Chapter 5

Current International Law and Practice
This chapter examines the current law and practice in child protection matters in a number of international jurisdictions which have similar legal systems to Australia.

NEW ZEALAND

GENERAL

5.2 The Children, Young Persons and Their Families Act 1989 (NZ) (CYPF Act 1989) governs child protection in New Zealand and is administered by the Ministry of Social Welfare (the Ministry). The CYPF Act 1989 places great emphasis on family participation in decisions affecting children and young people. The CYPF Act 1989 was strongly influenced by Maori culture, but applies to all children referred to Child, Youth and Family Services (CYF) because of protection concerns.

5.3 The core tenets of the CYPF Act 1989 are that the child’s welfare and interests are paramount in all matters relating to the administration and application of the Act, and that the family is the carer for and protector of the child, supported by the state in its role.

5.4 The CYPF Act 1989 provides the following principles relating specifically to the care and protection of children and young people: they must be protected from harm, have their rights upheld and have their welfare promoted. The principles also provide that it is desirable for a child or young person to live with his or her family and family group where possible.

5.5 Two notable features of the New Zealand system are that:
- authorisation is required before a child can be involuntarily removed from his or her family by child protection workers, even in emergency circumstances
- family group conferencing (FGC) is ordinarily mandatory before commencing court proceedings in relation to the care and protection of a child or young person.

COMMENCEMENT OF A CARE AND PROTECTION MATTER

Notification and investigation

5.6 A care and protection matter commences when a report is made to a social worker or police officer that a child has been, or is likely to be, harmed physically, emotionally or sexually, ill-treated, neglected or deprived. Although New Zealand does not have mandatory reporting, reports may be made by individuals, bodies or organisations concerned with the welfare of children and young people, or by a court following any proceedings where it is believed that a child is in need of care and protection. The matter will be investigated by the social worker or police officer to whom the report was made, then referred to a care and protection coordinator (coordinator) if it is believed that the child is in need of care and protection. The coordinator is responsible for convening an FGC.

5.7 It is at the coordinator’s discretion whether it is necessary to convene an FGC. An FGC will only be convened where it is reasonably believed that a child is in need of care and protection. This will be determined by reference to the grounds set out in the CYPF Act 1989.
Grounds for determining that a child is in need of care and protection

5.8 Many of the grounds for determining that a child is in need of care and protection under the CYPF Act 1989 are similar to those set out in the Children, Youth and Families Act 2005 (Vic). The CYPF Act 1989 provides that a child or young person is in need of care and protection if he or she is being, or is likely to be, harmed, ill-treated, abused or seriously deprived.13 Harm can be physical, emotional or sexual.14 The New Zealand grounds relating to ‘harm’ are similar to Victorian grounds. Both Acts also provide for circumstances in which the child or young person has been abandoned or the child or young person’s parents are deceased or incapacitated.20

5.9 The New Zealand grounds diverge from the Victorian grounds where ‘no fault’ characteristics have been included. While the Victorian grounds focus on parents not protecting or being unlikely to protect the child from harm, the New Zealand grounds include reference to parents being ‘unable’ to care for the child or young person.21 This inability is not limited, as it is in the CYF Act 2005, to parents who are incapacitated.22 There is also a ground in the CYPF Act 1989 which deals with situations in which behaviour of a child or young person is likely to be harmful to the wellbeing of that child or young person or others, and the young person’s parents or guardians are unable or unwilling to control that behaviour.23

FAMILY GROUP CONFERENCING

5.10 FGC plays a central role in New Zealand’s child protection system, as it is ordinarily the mandatory first step before court proceedings can commence. It is ‘a core part of the machinery of government, the engine-room of decision-making for child welfare and youth justice’.24 In this report, the Commission considers the child welfare role of the FGC.

5.11 Decisions will be made at the FGC regarding whether the child is in need of care and protection and what steps are to be taken. It is a process that brings the family and professionals together in a ‘family-led decision-making forum’.25 The model used in New Zealand has been described as being at the ‘cutting edge of family-centred practice’.26

2 Child, Youth and Family Services is a government agency within the Ministry of Social Development and has legal powers to intervene and help children who are being abused or neglected or are exhibiting problem behaviour: Ministry of Social Development (NZ), Service Delivery Cluster <www.msd.govt.nz/about-msd-and-our-work/about-msd-structure/service-delivery-cluster.html> at 19 May 2010.
3 Connolly, ‘An Act of Empowerment’, above n 1. The Children, Young Persons and Their Families Act 1989 (NZ) has jurisdiction over persons who are under 17 years of age, with the exclusion of those who have been married or in a civil union: s 2.  
4 Children, Young Persons and their Families Act 1989 (NZ) s 6.
6 Children, Young Persons and their Families Act 1989 (NZ) s 13(a).
7 Children, Young Persons and their Families Act 1989 (NZ) s 13(b)–(c).  
8 That is, in New Zealand there is no equivalent of the Victorian power for a ‘protective intervener’ to take a child into safe custody without a warrant.
9 Children, Young Persons and their Families Act 1989 (NZ) s 70.
10 Children, Young Persons and their Families Act 1989 (NZ) s 15.
12 Children, Young Persons and their Families Act 1989 (NZ) s 19.
13 Children, Young Persons and their Families Act 1989 (NZ) s 17(1).
14 Children, Young Persons and their Families Act 1989 (NZ) s 17(1). At this investigation stage, the social worker or police officer will consult with a care and protection resource panel—an advisory panel appointed by the Chief Executive from occupations and organisations concerned with the care and protection of young persons: s 428. If the report is made by a body, organisation or court then the matter can be referred to a coordinator directly and the investigation stage may not be necessary: s 19.  
15 Children, Young Persons and their Families Act 1989 (NZ) ss 18(1), 20 if referred by a social worker or police officer, or s 192(–3) if referred by a body, organisation or court.  
16 Children, Young Persons and their Families Act 1989 (NZ) s 19(3).
17 Children, Young Persons and their Families Act 1989 (NZ) ss 18(1), 19(1).
18 Children, Young Persons and their Families Act 1989 (NZ) s 14(1)(a).
20 Children, Young Persons and their Families Act 1989 (NZ) s 14(1)(g); Children, Youth and Families Act 2005 (Vic) s 162(1)(a–b).
21 Children, Young Persons and their Families Act 1989 (NZ) s 14(f).
22 Children, Youth and Families Act 2005 (Vic) s 162(1)(b).
23 Children, Young Persons and their Families Act 1989 (NZ) s 14(d).
Convenors

5.12 Coordinators responsible for convening FGCs are appointed by the Chief Executive of the Ministry (Chief Executive) and are employed by CYF. A coordinator must be suitably qualified by reason of his or her personality, training and experience. However, no specific training requirements are set out in the CYPF Act 1989. It is the responsibility of the Chief Executive to ensure that those performing functions under the CYPF Act 1989 receive adequate training and comply with appropriate standards. The coordinator has the power to delegate any function under the CYPF Act 1989 to a social worker. There are no exemptions to this power of delegation, so it is possible that one social worker could be involved in the FGC and another social worker could be convening the FGC. This could have implications for the perceived independence of the FGC convenor.

Procedure and functions of the FGC

5.13 It is the coordinator’s responsibility to convene the FGC. Before convening an FGC, the coordinator must consult with a care and protection resource panel.

5.14 The overall functions of the FGC are to:

- consider matters relating to the care and protection of the child in relation to whom the FGC was convened
- make decisions and recommendations and formulate plans when the FGC determines that the child or young person is in need of care and protection, in accordance with the overarching principles of the CYPF Act 1989
- review from time to time the decisions, recommendations and plans of the FGC and then implement any such decisions, recommendations and plans.

CYF must provide the FGC with administrative services to enable it to discharge these functions.

5.15 There are ordinarily three phases to the FGC:

- information sharing
- private family deliberation
- the coordinator seeking agreement to the conference’s decisions.

At the first stage, the coordinator is responsible for making all relevant information available to the family group. This information is often provided by the referring social worker and other professionals. During the second stage, non-family members withdraw from the process, leaving the family alone to begin decision making. Even the representative for the child must withdraw from deliberations at this stage, unless members of the family request that the representative is present. At the third stage, the coordinator seeks agreement from the family group and then from the referral source. The conference decides together whether the child is in need of care and protection and, if so, decides on an appropriate course of action. The FGC’s process is self-regulated and does not operate under strict procedural requirements.
5.16 FGC proceedings are privileged and are not to be published. Information, statements or admissions made or disclosed in the course of the FGC are inadmissible before any court or any person acting judicially. The only information admissible before a court is the record of decisions and recommendations made and plans formulated by the FGC. The privilege that operates in relation to FGC admissions or disclosures is absolute and cannot be waived, but this does not preclude concerns being raised with police.

Attendees and legal representation

5.17 Those entitled to attend the FGC are listed in the CYPF Act 1989 and include:

- the child or young person, unless it would not be in his or her best interests or he or she would be unable to understand proceedings
- every parent, guardian, person having care of the child or young person and member of the family or family group of the young person, unless a person’s attendance would not be in the best interests of the child or young person or would be otherwise undesirable
- the care and protection coordinator
- the social worker or police officer who referred the matter to the coordinator
- a representative of the body or organisation which referred the matter to the coordinator
- any barrister, solicitor or lay advocate representing the child or young person.

5.18 Several other interested parties are also listed and, in addition to this list, any person may attend in accordance with the wishes of the family or family group of the child or young person. Those wishes will have been made known during consultation with the coordinator prior to the FGC. When discussion between family members or the wider family group is taking place, any members outside of the family group must not be present unless family members request otherwise.
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5.19 The parents and family members, the coordinator and a referring social worker from CYF will be entitled members of the FGC, which means that they have ‘voting rights’ in FGC decisions. Counsel for the child will be an entitled member if care and protection proceedings have already commenced in the Family Court. Alternatively, as provided for in the CYPF Act 1989, the child or young person may be represented by a lay advocate. The parties’ lawyers are not usually present and will not be entitled members, unless all members of the conference agree.

Agreements and enforceability

5.20 If the FGC reaches agreement, it may formulate a plan for the care and protection of the child or young person. The decision, recommendation or plan of the FGC must be communicated to the referring social worker, police officer, court or organisation and—with exception of referring courts—their agreement must be sought. The Chief Executive must give effect to the FGC’s decisions, recommendations and plans, unless the referring social worker does not agree or the decision, recommendation or plan is clearly impracticable or inconsistent with the principles of the CYPF Act 1989. It is the coordinator’s duty to ensure that any decision, recommendation or plan of an FGC is reviewed regularly.

5.21 It is possible for a plan to be implemented solely by way of FGC agreement, and all parties are required to adhere to that agreement. However, if obligations under the plan are not carried out, the Court may be required to implement the plan through orders. Judges will place reliance on FGC outcomes in all but rare cases. The decisions of an FGC are not registrable in court and the Court, unlike the Chief Executive, is under no obligation to give effect to the decisions of an FGC. However, care and protection proceedings—that is, proceedings for a declaration that a child is in need of care and protection—cannot generally be commenced in the Family Court unless an FGC has taken place.

5.22 Even in circumstances where an exception applies and an FGC has not taken place before the application for a declaration, an FGC must still take place before the Family Court will make a declaration. It is this mandatory nature of FGC that strengthens agreements made at the conferencing stage. This has been referred to as the ‘jurisdictional quality’ of FGCs, where the FGC is the necessary first step that precedes court involvement.

5.23 If the members of the FGC or the referring person or body cannot agree on an outcome, the coordinator is to consult a care and protection resource panel and report the failure to reach agreement to the referring social worker or police officer. The police officer or social worker may then take action under the CYPF Act 1989 as he or she considers appropriate. In these instances, if the concerns were serious enough, it is likely that court proceedings would be initiated.

EMERGENCY REMOVAL POWERS

Comparison of New Zealand and Victoria

5.24 In all but rare cases, care and protection matters will be dealt with in the first instance by an FGC. However, there are circumstances in which it will not be possible or practicable to convene an FGC to resolve urgent care and protection issues. The power to remove a child in emergency circumstances is one way in which New Zealand differs greatly from Victoria. In New Zealand, authorisation is required before a child can be removed and, in the absence of judicial authorisation, only police have removal power. In Victoria, child protection workers may take a child into safe custody without authorisation.
5.25 The New Zealand warrant system requires a social worker or police officer to apply in writing and on oath for a ‘place of safety warrant’ if removal of the child is believed to be necessary. Applications are made to a District Court judge, or, if no District Court judge is available, any justice or community magistrate, or any registrar other than a police officer. For such a warrant to be granted, the judge or other officer of the court must be satisfied that there are reasonable grounds to believe that a child or young person is suffering, or is likely to suffer, ill-treatment, neglect, deprivation, abuse, or harm. This warrant authorises any police officer or social worker to enter and search premises and remove or detain the child or young person, by force if necessary.

5.26 In New Zealand only police, and not child protection workers, have the power to remove a child without a warrant. Any officer who believes on reasonable grounds that it is necessary to protect a child or young person from injury or death is able to enter and search premises and remove a child or young person without a warrant. The New Zealand threshold for exercising this police power is also substantially higher than that in Victoria, requiring that removal is ‘critically necessary to protect a child or young person from injury or death’. In Victoria, all that is required to remove a child without judicial authorisation is that the child is believed to be in need of protection, as determined by reference to the grounds.

5.27 If a child or young person is found unaccompanied in circumstances which are likely to impair the child or young person’s mental or physical health, the New Zealand legislation also allows a police officer to deliver the child or young person to a parent or guardian, or a social worker if that is not possible. This measure will only be temporary if it does not appear that the child is in need of care and protection; it is not the same as an emergency removal power.
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New Zealand process following removal

5.28 Once a child or young person has been removed, either with or without a warrant, he or she is placed in the custody of the Chief Executive. The matter may come before the Court when a parent or guardian applies for the release of or access to the child or young person while he or she is in the Chief Executive’s custody. The child or young person will otherwise be brought before the Court within five days, if not sooner released. In these cases, the Court has power to make one of several orders:

- directing that the child be released from custody
- directing any person the Court sees fit to provide for the day-to-day care of the child
- granting the parent or guardian of the child or young person access to that child or young person.

5.29 This first court appearance does not necessitate the commencement of proceedings for a declaration that a child is in need of care and protection. Investigation will have taken place during the five-day period before the child or young person is brought before the Court, and it is possible that a referral to an FGC will satisfy concerns held about the child or young person.

5.30 Alternatively, the parents or guardians of the child or young person and the Chief Executive may have reached a temporary care agreement, whereby the child or young person remains in the custody of the Chief Executive while the parents or guardians access support services, for example. Removal of the child is used in emergency situations only, and not as an alternative to FGC as the first stage.

COURT PROCEDURE AND PROCESSES

Commencement

5.31 The Family Court of New Zealand hears care and protection proceedings for children and young people. In New Zealand, proceedings are commenced by bringing an application for a declaration that a child or young person is in need of care and protection. Ordinarily proceedings cannot commence until the matter has been to an FGC, but there are some exceptions. An application for a declaration can be made prior to an FGC taking place when:

- the child or young person has been removed on a place of safety warrant or removed by police without a warrant
- an interim restraining order needs to be granted as a matter of urgency
- an application for a custody order pending final determination, made at the same time as the application, needs to be granted as a matter of urgency
- the application is made on the ground that the child has been abandoned and no family group members are able to be found.

5.32 The Court may make a declaration if it is satisfied that a child is in need of care and protection based on any of the specified grounds. However, in most circumstances, the Court must refer the matter to an FGC before it can make a declaration.
Court-annexed mediation

5.33 Where an application has been made to the Court for a declaration that a child or young person is in need of care and protection, the Court, the child or young person, parties to the application or legal representatives of those persons may request that a mediation conference be convened.99 The purpose of the mediation conference is to identify the problem and attempt to reach agreement.100 Every mediation conference is presided over by a Family Court judge,101 and, if appropriate, that same judge may hear any Family Court proceedings that eventuate.102 The child or young person, parties and legal representatives may attend.103 The presiding judge has the power to make consent orders at the mediation conference.104

Representation and participation of the child or young person in proceedings

5.34 Where the child is not already represented, the Court or court registrar must appoint a barrister or solicitor to act for the child in the proceedings and for any other purpose considered desirable.105

5.35 The lawyer is to provide independent representation and advice to the child and has a duty to put the child’s views before the Court.106 The lawyer should not, however, require the child to express a view if the child does not want to, and the lawyer will not be required to put before the Court any views expressed in confidence to him or her by the child.107 In cases where a conflict arises between a child’s views and information relevant to the welfare and best interests of the child, the lawyer will:

- discuss the issues and the lawyer’s obligations with the child
- attempt to resolve the conflict with the child
- advise the Court of the lawyer’s position and, if the conflict cannot be resolved and as a matter of professional judgment the lawyer can only advocate the child’s views, invite the Court to appoint a separate lawyer in respect of welfare and best interests.108
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5.36 If, because of age, maturity or a disability, a child is unable to express a view or guide representation in any way, the lawyer is to represent the child in accordance with the child’s welfare and best interests and put all factors that impact on the child’s welfare and best interests before the Court.109

5.37 At any stage in proceedings, the Court may also appoint a lay advocate for the child, even if the child already has a legal representative.110 Representations may be made to the Court on behalf of the child or young person by the child or young person, a barrister or solicitor, a lay advocate or, with the leave of the Court, any other person.111 Representations may also be made to the Court by or on behalf of a parent, guardian or other person having care of the child.112

5.38 It appears that the child is not formally a party to proceedings, as persons with the right to appeal a Family Court decision are listed as: any party to the proceedings, the child or young person to whom the proceedings relate, and any other person prejudicially affected by the decision.113 Listing the child separately from ‘party to the proceedings’ in this manner suggests that the child is not a party. With regard to participation in proceedings, children over the age of 12 are to be given notice that there has been an application for a declaration that they are in need of care and protection.114 As noted, the child may make representations to the Court him- or herself.115

Court procedure
5.39 The CYPF Act 1989 provides for certain specialised court procedures in care and protection proceedings. These include the following:

- Some matters of urgency do not have to be heard by the Family Court but can be heard by a District Court.116
- Certain applications may be heard together where they relate to the same child or young person. For example, an application for a declaration that a child is in need of care and protection may be heard at the same time as domestic violence proceedings.117
- Care and protection proceedings are not open to the public and the CYPF Act 1989 provides an exhaustive list of persons who may attend (although this includes accredited news media reporters).118
- The judge may require any person to leave while the child or young person gives evidence, or may confer with the child or young person in private.119

FINAL ORDERS

Types of orders
5.40 The Court has the power to make various orders if it declares that the child or young person is in need of care and protection.120 It may:

- discharge the child or young person, or any parent, guardian or person having the care of the child or young person, from proceedings without further order121
- order that the child or young person, or any parent, guardian or person having the care of the child or young person, come before the Court at any time within two years, if called122
- order that certain persons receive counselling123
• make a services order, directing the Chief Executive or any other named person or organisation to provide specified services and assistance to the child or young person, parent, guardian or other person having care of the child or young person.\textsuperscript{124}

• make a support order, directing the Chief Executive or any other named person or organisation to provide support to the child or young person for up to 12 months.\textsuperscript{125} Unlike a services order, a support order creates a duty for the Chief Executive or other person or organisation to monitor the standard of care provided and to provide or coordinate the provision of services and resources that will ensure appropriate care.\textsuperscript{126}

• make a restraining order, restraining any named person from doing certain things, including residing with the child or young person and using or threatening violence.\textsuperscript{127}

• make a custody order, placing the child or young person in the custody of the Chief Executive, a social service, the director of a child and family support service, or any other person for a specified period.\textsuperscript{128}

• make a guardianship order, appointing the Chief Executive, a social service, the director of a family support service, or any other person to be the child’s guardian.\textsuperscript{129}

5.41 Services orders, restraining orders, support orders and custody orders may also be made on an interim basis pending the determination of an application for a declaration that a child is in need of care and protection.\textsuperscript{130} Where the Court proposes to make a services, support, custody or guardianship order, it must first obtain and consider a plan for the child or young person.\textsuperscript{131}
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Review of orders

5.42 Various people listed in the CYPF Act 1989 may apply for an order to be varied or discharged. Applications may also be made to have support orders suspended. The child or young person, a parent or guardian of the child or young person, a barrister or solicitor of the child or young person, and various other parties can make such an application. The Court can vary or discharge the order, discharge a condition of the order or impose further conditions on the order. Alternatively, the Court may refer an application for variation, discharge or suspension of an order to an FGC.

Appeals from decisions of the Family Court

5.43 If the Family Court decides to make or refuses to make an order to dismiss or otherwise finally determine the proceedings, a party to the proceedings, the child or young person to whom the proceedings relate or any other person prejudicially affected by the decision may appeal to the High Court against the decision. For interlocutory or interim orders, a party to the proceedings, a child or young person to whom the proceedings relate, or any other person prejudicially affected by the order may appeal to the High Court with the leave of the Family Court.

5.44 Further appeals from decisions of the High Court are to the Court of Appeal, with leave of the Court of Appeal.

Scotland

General

5.45 Child protection in Scotland is governed by the Children (Scotland) Act 1995 (CS Act 1995) and its related rules. The CS Act 1995 provides the legislative basis for the children’s hearings system, including the processes relating to referral and investigation of matters, and the Sheriff’s Court. Of the principles that underpin the CS Act 1995 and guide the actions of the children’s hearings, panels and courts, the welfare of the child is the paramount consideration.

5.46 Some distinguishing features of the Scottish child protection system are:

- Most matters are dealt with by children’s hearings, which are conducted by tribunals of lay volunteers from the community.
- The children’s hearing system deals with juvenile justice matters and child protection matters together.
- There is a principle that no order or supervision requirement can be made by a court or a children’s hearing, unless it is determined that it would be better for the child than none being made at all.

Terminology within the Act

5.47 ‘Child’ is defined in different ways throughout the CS Act 1995. For provisions relating to the children’s hearing system, a child is generally defined as someone under the age of 16 years. The term ‘relevant person’ is used repeatedly throughout the CS Act 1995 in relation to both children’s hearings and Sheriff’s Court proceedings; it means a person who enjoys or is vested with parental responsibilities and rights.
NOTIFICATION AND INVESTIGATION OF PROTECTION CONCERNS

The role of the local authority

5.48 Local authorities (LAs), which are central to the provision of children’s services in Scotland, play a significant role in child protection and the children’s hearing system. They have a general responsibility to provide services to promote and safeguard the welfare of ‘children in need’, and they have specific responsibilities to children ‘looked after by them’, including children under supervision requirements.

5.49 Following notification, LAs must undertake inquiries when a child might require compulsory supervision. Social workers play a key role in the initial inquiries and investigation of matters referred to the LA. Appropriate matters are referred to the Children’s Reporter.

The role of the children’s reporter

5.50 In addition to LAs, anybody, including the child, may refer a matter to a reporter where they believe a child may require compulsory measures of supervision. Only LAs and the police are obliged to refer such matters. Most referrals are from police, but referrals are also made by social workers and health and education agencies. Courts can also refer matters to a reporter.

5.51 Reporters are the gatekeepers to the children’s hearings system, receiving and investigating referrals and ultimately deciding whether there are grounds for particular matters to go to a hearing. They are trained officers of an independent statutory agency—the Scottish Children’s Reporter Administration—and usually have legal training or social work backgrounds.

5.52 Once a referral is received, the reporter undertakes an initial investigation, usually obtaining the LA’s report about the child and information from other relevant persons. The reporter may then decide to:

- take no further action
- refer the child to an appropriate LA
- decide a children’s hearing is required and arrange one.

The reporter can only refer the matter to a hearing if satisfied that compulsory measures of supervision are necessary and that at least one of the grounds listed in the CS Act 1995 is established. The majority of referrals to the reporter do not proceed to a hearing.
Grounds for determining that measures of supervision are necessary

5.53 In order for compulsory measures of supervision to be considered necessary, and for referral of the matter for a children’s hearing, one of the grounds listed in the CS Act 1995 must be satisfied. These grounds include that the child:

- is beyond the control of any relevant person
- is falling into bad associations or is exposed to moral danger
- is likely to suffer unnecessarily or be impaired seriously in his or her health or development due to a lack of parental care
- has failed to attend school regularly without reasonable excuse
- has committed an offence
- has misused alcohol, drugs or volatile substances
- is the victim of particular offences, including physical injury or sexual abuse
- in certain circumstances, behaves in such a way that special measures are necessary in the interest of the child or others.163

PRE-HEARING PROCESSES

5.54 The CS Act 1995 does not mandate any specific pre-hearing ADR processes. However, a policy and practice emphasis on child protection and service delivery has responded to concerns about the hearing system, including the ‘ever increasing’ number of referrals.164 There is now a focus on improving and encouraging all children’s access to the services they need, ensuring that only appropriate cases are referred into the hearing system and promoting multi-agency coordination and cooperation.165 Child protection case conferences (CPCCs) seek to fulfil these aims.

CPCCs are a feature of LA pre-hearing processes where initial investigation has raised concerns.166 A CPCC is ‘a formal multi agency meeting that shares agencies’ assessments … and identifies necessary actions to protect a child’, and will usually involve the child and family.167 A CPCC can decide to refer the matter to the reporter, apply for exclusion or child protection orders, and place the child on the Child Protection Register.168 If a CPCC results in a matter being referred to the reporter, it may subsequently be referred for a children’s hearing.

Before a children’s hearing occurs, the reporter may meet members of the children’s panel who will hear the matter.169 This is referred to as a ‘business meeting’ and will determine procedural and other matters, as well as defining the reporter’s role in the hearing.170 The child and any relevant person will have the opportunity to have their views presented through the reporter.171

HEARING OF PROTECTION MATTERS: THE CHILDREN’S HEARING

General

5.57 The children’s hearing system is a central component of the Scottish child protection jurisdiction. Tribunals comprised of unpaid laypeople from within the community run children’s hearings.172 These tribunals are responsible for decision making in most matters relating to the welfare of children, whether they are referred because of ‘child maltreatment or of offending behaviour’.173 A protection matter can be determined in two primary ways: the general children’s hearing procedure or, in certain circumstances, referral to the Sheriff’s Court.174
5.58 The 1964 Kilbrandon Report \(^{175}\) led to the development of the hearing system. The report was triggered by concerns about how children ‘at risk’ or ‘in trouble’ were being dealt with. \(^{176}\) In part, the report found that child offenders and children in need of care and protection faced common issues, namely ‘a failure in the normal experiences of upbringing’. \(^{177}\) The report also recommended that another system would be preferable to court as a forum for making decisions about child welfare. \(^{178}\)

5.59 The children’s hearing system is seen as welfare and child focused. \(^{179}\) It is a decision-making system for dealing with children in trouble and at risk. Consequently, grounds for referral of a matter to a children’s hearing include that a child is ‘uncontrollable’, has offended, or is at risk of harm. \(^{180}\) There is a ‘separation between the establishment of issues of disputed fact and decisions on the treatment of the child’. \(^{181}\) A children’s hearing undertakes the second function but can only make final decisions on grounds accepted by the child and relevant person. \(^{182}\) Where grounds are disputed, the Sheriff’s Court must find them established on the facts before the matter can be remitted to a children’s hearing. \(^{183}\)

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163 Children (Scotland) Act 1995 (Scot) s 52(2).
165 For further information see Scottish Government, Getting it Right for Every Child: Overview <www.scotland.gov.uk/Topics/People/YoungPeople/childrenservices/audits/programme-overview> at 22 June 2010.
166 Edinburgh, Lothian and Borders Executive Group, above n 151. CPCCs are convened on behalf of child protection committees—bodies consisting of representatives from agencies such as the local authority, police, health and children’s services, which oversee child protection processes and services in their area and are a point of inter-agency communication and liaison. Note, however, that CPCCs are not legislatively mandated.
167 Ibid [11.1].
168 Ibid [11.11]. The CPCC may also decide that no further action is required, or the child or family are referred voluntarily to support agencies or services.
169 Children (Scotland) Act 1995 (Scot) s 64(1).
170 Children (Scotland) Act 1995 (Scot) s 64(3).
171 Children (Scotland) Act 1995 (Scot) s 64(2), (4).
172 Sheehan, above n 162, 207.
173 Ibid. Note that the focus of the Commission’s discussion is on applications made on care and protection grounds, pursuant to our terms of reference. Provisions relating to child offenders may be somewhat different from or additional to those covered here.
174 One such circumstance involves making an emergency application to the Court where there is fear of significant harm to the child. The general children’s hearing procedure is discussed immediately below, while the emergency route is detailed under ‘Court and associated processes’, as it is generally initiated by application to the Court for an order.
175 Scottish Home and Health Department, Children and Young Persons Scotland (1964). The Kilbrandon Report was largely focused on child offenders. There has been a significant shift, with welfare grounds the dominant grounds for referral today.
178 Ibid 26–7. Court was, however, considered to be an ideal forum for determining questions of fact.
181 Sheehan, above n 162, 211–12.
182 Children (Scotland) Act 1995 (Scot) s 52.
183 Scottish Home and Health Department, above n 175, vi.
184 Children (Scotland) Act 1995 (Scot) s 65.
185 Children (Scotland) Act 1995 (Scot) s 65.
Children’s hearings panels

5.60 Each LA area is required to have a panel of members available to sit at children’s hearings. The members are trained lay volunteers from the local community, sitting on a rota basis. Initially, members are appointed for three years, and appointments may be extended. Each local area has a Children’s Panel Advisory Committee that nominates members for the panel, who are then appointed by the State Secretary.

5.61 Each children’s hearing is conducted before a tribunal of three members. The tribunal must not be solely comprised of men or women and the aim is to have a mix of backgrounds and ages represented by the sitting members.

5.62 A children’s hearing will ultimately decide whether a child requires compulsory measures of supervision (also referred to as supervision requirements), and, if so, which measures. Compulsory measures can be for the protection, guidance, treatment or control of the child, and will include where the child is to reside, including secure accommodation. There may be conditions on the compulsory measures regulating contact with the child.

Procedure and processes of children’s hearings

5.63 The first sitting of a children’s hearing establishes whether the child and the relevant person accept or dispute the grounds of referral to the hearing. As noted previously, if the grounds are disputed the matter will be referred to the Sheriff’s Court to determine whether the grounds are established on the facts. If the grounds are made out on the facts, the matter will be remitted to the children’s hearing. In circumstances where the grounds are accepted by both the child and the relevant person, there is no need for referral to the Sheriff’s Court.

5.64 A children’s hearing is ‘informal, non-adversarial, direct and participatory’. In order to make a determination, a children’s hearing will consider the LA’s report, any other relevant information, and the views of the child, the relevant person and, if present, the safeguarder and any representatives.

5.65 Although present at hearings, the reporter has no part in decision making; their role during a hearing is to ensure fair processes are followed. There is no legislative requirement for continuity of either the reporter or the children’s hearing members.

5.66 The children’s hearing discusses the circumstances of the child fully with the parents, the child or young person and any representatives, the social worker and the teacher, if present. As the hearing is concerned with the wider picture and the long-term wellbeing of the child, the measures implemented will be based on the welfare of the child. They may not appear to relate directly to the reasons that were the immediate cause of the child’s appearance at the hearing.

Representation and participation in children’s hearings

5.67 Children have a right to attend the hearing and in general must attend. The relevant person is legally required to attend. Both are considered central participants. As far as is practicable, a child should have the right to express his or her views and have these views considered. The child’s views cannot be given to the hearing confidentially, although the members have the power to exclude the relevant person for a period and later explain the substance of what happened in the person’s absence.
5.68 One of the determinations that a children’s hearing makes is whether to appoint either or both a legal representative or a safeguarder. A safeguarder is appointed if the members determine that this is necessary to safeguard the interests of the child in the proceedings.\(^ {209} \) Safeguards are often appointed when there are conflicting views, either between the child and relevant person, or between either of these parties and the social worker.\(^ {210} \) There is some evidence that safeguards are appointed in approximately 10 per cent of cases.\(^ {211} \)

5.69 The role of the safeguarder is to make recommendations on the child’s best interests, producing a report for the children’s hearing.\(^ {212} \) The safeguarder is appointed from a panel maintained by the LA, which can include legally-qualified safeguards.\(^ {213} \)

5.70 Since 2002, free legal representation at hearings has been available for children, either when it is required to ensure effective participation, or when the hearing is considering or reviewing placement of a child in secure accommodation.\(^ {214} \) Since 2009, state-funded legal representation has also been available for relevant persons in children’s hearings where it is necessary to ensure effective participation.\(^ {215} \)

5.71 Members decide whether to appoint a legal representative at a hearing or during a pre-hearing business meeting.\(^ {216} \) Children’s legal representatives are qualified legal practitioners appointed from specialist panels maintained by LAs, and ‘are expected to be sensitive to the atmosphere and ethos of the children’s hearing’.\(^ {217} \) These legal representatives must be members of either the panel of safeguards or curator ad litem,\(^ {218} \) which the LA maintains.\(^ {219} \)

5.72 The ‘regulations do not specify the role that the legal representative is to play’,\(^ {220} \) although there is a clear distinction between the role of legal representatives and safeguarders:

> A safeguarder safeguards the interests of the child, takes account of his/her views and interests and makes a recommendation on what is in the child’s best interest. A legal representative will protect the child’s rights, and if the child is able to instruct the solicitor, will act on the child’s wishes. The legal representative need not consider the child’s interests.\(^ {221} \)

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186 Children (Scotland) Act 1995 (Scot) s 39.
188 Ibid.
189 Children (Scotland) Act 1995 (Scot) sch 1.
190 Children (Scotland) Act 1995 (Scot) s 39(5).
191 Children (Scotland) Act 1995 (Scot) s 39(5).
193 Children (Scotland) Act 1995 (Scot) s 70.
194 Children (Scotland) Act 1995 (Scot) s 70.
195 Children (Scotland) Act 1995 (Scot) s 70(5)(b).
196 As noted previously, a ‘relevant person’ is someone vested with parental rights and responsibilities: Children (Scotland) Act 1995 (Scot) s 93.
197 Children (Scotland) Act 1995 (Scot) s 65. Matters will also be referred to the sheriff for a finding if the hearing is satisfied that the child will be incapable of understanding the grounds or the hearing if, for example, the child is too young.
198 Children (Scotland) Act 1995 (Scot) s 65. The grounds are set out above.
199 This is discussed further under ‘Court and associated processes’ below. The hearing can also discharge the grounds if this is considered more appropriate.
200 Sheehan, above n 162, 211.
201 The safeguarder makes recommendations on the child’s best interests and produces a report for the hearing. This is discussed below in this chapter.
202 Children’s Hearings (Scotland) Rules 1996 (Scot) r 20.
204 Ibid.
205 Children (Scotland) Act 1995 (Scot) s 45.
207 Children (Scotland) Act 1995 (Scot) s 162(2).
208 Children (Scotland) Act 1995 (Scot) s 46.
209 Children (Scotland) Act 1995 (Scot) s 41.
210 Scottish Executive, Scotland’s Children Research Findings No.1: The Role of Safeguards in Scotland (2002) 3. A safeguarder may also be appointed when the views of the child are difficult to obtain, or when there are gaps in the information put before the hearing. The appointment of a specific safeguarder is usually left to the reporter.
211 Ibid. The report suggests that there are discrepancies between different data sources.
212 Children’s Hearings (Scotland) Rules 1996 (Scot) r 14.
213 The Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001 (Scot).
215 Children’s Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (Scot). This amends Children’s Hearings (Legal Representation)(Scotland) Rules 2002 (Scot), inserting r 34.
216 The business meeting is discussed above under ‘Pre-hearing processes’.
218 A curator ad litem is a ‘legal representative’ appointed where ‘the court believes that the person lacks the mental capacity to make decisions for themselves’: Ormston and Marryat, above n 214, 4.
219 Children’s Hearings (Scotland) Rules 1996 (Scot) r 5.
221 Scottish Executive, Advice to Panel Members: The Children’s Hearings (Legal Representation) (Scotland) Rules 2001 (2002) as cited in Ormston and Marryat, above n 214, 33. It has been suggested that the distinction between safeguarder and legal representative can be confusing: Ormston and Marryat, above n 214, 33.
Outcomes of children’s hearings

5.73 As noted above, the primary function of children’s hearings is to determine whether a child requires compulsory measures of supervision. A children’s hearing has significant powers and can decide to:

- make a supervision requirement
- continue to a subsequent hearing because the tribunal determines further investigation is needed to make a determination
- discharge the referral
- grant a warrant to find or remove the child, or move the child to a place of safety, and require the child to submit to medical or other treatment.

5.74 The CS Act 1995 provides that the children’s hearing should not put a supervision requirement in place unless it would be better for the child than no supervision requirement at all. Most children subject to supervision requirements will remain at home with supervision by a social worker. Less commonly, a hearing will decide that a child should reside with kinship or foster carers or in a residence managed by the LA or other organisation, which includes secure accommodation facilities. The duration of a supervision requirement is guided by the underlying principle that any such order should be in place only as long as it is necessary in the interest of promoting or safeguarding the child’s welfare. Without continuation or variation, a supervision order does not continue for longer than one year.

5.75 Where a supervision requirement is ordered by a children’s hearing, the relevant LA is required to give effect to that supervision requirement. Where an LA breaches this obligation, the reporter may enforce it. Where the child’s place of residence is part of the supervision requirement, the LA is obliged to investigate whether the conditions of the supervision requirement are being fulfilled.

5.76 The LA can refer a breach of a supervision requirement or its attached conditions to the reporter, and can take other measures, of which the LA must inform the reporter, including applying to a court for a parental responsibility order.

5.77 A review hearing is required to determine whether a supervision requirement should continue or be varied. Prior to expiry or when, for example, the LA refers a case for consideration of variation, breach or termination, the reporter arranges a review of the supervision requirement by a children’s hearing. At this point, the supervision requirement can be further investigated, continued, varied or terminated. Three months after an initial supervision requirement or a review decision as above has been made, a child or relevant person may require a review by a children’s hearing panel.

Appeals against children’s hearings findings

5.78 The child or relevant person can appeal a decision of a children’s hearing. The appeal must be made to the Sheriff’s Court within three weeks of the hearing’s decision and the sheriff is able to confirm or substitute a decision by a children’s hearing.

COURT AND ASSOCIATED PROCESSES

5.79 Although children’s hearings are the main decision-making forum for children who are ‘in trouble’ or ‘at risk’, there are a number of reasons why matters involving such children may come before the Sheriff’s Court.
5.80 The Sheriff’s Court is the mechanism by which emergency child protection orders may be sought, and the appeal body for children’s hearing decisions. Additionally, there are a number of orders relating to children and their families which can only be made by the Court.

5.81 Legal aid is available in particular circumstances for proceedings relating to child protection orders, child assessment orders and appeals from a children’s hearing decision, including the decision to grant a warrant. If necessary, the sheriff may appoint a safeguarder to safeguard the child’s interests in a proceeding before the Court.

Emergency protection: child protection orders

5.82 Where the emergency protection of a child is sought, an application is made to the Sheriff’s Court for a child protection order (CPO). Anybody, including an LA, can apply for a CPO. In order to grant a CPO, the sheriff must be satisfied:

- that there are reasonable grounds to believe that the child is being treated or neglected in such a way as to be suffering significant harm, or will suffer significant harm if not removed or retained at a place of safety, and
- that the order is necessary to protect the child.

5.83 In certain circumstances, the LA may also apply for a CPO where it has reasonable grounds to believe that a child is suffering, or will suffer, significant harm due to the manner in which he or she is being treated or neglected, and is seeking to make inquiries to determine whether action needs to be taken. If access to the child is being unreasonably denied, the inquiries of the LA are being frustrated, and access to the child is required as a matter of urgency, the LA may apply for a CPO. In an emergency where a sheriff is unavailable, applications are made to a justice of the peace.

222 Children (Scotland) Act 1995 (Scot) s 69.
223 Children (Scotland) Act 1995 (Scot) s 16(3).
225 Ibid.
226 Children (Scotland) Act 1995 (Scot) s 73(1).
227 Children (Scotland) Act 1995 (Scot) s 73.
228 Children (Scotland) Act 1995 (Scot) s 71(1).
229 Children (Scotland) Act 1995 (Scot) s 71.
230 Children (Scotland) Act 1995 (Scot) s 73(4).
231 Children (Scotland) Act 1995 (Scot) s 71(2).
232 Children (Scotland) Act 1995 (Scot) s 73(9).
233 Children (Scotland) Act 1995 (Scot) s 73(8).
234 Children (Scotland) Act 1995 (Scot) s 73(9).
235 Children (Scotland) Act 1995 (Scot) s 73(8).
236 Children (Scotland) Act 1995 (Scot) s 51.
237 Children (Scotland) Act 1995 (Scot) s 51.
238 Children (Scotland) Act 1995 (Scot) s 57.
239 Children (Scotland) Act 1995 (Scot) s 68.
240 Children (Scotland) Act 1995 (Scot) s 51.
241 The appeal must be made within three weeks of the hearing’s decision. Appeals are discussed above.
242 For appeals against warrants issued by a sheriff, legal aid is granted on application without inquiry into the resources of the applicant: Children (Scotland) Act 1995 (Scot) s 92. For other appeals, grants of legal aid are dependent on consideration by the sheriff of the interests of the child and financial circumstances.
243 Children (Scotland) Act 1995 (Scot) s 92 (substituted for s 29 of the Legal Aid (Scotland) Act 1986 (Scot)).
244 Children (Scotland) Act 1995 (Scot) s 41. The Court may also appoint a curator ad litem.
245 Children (Scotland) Act 1995 (Scot) s 57.
246 Children (Scotland) Act 1995 (Scot) s 57.
247 Children (Scotland) Act 1995 (Scot) s 57(1).
248 Children (Scotland) Act 1995 (Scot) s 57(2).
249 Children (Scotland) Act 1995 (Scot) s 57(2).
250 The justice of the peace must be satisfied that the conditions required for a CPO exist and that it is not practicable for such an order to be made by a sheriff: Children (Scotland) Act 1995 (Scot) s 61.
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5.84 When a CPO is made, the LA and the reporter must be informed,251 and the reporter must arrange an initial children’s hearing on the second working day after the order was implemented.252 A CPO will cease to have effect if it is not acted upon within 24 hours.253 If the hearing determines that the CPO should be continued, the reporter must arrange a children’s hearing on the eighth working day after the order was implemented.254 This hearing will take place in the manner described above.

5.85 The only power under the CS Act 1995 for the removal of a child without a CPO or approval of a justice of the peace lies with the police.255 A police officer can remove a child to a place of safety256 when the police officer has reasonable cause to believe the conditions for making a CPO are satisfied but it is not practicable in the circumstances to make that application.257 This power only allows for the child to be removed for 24 hours, and ceases if a CPO is applied for.258

Referral from a children’s hearing on the basis of disputed grounds

5.86 Where a child and relevant person dispute a ground of referral to a hearing, or where, for example, the child is too young to be able to accept the grounds of referral, the children’s hearing may direct the reporter to apply to the Sheriff’s Court for a finding.259 A sheriff hears the application within 28 days of it being lodged.260 The child has a right to attend, and generally must attend.261 The sheriff makes a determination based on the evidence provided to the Court by the reporter.

5.87 If the sheriff determines that the grounds are not established, the application is dismissed and the referral to the hearing is discharged.262 Where the sheriff determines that a ground is established, it is remitted back to a hearing.263

Sheriff’s court orders

5.88 In addition to CPOs, the Sheriff’s Court can make other orders related to children and their families. These include child assessment orders, exclusion orders and parental responsibility orders. The Sheriff’s Court must be satisfied when making an order that doing so would be better for the child than making no order at all.264

5.89 The Sheriff’s Court has discretion to grant child assessment orders sought by an LA. The Court may grant a child assessment order if satisfied that:

• the authority has reasonable cause to believe a child is being treated so that she or he is or is likely to suffer significant harm
• the assessment is needed to establish this, and
• such assessment is unlikely to be carried out satisfactorily if such an order is not made.265

5.90 An LA can apply for an exclusion order, which, if granted, excludes any person named in the order from the child’s home. The Court can grant the exclusion order if satisfied that:

• the child is suffering from significant harm as a result of any conduct by a named person
• such an order is necessary for the child’s protection, and
• an exclusion order would better safeguard the child’s welfare than removal of the child from the family home.266
The person the sheriff is considering excluding must have an opportunity to be heard before a final determination can be made, but an interim order can be granted.\footnote{267}

5.91 Parental responsibility orders may be sought by LAs to transfer appropriate parental rights and responsibilities of a child to them.\footnote{268} These orders can be made where each relevant person either consents, or is in some way incapacitated or failing in their parental responsibilities.\footnote{269}

**REFORM PROGRAM**

5.92 The Scottish system has undergone significant review and reform. As noted previously, much of this reform has led to initiatives directed to improving all children’s access to services as and when they need them, ensuring that only appropriate cases are referred into the hearing system, and promoting multi-agency coordination and cooperation.

5.93 The Children’s Hearings (Scotland) Bill (Scot), introduced in 2010, contains additional proposed reforms.\footnote{270} Overall, the reforms uphold the Kilbrandon philosophy and the children’s hearing system.\footnote{271} The Scottish Government has described the reforms as necessary to modernise the system and provide appropriate support to practitioners and volunteers.\footnote{272}

5.94 Some notable recommendations include a move towards better national uniformity in the children’s hearing system, including children’s hearing panel recruitment and training.\footnote{273} Recruitment and training of panel members would be managed by a newly established ‘National Convenor’, to be supported by the new body ‘Children’s Hearing Scotland’, and localised support teams.\footnote{274}

5.95 Further, state-funded legal representation would be provided through the general civil route as administered by the Scottish Legal Aid Board (SLAB).\footnote{275} Legal representation would be automatically available in some circumstances, including where the children’s hearing considers it might be necessary to make a ‘compulsory supervision order’.\footnote{276} Where the SLAB is satisfied particular conditions are met, including that it is in the child’s best interests, representation would also be available for proceedings before the Sheriff’s Court, including appeals.\footnote{277}

5.96 The reforms would also require the SLAB to maintain a register of solicitors and firms eligible to provide children’s legal assistance,\footnote{278} and to draft a code of practice in relation to registered solicitors carrying out their provision of such assistance.\footnote{279} Under the Bill, the Minister would be empowered to make regulations about qualifications required by registered solicitors.\footnote{280}

5.97 Under the Children’s Hearings (Scotland) Bill (Scot), the role of the reporter would largely remain the same, but with the Ministers having power to make regulations changing the functions of the reporter.\footnote{281} LA accountability would be strengthened by empowering a hearing to be able to direct the National Convenor to take an LA to court when there are concerns about the LA implementing a hearing’s decisions.\footnote{282}

5.98 The Bill was at the initial ‘Inquiry and Report’ stage at the time of writing, and has been referred to a committee of the Scottish Parliament for consideration. The committee is due to report by July 2010.\footnote{283}
ENGLAND AND WALES

GENERAL

5.99 The Children Act 1989 (UK) (CA 1989) governs child protection in England and Wales. It came into force on 14 October 1991 and was considered to be “the most comprehensive and far-reaching reform of child law which [had] come before parliament in living memory”. Some distinguishing features of the child protection system in England and Wales are:

- Only police have the power to remove a child from his or her accommodation without judicial authorisation.
- Lay magistrates sit in the Family Proceedings Court—one of the courts with jurisdiction to deal with child protection proceedings.
- There is a statutory requirement for the Court to appoint a guardian ad litem for specified proceedings, who then appoints a solicitor for the child. This results in a tandem representation model.
- A child is automatically a party to proceedings.
- There is a ‘no order’ principle, meaning that before making an order, the Court must be satisfied that making the order would be better for the child than making no order at all.

5.100 The CA 1989 consolidated earlier legislation, which was considered complex and fragmented, and responded to criticism of existing child protection practice. The legislative framework is based on a best interests model, emphasising the preference for keeping the family unit together and the child at home.

5.101 The CA 1989 was supplemented by the Children Act 2004 (UK) (CA 2004). The CA 2004 enhances the child protection system in England and Wales by establishing a Children’s Commissioner and bodies responsible for inter-agency collaboration and provision of services, as well as setting up databases to hold information on all children. The rationale for enacting the CA 2004 was to encourage integrated planning, commissioning and delivery of services as well as improve multi-disciplinary working, remove duplication, increase accountability and improve the coordination of individual and joint inspections in local authorities.

5.102 The family justice system in England and Wales, including child welfare, is currently under review by the Ministry of Justice. The terms of reference direct an expert panel to consider the use of mediation as a way to avoid undue adversarialism in proceedings. Preserving the best interests of the child is the focus of the reference.

KEY BODIES RESPONSIBLE FOR CHILD PROTECTION

5.103 Local authorities (LAs): are responsible for child protection matters under the CA 1989. They are the government structures responsible for social services, including children’s services, education and other services in each region. They are required to provide services to safeguard and promote the welfare of children within their area and, by extension, promote the upbringing of such children.

5.104 Department of Education (DE): formerly the Department for Children, Schools and Families, is responsible for the CA 1989 and for producing statutory and non-statutory guidelines for LAs.
5.106 The Children and Family Court Advisory and Support Service (CAFCASS): is a non-departmental public body that reports to the Secretary of State for Education, in what is now called the Department of Education. It brought together functions previously provided by three agencies, namely: the Family Court Welfare Service, the Guardian Ad Litem and Reporting Service, and the Children’s Division of the Official Solicitor’s Office.

COMMENCEMENT OF A PROTECTION MATTER
Notification and investigation
5.107 Although there are no mandatory reporting laws in England or Wales, guidelines issued by professional bodies and LSCBs emphasise the need to make a referral where there is a ‘reasonable belief that a child is at risk of significant harm’.

5.108 Where an LA is informed or has reasonable cause to believe that a child is suffering or likely to suffer significant harm, the LA shall make such inquiries as it considers necessary to decide whether to take any action to safeguard the child’s welfare. If, in the course of inquiries, access to the child is being refused or the child’s whereabouts is being concealed, the LA is to apply for an order in respect of the child unless it is satisfied that the child’s welfare can be safeguarded without an order.

5.109 The LA child protection team must decide what action to take within one working day of receiving a referral. The LA must investigate concerns about any child who is physically present in its area. This includes a child who is the subject of an emergency protection order, is in police protection, or who is likely to suffer significant harm.
5.110 The LA may decide that no further action is necessary if the child is deemed to be at no risk of harm. In all other circumstances, the child protection team operating within the LA will proceed with an initial assessment within ten working days of receiving the referral. If it becomes evident that a child is at risk of significant harm, the LA can apply for an emergency protection order (EPO).

**Child assessment orders**

5.111 To enable an investigation to take place, an LA or authorised person may apply to the Court for a child assessment order. The Court may only grant such an order if:

- there is reasonable cause to believe that the child is suffering, or is likely to suffer, significant harm
- an assessment of the child’s health, development, or the way in which he or she has been treated is necessary to determine whether the child is suffering harm, and
- it is unlikely that such an assessment could be satisfactorily made in the absence of a child assessment order.

A child assessment order lasts up to seven days and there is provision for the child to be kept away from home if it is necessary to conduct the assessment. Child assessment orders are used very rarely.

**PRE-COURT PROCESSES**

5.113 The CA 1989 and accompanying guidance encourages greater cooperation between those responsible for children and statutory or voluntary agencies. The purpose of this is to divert child protection matters away from court and legal processes and instead use the child welfare guidance of the Court to settle matters. Even after proceedings have been commenced, the Court can encourage and facilitate alternative dispute resolution at any stage, if it is safe and in the best interests of the child.

5.114 Child protection procedures, including the conduct of the child protection conferences (CPCs), are the responsibility of LAs, acting in accordance with guidance from the relevant governmental department.

**Child protection conferences**

5.115 A CPC is a multi-disciplinary meeting to discuss the case of a particular child. It is the responsibility of the LA to convene a child protection conference. This conference is chaired by an LA officer who is not responsible for managing the child’s case. The purpose of a CPC is to assess all relevant information and agree on a child protection plan in order to best safeguard and promote the welfare of that child.

5.116 The LA solicitor may attend a CPC to advise the chair on issues relating to the management of the meeting, but may not give advice on the child protection plan or the case. Other parties who may attend the CPC are family members and any professional that is involved with the child and his or her family. A child may attend in circumstances where it is deemed appropriate. Although family members may attend, the professionals are responsible for drawing up the plan.
Family group conference

5.117 An FGC is a decision-making forum, increasingly used to establish communication between the relevant parties. Although FGCs are not currently mandated by legislation, they are becoming more widely used as a method to integrate support from the wider family group with professional support services. The Court may direct parties to an FGC at any stage of proceedings, where appropriate. An FGC is convened by an independent coordinator, whose appointment is regulated by the LA. The independent coordinator will ordinarily be a professional recruited from local statutory and voluntary service communities. The aim of this is to meet and discuss the welfare of the family based on the information provided by the relevant professionals. The key difference between a CPC and an FGC is that the latter provides a chance for the wider family to meet and discuss the welfare of the child based on the information provided by the relevant professionals. The aim of this is to encourage the wider family to make a decision about how best to safeguard and promote the child’s welfare based on the needs of the child. FGCs do not replace CPCs, but may be run alongside them to give the wider family group greater input into the child protection plan than they would have at a CPC.

Differences between CPCs and FGCs

5.118 The key difference between a CPC and an FGC is that the latter provides a chance for the wider family to meet and discuss the welfare of the child based on the information provided by the relevant professionals. The aim of this is to encourage the wider family to make a decision about how best to safeguard and promote the child’s welfare based on the needs of the child. FGCs do not replace CPCs, but may be run alongside them to give the wider family group greater input into the child protection plan than they would have at a CPC.

Emergency Removal Powers

5.119 In England and Wales, only the police have the power to remove a child from his or her family without judicial authorisation. Emergency removal is treated quite separately from care and supervision proceedings. Although emergency removal will often lead to care and supervision proceedings, it is not part of, or a prelude to, these proceedings.

Emergency removal of a child without judicial authorisation

5.120 Only police have the power to remove a child from his or her accommodation in emergency circumstances. A child may be taken into police protection for 72 hours without the Court first making an order. To exercise this power, the police officer must be satisfied that there is reasonable cause to believe the child would be likely to suffer significant harm if not removed. This police power may be exercised either at the request of the LA or at a police officer’s own discretion.
5.121 As soon as reasonably practicable after removing a child from his or her accommodation, the police must inform all relevant parties of steps that have been taken and the reasons for removal. Relevant parties to be informed include:

- the child, if he or she appears capable of understanding
- the child’s parents or carers
- the LA.

On removal, the police are to ensure that the child is placed in accommodation provided by or on behalf of the LA, or in a refuge. Despite the preference for making placement arrangements for the child prior to removal, it seems that many children are taken to police stations.

5.122 Following removal, the police officer responsible for removing the child must take reasonable steps to ascertain the wishes and feelings of the child and ensure that a designated officer inquires into the case. When that inquiry is complete, the designated officer must release the child from police protection unless he or she considers that there is still reasonable cause to believe the child would suffer significant harm if released. If it is determined that it is not appropriate to release the child, the designated officer may apply for an EPO.

5.123 When a child is in police protection, neither the officer who removed the child nor the designated officer has parental responsibility for the child. While a child is in police protection, the designated officer must allow certain persons, including the child’s parents, to have contact with the child if the officer considers it to be both reasonable and in the child’s best interests.

Research has shown that the extent to which police exercise their powers in these matters varies greatly between forces. There are Child Abuse Investigation Units within the police force that are responsible for these types of cases, although these units are not always able to respond to all cases where police protection is required. Social workers from an LA sought police assistance

where the risk of violence or refusal of entry necessitated the use of police presence and powers, or where action was needed in an emergency and it was not possible to obtain a court order for a child’s removal immediately.

Emergency removal of the child with judicial authorisation

5.125 Under the CA 1989, if the LA has reason to believe that the child is likely to suffer, or is suffering, significant harm it may apply to the Court for an EPO. Similarly, if the LA is unreasonably denied access while trying to undertake an investigation in relation to a child, it may apply for an EPO. In cases of the LA applying for an EPO, the child is most likely known to the LA and on the child protection register. An EPO authorises the removal of the child to accommodation provided by or on behalf of the applicant, or prevents the child’s removal from a hospital or other place. The EPO gives the applicant parental responsibility for the child.

5.126 While in force, the EPO requires any person in a position to do so to comply with a request to produce the child to the applicant. It is an offence to obstruct or prevent the removal of a child under an EPO. A recommendation by the Law Commission resulted in the addition of an exclusion requirement in the Family Law Act 1996 (UK) to operate alongside an EPO, so that it is possible for the child to remain at home while the perpetrator of abuse is excluded.
5.127 EPO applications are heard in the Family Proceedings Court (FP Court) unless the child is involved in separate proceedings in the County Court or High Court. The usual period of notice for an EPO application is one day, but the application can be heard ex parte. Where the Court refuses to hear the application ex parte, it is usually prepared to allow it to be heard on short notice. Short notice typically means that the application is approved at the beginning of a working day, served on the parents during the morning and heard at 2pm.

5.128 For the Court to grant an EPO, it must be satisfied that the child is suffering or likely to suffer significant harm if not removed from their accommodation. The ‘no order’ principle also applies to EPOs, meaning that the Court must be satisfied that making the order would be better for the child than making no order at all.

5.129 An EPO can last for up to eight days and may be extended once for a period of no longer than seven days. The CA 1989 specifies that no application for the discharge of an EPO should be made until 72 hours after the EPO is made. Even then, persons cannot apply for the discharge of the EPO if they were given notice and were present at the hearing of the application. There can be no appeal made against the making of or refusal to make an EPO by the Court.

5.130 The LA or other applicant must return the child once it appears that it is safe to do so. The child is to be returned to the person from whose care he or she was removed, or to another appropriate person if this is not reasonably practicable. While many EPO applications will ultimately lead to care and supervision proceedings, this will not necessarily be the case.

CARE AND SUPERVISION PROCEEDINGS

5.131 Care and supervision proceedings are dealt with separately from EPOs under the CA 1989. They are treated as a separate type of proceeding, giving rise to different procedural considerations and different orders. Care and supervision proceedings are commenced when an LA or authorised person applies for an order placing the child in the care or under the supervision of a designated LA.
Courts with jurisdiction to hear care and supervision proceedings

5.132 Proceedings in relation to the care and supervision of children and young people are dealt with by various courts in England and Wales. The CA 1989 created a combined jurisdiction for all courts dealing with family proceedings, encompassing both public law and private law matters. This means that in private law matters, such as divorce proceedings, a court may direct an investigation into a child’s circumstances if it appears that a care or supervision order may be appropriate. This combined jurisdiction is established by giving certain courts powers to make ‘orders with respect to children in family proceedings’. ‘Family proceedings’ include proceedings under:

- parts of the CA 1989
- the Matrimonial Causes Act 1973 (UK)
- the Domestic Violence and Matrimonial Proceedings Act 1976 (UK)
- the Adoption Act 1976 (UK).

5.133 The CA 1989 gives this combined jurisdiction to the three levels of courts that hear all matters relating to the care, supervision and protection of children: the FP Courts, the County Courts, and the High Court. These courts have equivalent powers under the CA 1989. The Act includes the provision for the commencement of proceedings in and the transfer of proceedings to:

- a specified level of court
- a court which falls within a specified class of court
- a particular court determined in accordance with, or specified in, the order.

This provision allows for the transfer of complex cases to the relevant level of court.

Family Proceedings Court

5.134 The FP Court, which usually hears care and protection proceedings, is a court of first instance in England and Wales. Its jurisdiction is derived from the Magistrates’ Court. A bench of three lay magistrates, chosen from the family panel, constitute the FP Court. These lay magistrates are also referred to as justices of the peace. A legally-qualified clerk supports the bench and advises the magistrates on the law.

5.135 Magistrates come from a range of backgrounds, are not usually legally qualified, and do not receive payment for their services. They can claim for expenses and loss of income. Magistrates receive supervised training by the Judicial Studies Board and must be appointed by the Lord Chancellor as a member of a FP Court. A legally qualified District Court judge may also hear matters in the FP Court.

Case management in care and supervision proceedings

5.136 The Judiciary for England and Wales and the Ministry of Justice provide a practice direction relating to case management that applies to all care and supervision proceedings. This practice direction is published jointly by the President of the Family Division and the Ministry of Justice and is referred to as the Public Law Outline (PLO). The PLO provides that its overriding objective is to enable the Court to ‘deal with matters justly, having regard to the welfare issues involved.’
5.137 Both the PLO and the Family Proceedings Court Bench Book provide case management measures in support of this overarching objective. These measures include:

- identifying the appropriate court to hear the matter and referring it there as soon as possible
- identifying at an early stage who should be a party to proceedings
- drawing up a timetable to avoid delay likely to be prejudicial to the child
- dealing with as many aspects of the case as possible on one occasion
- fixing dates for all appointments and hearings
- having no more than two magistrates or judges responsible for hearing proceedings in each case
- encouraging parties to cooperate with each other during the conduct of the proceedings.

Representation and participation of the child

The guardian ad litem

5.138 The CA 1989 introduced the statutory appointment of a guardian ad litem for a child in specified proceedings, including care and supervision proceedings. Although children have had the right to full party status in all public law proceedings since 1975, Her Majesty’s Inspectorate found in 2005 that ‘court staff, the judiciary and CAFCASS, both explicitly and formally’ do not encourage children to attend court.

5.139 The guardian is an independent professional appointed in accordance with the rules of court to safeguard the interests of a child. The Court is to appoint a guardian for the child concerned unless satisfied that it is not necessary to do so to protect the child’s best interests. In the event that a guardian is deemed necessary, the Children and Family Court Advisory and Support Service (CAFCASS) assists the Court in appointing a guardian. CAFCASS provides the name of an available guardian to the Court, usually a CAFCASS officer, and the Court then makes an order appointing that guardian, by name, for the individual child.

387 Children Act 1989 (UK) s 37; Brown, above n 292, 6–7. Public law proceedings include care and supervision proceedings in which the State is a party, and private law proceedings include divorce and custody proceedings, for example, in which the parties are private individuals.

388 Children Act 1989 (UK) s 37; Brown, above n 292, 6–7.

389 Children Act 1989 (UK) pt II.

390 Children Act 1989 (UK) s 92(7).

391 Children Act 1989 (UK) sch 1(1)(2).

392 Judiciary of England and Wales, above n 286. In 1991, the Family Proceedings Rules 1991 (UK) established procedures which to be adopted in all levels of courts dealing with family matters.


394 Children Act 1989 (UK) s 92(2).

395 The family panel is made up of magistrates authorised by the Training and Development Committee on the basis of aptitude and personal suitability: Judicial Studies Board, above n 366, 12.

396 Her Majesty’s Courts Service (UK), Magistrates and Magistrates’ Courts <www.hmcourts-service.gov.uk/info/about/magistrates/index.htm> at 25 April. There are approximately 30,000 lay magistrates in England and Wales.

397 Ibid.

398 Judiciary of England and Wales, above n 286.

399 Courts Act 2007 (UK) s 49(1)(3)(b).

400 Judiciary of England and Wales, above n 286.

401 President of the Family Division and Her Majesty’s Courts Service (UK), Public Law Outline, above n 325.

402 Ibid.

403 Ibid 1.

404 Ibid 2; Judicial Studies Board, above n 366, 39.

405 President of the Family Division and Her Majesty’s Courts Service (UK), Public Law Outline, above n 325, 5.

406 Judicial Studies Board, above n 366, 39.

407 Ibid 41; President of the Family Division and Her Majesty’s Courts Service (UK), Public Law Outline, above n 325, 2.

408 Judicial Studies Board, above n 366, 39.

409 Ibid; President of the Family Division and Her Majesty’s Courts Service (UK), Public Law Outline, above n 325, 2.

410 President of the Family Division and Her Majesty’s Courts Service (UK), Public Law Outline, above n 325, 2.

411 Judicial Studies Board, above n 366, 39.

412 Children Act 1989 (UK) ss 41(1), 6. Note that the guardian ad litem is also referred to as the ‘children’s guardian’ and ‘Family Court advisor’: Committee on the Lord Chancellor’s Department, House of Commons, Children and Family Court Advisory and Support Service: Third Report of Session 2002–03, vol 1 (23 July 2003) 9; Fortin, above n 289, 247.

413 Fortin, above n 289, 274.

414 Ibid 276.

415 Children Act 1989 (UK) ss 5, 41(2).

416 Children Act 1989 (UK) s 41(1).

417 Fortin, above n 289, 247.

418 Ibid.
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5.140 The primary functions of the guardian are:

- to appoint a solicitor for the child, unless this has already been done by the Court
- to give advice to the child as is appropriate to his or her understanding
- to instruct the solicitor on matters relevant to the child’s interests, unless the child is judged to be of sufficient age and maturity to directly instruct his or her solicitor
- to advise the Court about the management of proceedings and prepare a report advising the Court on the child’s interests.

5.141 In order to perform his or her functions, the guardian has direct contact with the child, interviews members of the child’s family and makes a professional assessment of the child’s welfare, sometimes with expert assistance.

The child solicitor

5.142 Child solicitors are selected from the family practice register—the Children Panel Accreditation Scheme—set up by the Law Society Child Care Panel. The register includes lawyers who have experience and an interest in family proceedings matters. Having both a guardian and a solicitor—the ‘tandem’ model of representation—combines the qualifications of a lawyer and a social worker, providing synthesis to court proceedings. If a guardian is not available to represent the child, the Court will appoint a solicitor for the child and the solicitor will represent the best interests of the child until a guardian is appointed. Thereafter, the solicitor will be instructed by the guardian. It is desirable that the guardian and solicitor remain with the child throughout proceedings.

5.143 In cases where the child or young person expresses a wish to instruct the solicitor him- or herself, is deemed competent to do so and wishes to give instructions that conflict with those of the guardian, the solicitor will act on the child’s instructions. The Practice Guidance for Guardians provides that ‘if the child is competent and wishes to instruct the solicitor directly it is likely that the guardian will separate from the child’s solicitor’. In this instance, the solicitor will no longer be acting on the guardian’s instructions and there is provision for the guardian to obtain separate legal representation.

Stages of care and supervision proceedings

5.144 The PLO sets out five stages for care and supervision proceedings.

1. Issue of proceedings

5.145 At this initial stage, the Court ensures that pre-proceedings requirements have been complied with, allocates or transfers proceedings to a particular court and obtains the information that will be necessary at the first appointment. Within three days of the issue of proceedings, CAFCASS allocates the case to a guardian ad litem. A solicitor for the child is also appointed. Upon issue of proceedings, the Court lists a date for the first appointment for within six days.

2. First appointment

5.146 During this stage, the Court confirms the allocation of proceedings and gives initial case management directions. This may involve identifying additional parties and determining whether the case is appropriate for an early final hearing. The Court scrutinises a care plan provided by the LA regarding future care of the child and lists the case management conference (CMC) for within 45 days of the issue of proceedings.
3. Case management conference

5.147 Two days before the CMC, an advocates’ meeting is held with the main purpose of drafting a case management order for the Court’s approval.439 The aim of this meeting is to avoid ‘discussions at the courtroom door’.440 Where the advocates are unable to agree on the terms of the draft order, they specify where they agree and where they disagree.441 The advocates also try to agree on any questions to be put to experts.442

5.148 The CMC is the main hearing at which the Court manages the case.443 At the CMC, the primary objectives are to identify key issues and give full case management directions.444 The Court issues the approved case management order and sets a date for the issues resolution hearing (IRH).445

4. Issues resolution hearing

5.149 There may also be an advocates’ meeting between two and seven days before the IRH to draft or update the case management order. The IRH takes place between 16 and 25 weeks after the issue of proceedings.446 At this stage, the Court identifies any key issues that are yet to be resolved and narrows the issues, if possible.447 The Court also issues the approved case management order if this was not done at the CMC stage, or if it has been updated since then.448 The Court undertakes any final case management and sets a date for the final hearing.449

5. Final hearing

5.150 The purpose of the final hearing is to determine any issues that could not be agreed upon at the IRH.450 There is opportunity for oral evidence to be heard and challenged.451

5.151 It is important to note that interim steps can be bypassed if the issues are clear and the case proceeds to an early final hearing.452 An early final hearing is appropriate where all the necessary information to determine issues of fact or welfare is immediately or shortly available to be filed.453 The PLO is flexible and provides that the Court can cancel or repeat a particular hearing, or give certain directions without a hearing.454

Grounds and orders in care and protection proceedings

5.152 Under the CA 1989, the grounds to be proved are closely linked to the order sought. Proceedings are not brought to determine whether the child is in need of protection, but rather to determine whether the grounds for making an order are made out.

5.153 The CA 1989 gives the Court power to make care and supervision orders.455 It establishes that a care or supervision order will only be granted if:

- the child is currently suffering or likely to suffer significant harm, and
- the harm is attributable to the care given to the child, or likely to be given to the child, or attributable to the fact that the child is beyond parental control.456

‘Harm’ means ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing the ill-treatment of another person.457
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5.154 Before making a care or supervision order, the Court must consider the ‘no order’ principle in the CA 1989\(^{368}\) and certain aspects of the child’s welfare.\(^{459}\) A child must be under 17 years old, or 16 years old if married, at the time an order is made.\(^{460}\)

5.155 The concept of parental responsibility is central to understanding the orders that can be made as a result of care and supervision proceedings. The CA 1989 defines parental responsibility as ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.\(^{461}\)

Care orders

5.156 A care order places the child in the care of a designated LA.\(^{462}\) It remains in force until the child is 18 and effectively gives the LA parental responsibility for the child and the right to decide the extent to which parents can meet their own responsibilities to the child.\(^{463}\) While the care order is in force, the LA will allow the child to have reasonable contact with persons including his or her parents.\(^{464}\)

5.157 The Court may make an order relating to contact with particular persons, whether or not such an order has been applied for.\(^{465}\) Before making a care order, the Court is to consider the arrangements that the LA has made or proposed to make regarding contact of certain persons with the child.\(^{466}\) The Court may grant an order to authorise the LA to refuse contact with certain persons, including the child’s parents.\(^{467}\) The Court may vary or discharge an order in relation to parental contact on the application of the LA, the child or the person named in the order.\(^{468}\)

5.158 The Court may order that a child under the care of an LA be placed in secure accommodation if he or she is likely to abscond and would suffer significant harm in doing so.\(^{469}\)

Supervision orders

5.159 If a supervision order is granted, parental responsibility remains with the child’s parents.\(^{470}\) The LA will assign the child a supervisor from its social services department,\(^{471}\) and it will be the role of the supervisor to advise, assist and befriend the supervised child.\(^{472}\) Under the CA 1989, a child and those persons with parental responsibility for him or her may be subject to a supervision order for 12 months,\(^{473}\) but this can be extended by the Court for up to three years.\(^{474}\)

5.160 A supervision order may require that persons having parental responsibility for the child keep the supervisor informed of their address,\(^{475}\) or ensure that the child is made available for medical or psychiatric assessments or treatment.\(^{476}\)

5.161 If a supervision order is not complied with or the supervisor considers that the order may no longer be necessary, the supervisor is to consider whether to apply to the Court for variation or discharge of the order.\(^{477}\)

Interim care and supervision orders

5.162 Where proceedings for a care order or supervision order have been adjourned, or the Court has directed an appropriate authority to undertake investigation into whether a care or supervision order is needed,\(^{478}\) the Court may make an interim care or supervision order.\(^{479}\) The first interim order may last up to eight weeks, and any subsequent orders can only last for periods of up to four weeks at a time.\(^{480}\)

5.163 To grant an interim care or supervision order, the Court must still be satisfied that the criteria for an ordinary care or supervision order are made out.\(^{481}\)
Residence, contact and other orders in care and supervision proceedings

5.164 The CA 1989 also provides that in care and supervision proceedings,\(^{482}\) the Court may make:

- **a contact order:** which requires the person with whom the child lives, or is to live, to allow the child to visit or stay with a named person, or for that person and the child to otherwise have contact
- **a prohibited steps order:** which provides that no step that could be taken by a parent exercising parental responsibility for a child shall be taken by a person without the consent of the Court
- **a residence order:** which settles the arrangements to be made as to the person with whom a child is to live
- **a specific issue order:** which gives directions for the purpose of determining a specific question in relation to the parental responsibility for a child.\(^{483}\)

**APPEALS**

5.165 No appeal can be made against the making of or refusal to make an EPO, or against any direction given by the Court in connection with such an order.\(^{484}\)

5.166 There is a general right of appeal from the FP Court to the High Court.\(^{485}\)