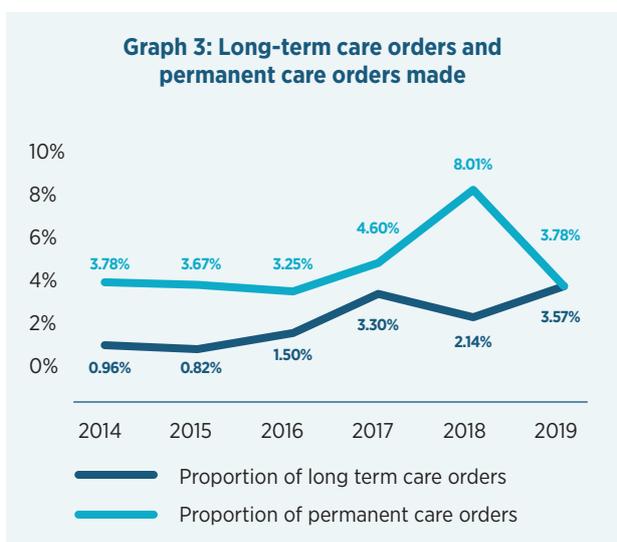
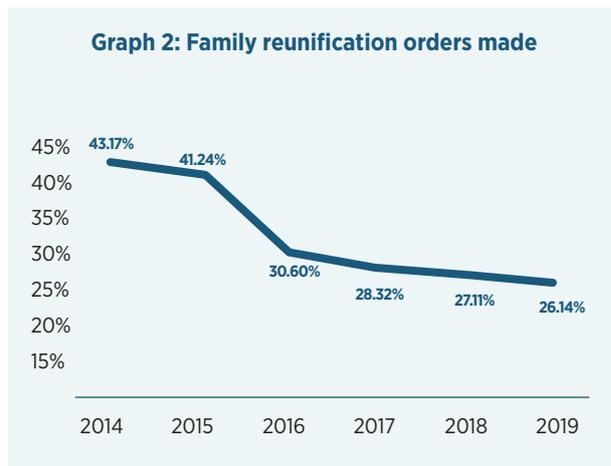
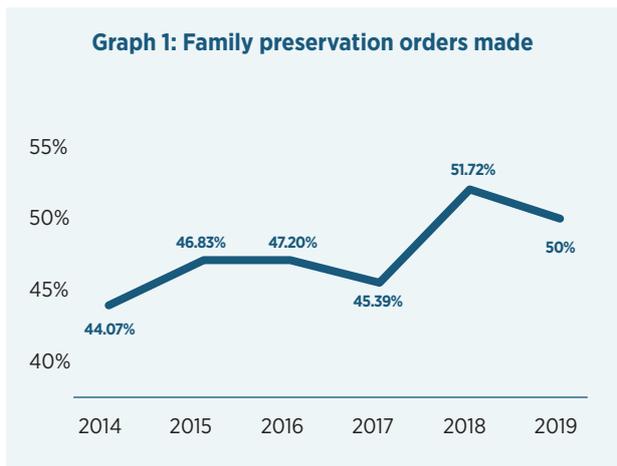
has reduced by approximately 17 percent since 2014 (graph 2), with a particularly significant decline since 2016. At the same time, for those children who cannot be safely cared for at home, our data highlights that between 2014 to 2019 there has been a slight increase in the use of permanent care and long-term care orders but proportionally they have remained below 10 percent of all orders made (graph 3).

It is concerning that an increase in use of orders that put children on a pathway to remaining or returning to the care of their parents or that determine a permanent care arrangement be found as soon as practicable for those children who cannot be safely cared for at home, is only slight, at best.

At the same time, we find that there has been an increase of approximately 50 percent in the proportion of care by Secretary orders (graph 4) despite this being the least certain and permanent outcome for a child.

For most children that VLA represents, a stable care arrangement on a care by Secretary order is not a common experience. We have concerns about reduced court oversight of children on care by Secretary orders particularly when placements are unstable and DHHS has administrative powers for decisions about such children including changes in placement.

As we discuss in finding three, Aboriginal and Torres Strait Islander children are overrepresented on care by Secretary orders and we see poor compliance with the requirement that every Aboriginal and Torres Strait Islander child has a cultural support plan before a permanent care order can be made. This leaves us concerned that Aboriginal and Torres Strait Islander children who could be in permanent care are instead remaining on care by Secretary orders because of non-compliance with developing cultural support plans.



A care by Secretary order is rarely a desirable final arrangement for a child. We are concerned that the increase in their use may be leading to some children remaining on a care by Secretary order for the duration of their time in out-of-home care.

Broader system impacts

While the permanency amendments and legislative architecture are integral to establishing a framework for the child protection system, they alone cannot guarantee a child a permanent home. The findings of this report show that the concerns we expressed in 2016¹³ remain the experience of our clients four years on. The implementation of the amendments has not been supported by

the resourcing required to give effect to the amendments' goals including resourcing of DHHS workers, Aboriginal cultural support planning and reunification planning support, public housing, drug and alcohol rehabilitation services, parenting support services, family violence survivor programs, men's behaviour change services, counselling, mental health services, disability assessment and support services, and support for kinship carers and foster carers as well as long court wait times. This has been exacerbated by measures introduced to reduce the spread of COVID-19.

13 VLA 2016 Submission to the CCYP Child Protection Permanency Amendments Inquiry (n 8).

Finding Two: Rigid timeframes may prevent family reunification, contrary to the intent of the legislation

Wherever appropriate and safe, child protection responses should aim to maintain and preserve the relationship between a parent and child. This is reflected in domestic and international laws that recognise the paramount importance of this relationship.

For example, Article 8 of the United Nations, *Convention on the Rights of the Child* places obligations on signatories to minimise unlawful interference between a child and their family.¹⁴

Section 10(3) (a) of the *Children, Youth and Families Act 2005* recognises the importance of maintaining and preserving the parent-child relationship, and requires that:

3) [when] 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.

Both provisions underline that wherever reunification between a parent-child is a possibility and in the best interests of children, it should be pursued.

What are the reunification timeframes?

Family reunification orders place a 12-month timeframe for a family to achieve reunification.¹⁵

The timeframes are intended to minimise the time that a child is in out-of-home care without certainty about whether they will be living with their parents. In certain circumstances, an additional 12 months may be provided by the court if reunification is likely to be achieved or a permanent alternative sought.

There is then no further option available to the court to order reunification of a child with their parent, including making or extending a family reunification order, if that child has been in court-ordered out-of-home care for a cumulative period of over 24 months, even if this may be in the child's best interests.

Further, once the 24 months has expired, and a child is on a long-term care order or care by Secretary order there can be no conditions on the order. While DHHS may give consideration to contact occurring between a parent and child on a case-by-case basis, a decision about contact made at the same time as the court order would give children more certainty, more quickly about contact with their parents. For children on permanent care orders, contact is only permitted up to four times per year; parents can only apply to the court to increase this contact after the order having been in place for 12 months.

Reunification timeframes without exception assume that all families are experiencing problems that can be addressed within two years if they receive timely supports. Where parents are receiving timely access to support, and safe contact with their child is occurring the timeframes may be reasonable in most circumstances. However, as noted above and further explained below not all families are receiving early timely support. Delays in the provision of tailored or additional supports for parents, especially for those who have particular needs, such as for parents with a

14 Convention on the Rights of the Child 1991 Article 8: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference' accessed on 22 May 2020 <<http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>>.

15 See Appendix A for a details on the changes made to protection orders by the permanency amendments.

disability, experiencing a mental health issue, homelessness or family violence, present circumstances where the reunification timeframe can be unreasonable.

How the timeframes were intended to work

To work as intended, a parent on a family reunification order must be intensively supported and assisted to receive timely access to support services. Support for a parent must commence ideally before, or otherwise immediately after a family reunification order is made so that a parent has the best possible chance of addressing protective concerns within the reunification timeframes.

To also ensure that the bond between a parent and their child is not significantly disrupted during the period of the family reunification order (and a child is in out-of-home care), it is critical that contact between the parent and child occurs on a regular basis where it is safe to do so and in the best interests of the child.

In practice without early and ongoing support, it's challenging for parents to meet reunification timelines

We see consistently better outcomes for children and families where parents are provided with early and ongoing support from DHHS.

In our 2016 submission to CCYP's Inquiry into the permanency amendments¹⁶ we identified the integral role that support plays in achieving good outcomes for families who are at high risk of having children removed. Where child protection practitioners are proactively referring clients to services and supporting them throughout the length of a family reunification order with high quality intensive case management, we see that reunification within the timeframes is possible.

Valeria's story shows how focused support can make a significant difference to a parent trying to reunify with their child:

Valeria's story: Making progress towards reunification with the right support

Valeria is a mum in her mid-twenties who has been experiencing challenges with drug use, homelessness, and related criminal offending. Due to these issues, Valeria's children were placed in the care of their maternal grandmother. In 2018, Valeria gave birth to Matheus. Matheus was removed from Valeria's care and was placed on a family reunification order. 12 months later, DHHS decided that they would no longer seek to reunify Valeria and Matheus because Valeria was not demonstrating sufficient change in her life. However, as of early 2020, through the help of a dedicated support worker, Valeria now has stable housing, is regularly providing clean drug screens, seeing a psychologist to better manage her anger, and has consistently participated in weekly contact visits with Matheus. With the help of her support worker, Valeria is confident that she can present evidence to the court about her progress with the goal of being reunited with Matheus.

Valeria was seeing Matheus weekly but, at time of writing, the interruption of COVID-19 restrictions on contact means she has now not seen him in several months. This will likely affect her progress towards reunification through no fault of her own. When Valeria's case is eventually heard at court, she may face additional hurdles in demonstrating to the court that Matheus should be returned to her care due to the loss of critical bonding time between them, and the risk that returning Matheus to his mum could be de-stabilising for him.

16 VLA 2016 Submission to the CCYP Child Protection Permanency Amendments Inquiry (n 8).

The experiences and outcomes of parents involved in the Family Drug Treatment Court (FDTC) also reinforce the critical role that tailored and intensive support can have in successfully reunifying parents and children. The FDTC is a judicially monitored, therapeutic 12-month program conducted in a highly supportive non-adversarial environment.¹⁷ The program aims to achieve safe and sustainable family reunification of parents with their children. This is achieved through providing intensive supervision and case planning to the parents involved in the program.

Two independent evaluations of the FDTC have demonstrated that FDTC participants are up to 2.5 times more likely to achieve reunification than a sample of parents who had their cases progressed through mainstream court processes alone. FDTC participants also achieved reunification in a shorter timeframe and were 2.2 times less likely to have a substantiated report made to child protection in the post-court period.¹⁸

Parents are facing barriers to accessing services

VLA lawyers frequently see that timely access to support services is critically important for parents where their children are on family reunification orders to demonstrate to the court that they are addressing protective concerns during the first 12 months of a family reunification order and have the best chance of their child being returned to their care.

Services that parents on family reunification orders may need to access to address protective concerns may include: drug or alcohol screening, parenting skills programs, anger management programs, counselling, family violence counselling, mental health

services, family violence support services, men's behaviour change programs and/or housing services.

However, our lawyers see the multiple barriers parents experience when seeking to access services, often outside of the parents' control. Some of the common service access barriers that VLA lawyers see their clients experiencing include:

- slow referrals to services causing a parent to experience delays;
- long waitlists for public or specialist services;
- the cost of gap payments for private psychologists to avoid waiting several months to access a bulk billing psychologist;
- logistical challenges, particularly for parents who live in regional areas who must travel long distances or for other parents needing to find a mode of transport as they do not own a car;
- organisational processes, such as in Rita's story where she was prevented from accessing services without having a permanent address; and
- long wait times for public housing¹⁹ which puts some parents in a 'catch 22' scenario where their application would be prioritised if their children were on the application but DHHS will not agree to reunification until housing is in place.

Rita and Yvonne's experiences demonstrate the way inaccessible services and supports are creating long term consequences for families and the likelihood of children being reunified with their parents.

17 Children's Court of Victoria 2020 'Family Drug Treatment Court' (webpage) accessed on 31 August 2020 <<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>>.

18 Ibid.

19 As at December 2019, the total applications for social housing under the Register in Victoria was 51,646. Housing Vic 2020, Victorian Housing Register, accessed 20 June 2020 <<https://www.housing.vic.gov.au/victorian-housing-register>>.

Rita's story: A lack of housing prevents Rita from being able to address mental health and parenting challenges

Toby is an infant that we represent in child protection proceedings, he is the son of Rita. DHHS became involved with the family due to concerns about Rita's mental health, and lack of stable housing. Due to these concerns, DHHS placed Toby in out-of-home care.

DHHS referred Rita to mental health services and to a parenting program however many of the services are unable to work with Rita without evidence of a permanent address. For example, Rita cannot participate in a parenting skills program because part of their requirement is that Rita has somewhere to go following discharge from the program.

Despite her limited English, Rita has persistently tried to find suitable, stable housing however she currently remains on a waiting list. Since receiving a referral to services, DHHS has not contacted Rita to check that the services are in place or to support her in addressing challenges in accessing them.

For Rita, this means that she's caught in a situation where she can't begin to gather the evidence needed to demonstrate to DHHS her capacity to care for Toby. With no long-term housing on the horizon, and a lack of support services available to help her, Rita will have to wait longer before Toby can be returned to her care.

Yvonne's story: Yvonne postpones return of kids until she can get a new home

Yvonne is mum to Sasha and Frank. Yvonne is Aboriginal and grew up in a small town in regional NSW and she remains closely connected to community there, as are her two children.

After experiencing significant family violence, Yvonne struggled with drug use and engaged in minor criminal activity. Because of this, DHHS removed Sasha and Frank from Yvonne's care.

Yvonne is still living in the same house where she experienced family violence because she's unable to find alternative accommodation. She is eager to avoid any further disruption to the kid's schooling and living arrangements so to avoid them only having to move again she has delayed the return of her children until she has found secure housing.

Yvonne is currently on the waitlist for housing, but it is unclear when a house will become available, or where it will be. If Yvonne's housing situation could be resolved expeditiously, it would allow this family to be reunited and for Sasha and Frank to have the benefit of a close relationship with their mum.

Additional or more intensive supports are needed for some parents

Further, we see that for parents on family reunification orders who have a disability, are experiencing a mental health issue or family violence, tailored, intensive support is even more important. Where the provision of supports is inadequate, such as in Rhiannon's story, they face greater challenges in achieving reunification with their child.

The consequences for children of parents who may require additional support to meet reunification timeframes

Concerningly, analysis of our data suggests that parents with a disability or experiencing a mental health issue, homelessness or who live in a regional area are at an increased risk of having their child removed from their care.

Since the introduction of the amendments, 19 percent of children who had a parent with a disclosed disability were removed from their parents and are not on a reunification pathway compared with 11 percent of children whose parents did not have a disclosed disability (graph 6).

Over a five-year period, on average 32 percent of family reunification orders that were made involved a parent experiencing homelessness compared to 25 percent where parents were not experiencing homelessness (graph 7). Given that we see lengthy delays for our clients in accessing housing, these parents are at risk of being unfairly disadvantaged and unable to meet the reunification timeframe if housing cannot be found. Yvonne's story on page 13 provides an example of how inadequate housing can delay reunification for families when there are no other safety risks.

Rhiannon's story: Without intensive supports and reasonable adjustments, reunification was made more challenging to achieve

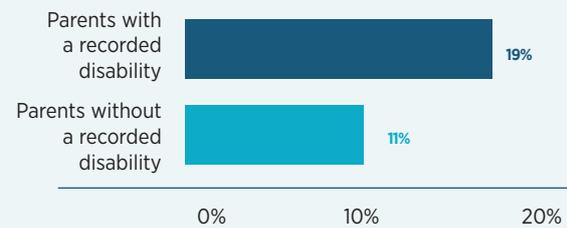
Rhiannon has three children and was recently diagnosed with several disabilities that impact on her ability to address concerns that have been raised by child protection. Rhiannon also has a history of exposure to family violence.

Rhiannon's eldest two children were removed from her care three years ago. At the time, Rhiannon felt that DHHS did not make reasonable adjustments during the reunification period to account for Rhiannon's disabilities. For example, DHHS did not provide assistance to Rhiannon for her to obtain a National Disability Insurance Scheme (NDIS) plan with a view to providing her additional help that could have allowed for her two eldest children to safely return to her care. Despite requesting assistance to attend a parenting program

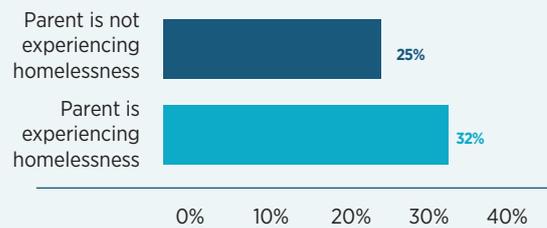
for parents with disabilities, a referral was never made by DHHS. At this point Rhiannon felt a pre-assessment had been made that her intellectual disability would prevent her from successfully engaging in the program.

When the reunification timeframe was almost concluding, DHHS advised Rhiannon they had no other option but to change the case plan for her two children from a reunification to a non-reunification objective. Upon making this decision, DHHS significantly and immediately reduced Rhiannon's contact arrangement with her two eldest children. This has left Rhiannon feeling powerless about her situation and without any other choice but to accept that her children will not be returning to her care despite her willingness and capacity to do so.

Graph 6: Child removal outcomes where disability including a mental health issue is recorded for the parent (2016 -2020)



Graph 7: Family reunification order made where a parent is experiencing and not experiencing homelessness (2016-2020)



See footnote for information on how we prepared Graph 6 and Graph 7.²⁰

In addition, we also see that a parents’ access to support and services can be dependent on where they live in Victoria. While our data shows that children living in regional areas are less likely than children in metropolitan areas to be with their family, it is only a slight variation. However, VLA lawyers consistently report seeing parents on family reunification orders that live in regional areas unable to access supports that they need locally, experience long wait times before a service is available, or are being required to travel to other regional centres or Melbourne to access assistance, frequently at their own cost.

We are concerned that service shortages are a contributing factor to some children not being in their parents’ care and their parents have not been provided timely supports to address protective concerns within reunification timeframes.

It also reflects the reality that for some parents two years may not be enough time to address protective concerns but there is a good likelihood that it would be safe for a child to return to their parent’s care. Celeste’s story illustrates how recovery from a mental health issue takes time.

Celeste’s story: The time needed to recover from family violence means Celeste might never be reunified with her daughters

Celeste is the mum of twins, Evie and Ella. Celeste has been diagnosed with post-traumatic stress disorder (PTSD) from childhood abuse and after experiencing family violence during her relationship with Evie and Ella’s father.

Celeste began to experience worsening PTSD due to triggering events in her life. Following Celeste’s worsening mental health and post traumatic symptoms, DHHS became involved and placed Evie and Ella into foster care. After the girls went into care, Celeste voluntarily pursued new treatments for PTSD – this included participating in overnight therapeutic treatment programs.

Unknown to Celeste, DHHS sought to place Evie and Ella in the care of their

20 To prepare these graphs, we grouped file outcomes where:

- The child remained with the parent (family preservation orders, withdrawals, undertakings)
- Reunification is planned but the child might not yet be back with the family (family reunification orders)
- The child has been removed from the parents into out-of-home care (Care by Secretary orders, Long term care orders and permanent care orders)
- All data refers to the outcome at close of grant file.

Some outcomes are excluded from the table because they did not indicate a particular reunification or removal outcome for the child (for example, therapeutic treatment orders).

Note that clients will be represented in multiple charts (for example, one client might be represented as “not homeless”, and “no disclosed disability”).

Note also that grants may be for various family members within the same matter, for example a mother, father and the child so a matter related to one child may be represented more than once in the same chart. Courts or the DHHS might have more complete data about outcomes per matter as opposed to per client.

father who was living interstate despite knowledge of the family violence Celeste had experienced during their relationship.

Not long after DHHS moved Evie and Ella interstate to live with their father an incident occurred which resulted in DHHS removing the girls and returning them to foster care. On becoming aware of what had happened, Celeste became extremely distressed and grew concerned that her daughters were being abused. After several months of intensive support, Celeste was back in a good position and DHHS returned Evie and Ella to her care.

Unfortunately, during the time that Evie and Ella had been in out-of-home care, Ella had developed challenging behaviours because of the instability and stress in her life. Celeste found it hard to manage Ella's difficult behaviours due to her own mental health difficulties and suffered a breakdown which resulted in both girls going back to their foster care placement. For Celeste, this was deeply upsetting and resulted in a significant setback for her mental health. Even though Ella and Evie had only been out of her care for a year, DHHS pursued a care by Secretary order and stopped working towards reunification with Celeste.

Despite DHHS pursuing non-reunification, Celeste continued to engage with her PTSD treatment and worked hard to maintain a strong relationship with both of her daughters while they were in foster care. Celeste is now trying to challenge DHHS's decision. Celeste will need to be able to demonstrate to the court that her PTSD is under control and she will be able to manage the care of Ella and Evie on her own, which will be challenging for her given the loss of confidence she has suffered from so many setbacks.

One option that Celeste would like to consider is sharing care for her daughters with their foster parents, as this would provide Celeste more support. Unfortunately, the rigidity of the current court orders does not allow for this type of arrangement. On a permanent care order Celeste would only be entitled to contact four times per year which does not reflect the active role she has played in Ella and Evie's lives throughout the DHHS involvement.

Celeste's story is an example of how challenging it can be for a parent recovering from family violence and subsequent mental health challenges to achieve reunification in the legislated timeframes, even when counter to the best interests of children.

Court delays

For children on reunification orders where the parents are engaging well with support services and are on track to reunify, court delays outside of the control of a parent can extend the period of time children are in out-of-home care unnecessarily and undermine permanency for children and parents.

Pre COVID-19, in metropolitan court locations it was not uncommon for families to experience:

- a three month wait for a conciliation conference;
- a six to ten month wait for interim contested hearings; and
- a waiting period of one year for a final contested hearing.

In regional areas, wait times can be longer due to limited availability of Magistrates to hear child protection matters, and a lack of resourcing for matters to be heard locally. In one regional area, there is no capacity for contested hearings so these matters must be heard by the court in metropolitan areas.

Paula's experience highlights how, until the recent temporary extension of reunification timeframes in the COVID-19 Omnibus Act, court delays, exacerbated by COVID-19 adjournments, may have prevented her from coming before the court within the necessary timeframe. Even with the introduction of this temporary measure, the risk remains for Paula.

Paula's story: Court adjournments and delays, exacerbated by COVID-19, may impede Paula's chance of regaining significant time with her son

Paula is a mum to a young boy named Tully, who came to the attention of DHHS because of family violence Paula was experiencing from her new partner, Tim. DHHS was also concerned that she and Tim were engaging in drug use. Tully was removed from his mum's care and went to live with a relative for a brief period before DHHS decided Tully should live with his father, Sean, despite Sean having been a limited part of Tully's early life.

Paula sought a family violence intervention order to help with Tully and her safety. Despite continuing to experience family violence - Tim breached the intervention order multiple times - Paula reported all breaches. She attended regular family violence counselling, and drug and alcohol counselling and has consistently produced clean drug screens.

When Sean, with Tully in his care, moved to be closer to his parents for support, Paula moved to the same area to be close to Tully and to ensure that she could continue to see him weekly. On moving, Paula established a new support network, and continued her engagement with services to address DHHS concerns which had resulted in Tully's removal from her care.

Paula's matter was originally listed for a contested hearing in February 2019, but due to court demand the matter experienced several delays and adjournments. Now with a backlog of adjournments due to COVID-19, even with an extension of six months to her reunification timeframe Paula's matter may not be heard by the court in time. For Paula and Tully, next year will be two years since Tully has been in his father's care. Given this length of time, Paula may face challenges in the court making an order that allows her to have significant contact with Tully.

Finding Three: Initiatives that support connection to community and culture are showing positive results, where complied with, but Aboriginal and Torres Strait Islander families remain overrepresented

Since the introduction of the permanency amendments four years ago, a range of legislative amendments and funding initiatives have been introduced that are aimed at improving outcomes for Aboriginal and Torres Strait Islander children including:

- Commencement in August 2016 of Marram Ngala Ganbu at the Broadmeadow's Children's Court. Marram Ngala Ganbu provides a culturally appropriate court process response for Koori families that enables greater participation by family members and culturally-informed decision-making.²¹ VLA lawyers involved in matters listed at Marram Ngala Ganbu have highlighted that their clients were more engaged and satisfied with their court experience, and also saw that there was greater compliance with cultural support planning requirements and the Aboriginal Child Placement Principle (ACPP) than in mainstream court.
- The introduction of the requirement that a cultural support plan is prepared for all Aboriginal children in out-of-home care.²² Previously, only Aboriginal children on a care by Secretary order or long-term care order

where required to have a cultural support plan.

- The increased use of section 18 of the *Children, Youth and Families Act 2005* which authorises Aboriginal Community Controlled Organisations (ACCOs) to exercise specific functions and powers in relation to a protection order for an Aboriginal child or young person.²³
- The use of Aboriginal Family Led Decision Making (AFLDM)²⁴ and the expansion of Aboriginal Child Specialist Advice and Support Services (ACSASS).²⁵
- The use of section 13 of the *Children, Youth and Families Act 2005* which mandates adherence to the Aboriginal Child Placement Principle.

Where used and complied with, our data suggests we are starting to see these initiatives improving outcomes for Aboriginal and Torres Strait Islander families.

In 2016, approximately 36 percent of Aboriginal and Torres Strait Islander children were on a permanent care order, long term care order or a care by Secretary order at the close of their grant file. Four years later, the proportion of Aboriginal and Torres Strait Islander children in out-of-home care at close of grant file has dropped by approximately 14 percent (graph 8).

While reducing, this remains concerningly high. In 2020, almost 23 percent of Aboriginal and Torres Strait Islander children were on orders that resulted in their removal from the care of their parents, in contrast to just under 19 percent of non-Indigenous children removed from the care of their parents.

21 Arabena,K., Bunston,W.,Campbell,D.,Eccles,K.,Hume,D.,& King,S 2019 'Evaluation of Marram Ngala Ganbu: A Koori Family Hearing Day at the Children's Court of Victoria in Broadmeadows' prepared for the Children's Court of Victoria accessed on 2 September 2020 <https://www.childrenscourt.vic.gov.au/sites/default/files/Evaluation%20of%20Marram-Ngala%20Ganbu%20November%202019%20%28web%20version%29_0.pdf> 3.

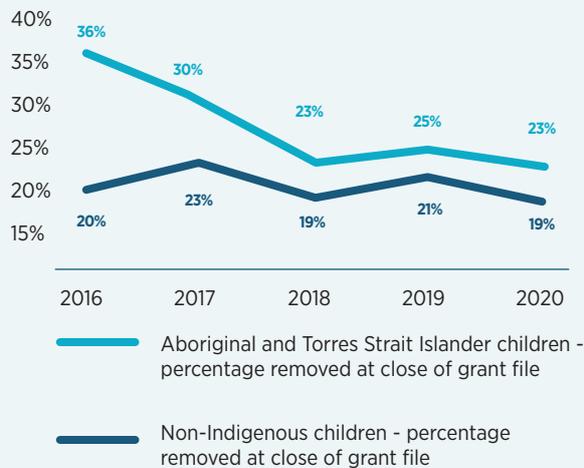
22 Section 176 *Children, Youth and Families Act 2005*.

23 The Department of Health and Human Services 2018 'Aboriginal children in Aboriginal care program' (webpage) accessed on 8 September 2020 <<https://www.dhhs.vic.gov.au/publications/aboriginal-children-aboriginal-care-program>>.

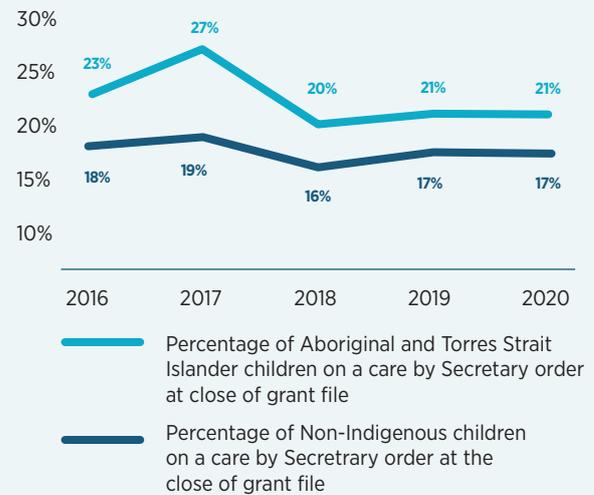
24 Commission for Children and Young People 2015 'In the child's best interests: Inquiry into compliance with the Intent of the Aboriginal Child Placement Principle in Victoria' accessed on 17 September 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf>>.

25 The Department of Health and Human Services 2016 'Roadmap for Reform: strong families and safe children' accessed on 17 September <<https://www.dhhs.vic.gov.au/sites/default/files/documents/201905/Roadmap-for-reform-28-4-2016.pdf>> 34.

Graph 8: Aboriginal and Torres Strait Islander children removed from their parents' care



Graph 9: Of all final orders made, a comparison of Aboriginal and Torres Strait Islander children and Non-Indigenous children on care by Secretary orders



For a description of the data presented in graphs 8 and 9 please see footnote.²⁶

Over-representation of Aboriginal and Torres Strait Islander children on care by Secretary orders

Of concern, our data also shows (graph 9) that there remains a significant number of Aboriginal and Torres Strait Islander children on care by Secretary orders, and again this is higher than for non-Indigenous children. For the period 2016 to 2020, of all final orders made, on average 22 percent of Aboriginal and Torres Strait Islander children were on a care by Secretary order, compared to an average of 17 percent of non-Indigenous children.²⁷

The trend in our data aligns with publicly available data on this issue. In their 2019 Inquiry, CCYP found that 'Aboriginal children and young people are more likely to transition to care by Secretary orders or long-term care orders than their non-Aboriginal peers' and that a higher proportion of Aboriginal children are subjects of a care by Secretary orders than non-Indigenous children.²⁸

The higher proportion of Aboriginal and Torres Strait Islander children on care by Secretary orders is particularly concerning. As outlined in finding one, care by Secretary orders usually represent the least certain form of out-of-home care. Children on care by Secretary orders are at more risk of being in non-familial placements such as in residential care than if they were on a long term or permanent care order, as a care by Secretary order is the only long term out-of-home care order that does not specify a carer. This poses additional risks for Aboriginal and Torres Strait Islander children for whom removal from family carries with it isolation from one's cultural identity and community.

Cultural support planning for Aboriginal and Torres Strait Islander children

Despite the positive introduction of the requirement to prepare a cultural support plan for all Aboriginal and Torres Strait Islander children in out-of-home care, VLA lawyers

²⁶ Due to differences in VLA data collection methods, graph 8 (Aboriginal and Torres Strait Islander children removed from their parent's care at close of grant file) and graph 9 (Aboriginal and Torres Strait Islander children that are on a care by Secretary order at close of grant file) has a date range of 2016-2020. Other data presented in this report is for the date range 2014-2019. 'Removed' means that at file close the child was on a permanent care order, long term care order or care by secretary order.

²⁷ Final orders are family reunification order, family preservation order, care by Secretary order, long term care order or a permanent care order.

²⁸ Ibid.

often see ongoing issues with adherence to this requirement and that the lack of cultural support planning can delay timely decision making about a child's long-term care arrangements.

In one regional area, VLA lawyers reported that they rarely saw matters where cultural support plans were developed. The adequacy of plans is also a concern. In one example, a cultural support plan for a child was delayed when the local Aboriginal Community Controlled Organisation (ACCO) would not endorse the plan because DHHS were yet to confirm the local Aboriginal community the child belonged to. This was despite the child, the child's parent and the child's support worker making it clear that her mob was known to them and not in any way contested by the local Aboriginal agency.

Again, VLA's practice experience is not isolated. In its 2019 inquiry, CCYP found that 61 percent of Aboriginal and Torres Strait Islander children and young people in Victoria who should have had a cultural support plan recorded did not.²⁹ Improving compliance with the requirement for cultural support planning is critical to ensuring that commitments are in place to support the connection of Aboriginal and Torres Strait Islander children with community and culture.

Finding Four: Reduced court oversight limits opportunity for review of decisions to ensure they are in the best interests of the child

The permanency amendments reduced the level of decision-making oversight and discretion that the court has for children involved in child protection legal proceedings. This was considered necessary to minimise protracted negotiations and to aid in timely decision making about the long-term care of children.³⁰

While important to preventing children and young people spending years in the court system, there are circumstances where time is required to ensure a decision is made in the best interests of the child. VLA lawyers' experiences also suggest that court oversight is important to ensure outcomes are consistently in the best interests of the child and that the removal of court discretion may be inadvertently prolonging court proceedings.

Consequences of the removal of conditions from protection orders

In our experience, we see examples where children do need to be in out-of-home care but would also benefit from maintaining a relationship with their parents where it remains safe for them to do so. However, since the amendments, conditions can only be attached to family preservation and family reunification orders. This means that for children that are in out-of-home care, that will not be reunified with their parents, there are no protection orders that allow for the court to impose conditions. While contact between a parent and child can be negotiated and agreed to informally by DHHS and the carers, this does not carry with it the same certainty for the child and parent as contact determined when a court makes an order.

29 Ibid 94.

30 Commission for Children and Young People 2017 '...safe and wanted...: Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014' accessed on 20 March 2020 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/201712/Safe%20and%20wanted%20inquiry%20into%20permanency%20arrangements%20report%20June%202017.pdf>> 90.

Lavanya and Toby's story: Living with a disability adversely affected decisions about contact with their children

Lavanya is the mother of two children, Hitesh and Deepak. Lavanya and her husband, Toby are both deaf and have intellectual disabilities. The family had been living with Lavanya's elderly mother, Priya, to receive some extra help with Hitesh and Deepak.

Lavanya and Toby began to experience difficulties with caring for Hitesh and Deepak after Priya moved to her own home. DHHS became involved and Hitesh and Deepak were placed in the care of a relative, Yasmin, while having regular contact with their parents. The court made a (then) guardianship order in relation to the children. However, with the support of DHHS, an arrangement was made for Hitesh and Deepak to continue to spend time with their parents. When the permanency amendments were introduced in 2016, the guardianship order was administratively converted to a care by Secretary order.

Shortly afterwards, DHHS applied for a permanent care order for the two children to live with Yasmin. Due to the changes to contact conditions under the permanency amendments, this meant that Lavanya and Toby would only have guaranteed contact with their children four times a year. This would be very different to the arrangements they had in place and was contrary to the wishes of both the parents and the children, who wanted to retain the current contact regime with their parents.

Ultimately, Lavanya and Toby sought, and the court granted, an extension to the care by Secretary order, with a case plan endorsing weekly contact. If there was the option of a permanent care order with conditions that allowed for Lavanya and Toby to have regular contact with their sons, this would have been an ideal outcome for this family and would have better reflected their situation.

Lavanya and Toby's story illustrates how the introduction of simplified orders that remove conditions, unnecessarily caused a decision that was not in the best interests of their children while causing significant distress to them and their family.

Consequences of placements not being named on an order

The social science research suggests any change of placement contributes to instability and uncertainty for the child, and so should be limited to only where necessary.³¹ To support timely decision making, the amendments removed the court's ability to name a child's

placement when making orders, instead placement decisions are now made by DHHS administratively. We are concerned that a child can now be moved between different placements without any independent oversight of the frequency or reason that a child is being moved, and whether it is in the best interests of the child.

DHHS data shows that in June 2020, one in 12 children (on a daily average) experienced more than two placement changes in the preceding 12 months; this is approximately 1,012 children when applied to the daily average of children in out-of-home care at June 2020 (12,188).³² Therefore, a small but particularly vulnerable group of children and young people

31 Australian Institute of Family Studies 2018 'Child Family Community Australia Resource Sheet: Children in Care' accessed on 17 September 2020 <<https://aifs.gov.au/cfca/publications/children-care>>.

32 Department of Health and Human Services 2020 'Performance for selected measures – Q4 2019-20 financial year Child Protection and Family Services' (report) accessed on 17 September 2020 <<https://www.dhhs.vic.gov.au/additional-quarterly-data-operational-performance>> 5.

To calculate the approximate number of children who experience more than two placements, we calculated the daily average total of children in out-of-home care placements at June 2020 (12,118) against the percentage of children and young people in out-of-home care who have had two or less placements in the last 12 months at June 2020 (91.7%).

are experiencing multiple placements. This would include those who crossover from child protection to youth justice. Recent research by the Sentencing Advisory Council found that approximately one in two children who also have involvement with youth justice have experienced five or more placements.³³

We also see where the inability of the child or parents to participate in those decisions can potentially undermine the objectives of the permanency amendments. For example, a matter that VLA was involved in resulted in an Aboriginal child on a care by Secretary order being administratively moved from the stability of a relative's home to a non-familial placement. Without independent oversight, this decision potentially contravened the Aboriginal Child Placement Principle (ACPP) and only became apparent after DHHS applied to extend the care by Secretary order.

Options for internal and external review of a child's case plan

The permanency amendments introduced a requirement that a case plan is prepared for all children identified as needing protection at the point of substantiation (rather than at point of a final order). Administrative review avenues were introduced to ensure children and families are able to seek review of DHHS case plan decisions.

VLA data shows that there has been low uptake of internal and external reviews of case planning decisions since the option was introduced in 2016.³⁴ We have observed numerous issues with the process of seeking an internal or external review.

We experience a lack of clarity about DHHS' process for conducting internal reviews

33 Sentencing Advisory Council 2019 'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 1: Children who are known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court accessed 13 September 2020 < https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf > 69-72.

34 VLA introduced new grant guidelines in response to the amendments including VLA's new State Family Guideline 4 which provides aid for parties to be legally assisted to apply to DHHS for an internal review of a case plan and to apply to VCAT in certain circumstances.

including whether a review can be conducted where a child is on an order, the length of time it takes to receive an outcome of both an internal or an external review, and uncertainty about whether VCAT has jurisdiction to conduct an external review where the internal review has not been completed (but significant time has lapsed since the internal review was sought).

Phoebe's story is one example of the challenges of a child pursuing a case plan review and the consequences this had for her.

Phoebe's story: Phoebe was left waiting for a decision in a dangerous placement

Following prolonged abuse, Phoebe was placed into residential care. While in residential care, Phoebe was physically assaulted by another resident. Due to a shortage of foster care placements, DHHS sought to return Phoebe to the care of the family home.

Despite Phoebe's fears, the court made an interim accommodation order for Phoebe to live in the family home. Again, Phoebe was injured so DHHS intervened, returning her to a residential care unit. Phoebe began to suffer significant psychological distress and was sexually exploited by several older males.

Phoebe's lawyer applied to DHHS for an internal review of Phoebe's case plan with the goal of changing Phoebe's placement. DHHS refused and did not provide a response when Phoebe's lawyer made a second request for internal review.

VCAT made an order that provided significant reassurance and more safety to Phoebe. However, the time it took for an internal or external review to be undertaken significantly jeopardised Phoebe's safety, wellbeing, and mental health.

Finding Five: COVID-19 has exacerbated existing challenges to family reunification

The COVID-19 pandemic has exacerbated the existing challenges we were seeing as a result of the permanency amendments. In Victoria, the child protection system including the court and DHHS rapidly implemented practice changes from late March 2020 as part of public health measures responding to the COVID-19 pandemic including:

Children's Court changes: adjournment of most matters

The Children's Court introduced a series of Practice Directions³⁵ that set out a variety of changes to the operation of the Children's Court aiming to minimise the need for court attendance. Most child protection matters were adjourned for at least 6 weeks and up to five months. Interim and final contested hearings that were not suitable to be heard for remote hearing were also adjourned.

At the time of writing, all child protection proceedings are occurring via remote video links. While Readiness Hearings have assisted with the finalisation of many matters, and with urgent and priority matters and new protection applications being prioritised, it is expected that there will still be a backlog of cases that require judicial determination in the coming months.

Reduced DHHS managed contact between parents and children to minimise the spread of COVID-19

DHHS managed face to face contact between parents and children has been limited to prevent the transmission of COVID-19.³⁶ Now over six months into the pandemic, limits on face to face contact remain in effect.

While recognising the rapid and uncertain policy environment that DHHS continue to operate in, a prolonged lack of face to face contact poses a challenge for children and parents on family reunification orders to re-establish a relationship, particularly with very young children, after restrictions ease (for example Paula's story, p17).

Parents are experiencing significant additional challenges in accessing services that will help to address protective concerns while public health restrictions remain in place. VLA lawyers are seeing clients facing a range of barriers:

- Due to the move toward remote service delivery, some services were temporarily closed for several months. Parents seeking to commence their engagement with programs such as Men's Behaviour Change Programs have not been able to do so.
- To minimise risk of infection the number of placements available to clients at a service or program has been reduced, again causing delays for parents needing to commence rehabilitation or detox programs or to complete a stay at a 'mother and baby unit', for example.
- There has been a reduction in the availability of drug and alcohol screening services across Victoria. Some locations are operating limited hours, while others have suspended screening services. For parents who must present clean drug or alcohol screens several times a week this has caused considerable challenges to demonstrate progress.
- VLA lawyers also reported that there were, at times, unreasonable expectations placed on parents to engage with services without consideration of the health risks posed. For example, parents without private vehicles are still expected to use public transport to attend appointments or undertake screening.

35 For a complete list of Practice Directions issued in response to COVID-19, see Children's Court of Victoria 2020, *Practice Directions* (webpage) < <https://www.childrenscourt.vic.gov.au/legal/practice-directions> > accessed on 8 September 2020.

36 Department of Health and Human Services 2020 'Contact between children and their parents - Coronavirus (COVID-19) practice advice, version last updated 7 August 2020' 2-3.

Samantha and Lara's experiences illustrate the way in which their children have needed to spend longer in out-of-home care placements, and away from their parents, despite nearing reunification, due to challenges presented by COVID-19 measures:

At time of writing, it has now been over six months since Victorians have experienced a range of public health measures responding to COVID-19. VLA's experience to date indicate that there are many parents, such as Samantha and Lara, whose challenges to meeting the reunification timeline has only been exacerbated by COVID-19 and, without the court's ability to make an exception to the reunification timeframe for these parents, many may miss out entirely on the opportunity to reunify with their children, even where it may be in the best interests of the child.

VLA are pleased to see the government's recognition of the impact of COVID-19 measures are having on the ability for parents to meet reunification timeframes in the extension of the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020*³⁷, however we are concerned that that this amendment only allows for a maximum of six months longer on a family reunification order, when service reduction and delays in court hearings have already affected families for six months and are likely to continue to do so for some time yet.

Further, COVID-19 has highlighted an existing challenge with the rigidity of the current permanency timeframes. We continue to encourage the government to amend the timeframes for exceptional circumstances, including but not only for delays caused by COVID-19 service reduction or hearing delays and where it is in the best interests of the child.

Samantha's story: COVID-19 and logistical challenges mean that reunification will be delayed for Samantha and her children

Prior to COVID-19, Samantha was eagerly anticipating being reunited with her children.

Samantha had successfully addressed all protective concerns that had been raised by DHHS and had only one condition left to satisfy before reunification could occur. That condition was a requirement for Samantha to continue to undertake drug screening. Under normal circumstances, Samantha would have had no issues with meeting this requirement. COVID-19 impacted that; Samantha's nearest screening centre was converted to a COVID-19 testing site. Without a car, Samantha was willing to travel to another screening service via public transport.

Samantha's children had been placed with their grandmother, Samantha's mum, on what would have been a short-term basis. Unfortunately, Samantha's mum, who is currently caring for her children, has significant health problems which meant that in the midst of the COVID-19 pandemic, she did not want Samantha taking public transport and then visiting her home to have contact with her children. When this was explained to DHHS, they were unwilling to pursue reunification to allow Samantha to have care of the children despite Samantha displaying no behaviour indicating drug use. Eventually a solution was found where Samantha's dad volunteered to drive her to the screening service. This has, however, delayed reunification by several months causing disruption to the children's right to a long-term placement.

³⁷ COVID-19 Omnibus (Emergency Measures) and other Acts Amendment Act 2020, accessed 21 September 2020 <https://content.legislation.vic.gov.au/sites/default/files/bills/591238bi1.pdf>.

Lara's story: Barriers to contact mean that Lara has not seen her children since May

Lara's children are currently being cared for by her sister while she attends a long-term rehabilitation program to address substance abuse concerns. Since commencing the program, Lara has been making great progress and has gained permission for her children to stay overnight with her, with the goal of gradually moving towards reunification.

However, the risk of COVID-19 infection meant Lara's sister was unwilling to facilitate contact between Lara and her children. Following the introduction of stage four restrictions, the rehabilitation program where Lara is residing has not permitted face to face contact visits. Such a significant period of time with a lack of contact is significantly impacting on the bond between Lara and her children and may now also affect her prospects of reunification.

Where to from here?

The intention of the amendments – timely, safe, permanent homes for children who need state intervention to ensure that they have such a home – are important and the principle of prompt support for families at risk is vital.

However, a lack of availability of services and supports means too many parents, including those who may have more complex needs requiring additional and particular supports, are experiencing extensive wait times, costs and other logistical challenges that prevent them from accessing supports in a timely way to support them in seeking to address protective concerns.

While circumstances beyond their control are unfairly disadvantaging families, many children are still left lingering with uncertainty for too long or having decisions made that are contrary to their best interests.

The strict reunification timeframes, without exception, give the court no ability to make orders extending the timeframe where it is in the child's best interests to do so. The change to some decisions being made administratively, rather than through the courts, has reduced independent oversight of important decisions such as where a child is placed, or how frequently this placement is changing. This is of particular concern for some of the most vulnerable children who may be at risk of frequent placement breakdowns. A lack of clarity about internal and external review processes is undermining the ability of parents and children to have a voice in decisions about their lives in a timely way.

The COVID-19 pandemic has shone a spotlight on issues that were already apparent in preventing the intention of the permanency amendments being met. With this in mind and in any future legislative reform there is an opportunity for the Victorian government to make the necessary

legislative, policy, practice and resourcing changes to enable the amendments to operate in a way that will provide the best outcomes for children and not unfairly disadvantage their parents.

We make the following four recommendations to the Victorian government:

Recommendations

Recommendation one: Amend reunification timeframes to allow the court to make decisions in the best interest of the child

Allow the Children's Court to make any protection order that it deems to be in the best interests of a child, including making or extending a family reunification order, even if that child has been in court-ordered out-of-home care for a cumulative period of over 24 months.

Recommendation two: Improve court oversight and discretion through legislative reform to enable better outcomes for children

Allow the Children's Court to, in the best interests of the child:

- **make conditions on any protection orders; and**
- **name a placement on an order.**

Recommendation three: Address the ongoing over-representation of Aboriginal and Torres Strait Islander children on care by Secretary orders by:

- continuing to build upon the success of initiatives such as Marram Ngala Ganbu that provide a culturally safe and appropriate response specifically tailored to Aboriginal and Torres Strait Islander families involved in the child protection system; and
- introducing oversight mechanisms to ensure that there is compliance with the requirement for cultural support planning and adherence to the Aboriginal Child Placement Principle.

Recommendation four: Support parents to reunify with their children safely and quickly by providing more and better resourcing to:

- expand availability and timely access to vital services such as family violence services, public housing, drug and alcohol services, children's services, parenting support, mental health services;
- expand access to culturally safe initiatives and services for Aboriginal and Torres Strait Islander families; and
- increase the capacity for specialist Children's Court Magistrates to hear matters, especially in regional areas, to mitigate the impacts of COVID-19 adjournments

Appendix A:

Glossary of protection orders

The following is a description of the change to protection orders as part of the amendments.

Current order	Description of the order ³⁸	Order prior to 2016	Key changes
Family preservation order	<ul style="list-style-type: none"> A child is in need of protection but can safely stay in their parents' care while protective concerns are being addressed. Parental responsibility remains unchanged. Supervised visits by DHHS. Conditions on this type of order are permitted. 	Supervision order	No major changes made.
Family reunification order	<ul style="list-style-type: none"> A child is in need of protection but cannot safely stay in their parents' care while protective concerns are being addressed. Grants parental responsibility to DHHS (except for major long term decisions). Limitations apply on the length this order – maximum of 24 months. 	Custody to Secretary order	<ul style="list-style-type: none"> Introduction of a 12-month limit on the timeframe for achieving reunification. In certain circumstances, an additional 12 months may be provided by the Children's Court if reunification is likely to be achieved or a permanent alternative sought.
Care by Secretary order	<ul style="list-style-type: none"> The Secretary of DHHS has parental responsibility for the child, for two years. Objective is to find a permanent or long-term carer for the child, preferably with extended family. 	Guardianship to Secretary order	<ul style="list-style-type: none"> Conditions cannot be attached to this order type. Removal of the requirement to name a child's placement.
Long-term care order	<ul style="list-style-type: none"> Available where a child needs long term care and a suitable carer is available to raise the child. Under this order, the Secretary of DHHS has parental responsibility until the child turns 18. 	Long-term Guardianship to Secretary order	No major changes made.
Permanent care order	There is a permanent carer suitable to have parental responsibility for a child. This order will usually contain conditions.	Permanent care order	<ul style="list-style-type: none"> Court-ordered contact is now limited to up to four times per year between parents and children for the first 12 months after which time, parents can seek the Children's Court's permission to apply to vary the condition concerning contact. A requirement was inserted that a permanent care order must include a condition that the person caring for the child must, in the best interests of the child and unless the court otherwise provides, preserve the child's identity and connection to the child's culture of origin and the child's relationships with birth family.

³⁸ Description of orders were adapted from Department of Health and Human Services 2017, 'Child protection orders' (webpage) <<https://services.dhhs.vic.gov.au/child-protection-orders>>.



