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Certainty for Children, Fairness for Families?

Appendix 2:
Children's Court File Study

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Introduction

The permanency amendments to the child protection provisions of the *Children, Youth and Families Act 2005* (CYF Act) which came into effect on 1 March 2016 introduced a number of legislative and associated changes intended to support early and timely decision-making and legal permanency for children, preferably with their parents but otherwise in a permanent placement. The amendments were intended to result in earlier case planning with a clear permanency objective supported by clearer evidence; earlier engagement with birth parents and commencement of reunification casework; earlier family reunification or more timely decisions that reunification is unachievable and timelier permanent care orders, and Cultural support plans for all Aboriginal children in out-of-home care.

The aim of the court file study, as one limb of the Permanency Amendment Longitudinal Study, is to understand the implementation and outcomes of the amendments as they play out in the court process. It is based on an in-depth comparison of a sample of Children's Court files prior to and after the implementation of the amendments in March 2016.

The focus of the data collection and analysis in this court file study is on the operation and impact of the permanency amendments on:

- the timing and sequencing of the orders
- the alignment between the orders sought by DHHS and orders made by the Court
- the timeliness of decisions and delays in the process
- children's pathways through the orders and the pattern of orders for children who entered care and remained in care, were reunified, or re-entered care
- cultural plans and supports for Aboriginal children and families.

The three main questions are whether the permanency amendments have resulted in more timely decisions, and whether children are more likely to achieve permanency either through being more likely to be reunified with their parents or placed on a permanent or long-term care order as well as how these decisions are made through the process.

2. Court file sampling and data

The data in the court study were derived from 51 Court files provided by the Victorian Children's Court: 26 pre-amendment and 25 post-amendment files.

a. 26 cases were substantiated *prior* to the Permanency Amendments in the period March 2013 to September 2015.[1] [2][Pre-amendment files]

b. 25 cases were substantiated *after* the Permanency Amendments during the period March 2017 to September 2017 [Post--amendment files]

Data extraction from CRIS was conducted in two tranches to select cases to identify court files (for more detail about the process, see Appendix 1). The overall inclusion criteria[3] were:

1. Cases substantiated prior to the Permanency Amendments in the period March 2013 to September 2015 [Pre-files][4] or from March 2017 to September 2017 [Post-files]
2. Substantiated cases that had at least one of the following protection orders or a permanent care order:[5]
    a. Family reunification order (post), supervised custody order or custody to Secretary order (pre-amendments)
    b. Care by Secretary order (post) or guardianship to Secretary order (pre)
    c. Long-term care order (post) or long-term guardianship order (pre)
    d. Permanent care order.
3. Court location: Melbourne, Moorabbin, Broadmeadows, or Shepparton, Mildura and Ballarat.

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[1] The period from September 2015 until March 2016 was excluded since this was a transition period and there was concern that this period might have been subject to some different activity in the run-up to the implementation of the amendments.

[2] These court files included 8 matters with the first protection application in 2013 and 2014, and 10 in 2015.

[3] The criteria for inclusion of the cases in the sampling frame was the subject of considerable discussion with the President and CEO of the Children's Court of Victoria, senior DHHS staff and the PALS stakeholder advisory group and within the research team.

[4] To obtain pre-amendments files that were finalised prior to the implementation of the amendments in March 2016, the selection period was extended in the second tranche back to March 2013 since most of the initial files for March–September 2015 were not finalised prior to March 2016; they were 'transition' files with court work that continued into 2016, 2017, 2018 and even 2019. This was important not to bias the pre-amendment files to those that were finalised more quickly. The 2013 selection criteria also matched the CRIS analysis dates. The files were extracted and matched in December 2019 and the second tranche in April 2020.

[5] This does not include children who entered out-of-home care under an interim accommodation order and were reunified before a family reunification order was made or by making a family preservation order.

Following extraction of eligible post-amendment cases from CRIS, a comparison group was generated by matching the pre-files on the following characteristics: [6]

- Child's age at substantiation[7]
- Child's gender
- Child's Aboriginal status
- Whether the child had a previous placement in out-of-home care (OOHC)
- The last recorded order type and court location (see above).

2.1 Court file data

The court files include Protection Reports, Disposition Reports, and Minutes of Proposed Family Division Orders. A multi-sheet Excel template was used to record information on:

- The demographics of the child and family, and a case synopsis
- A summary of the protection and disposition reports, addendum reports, and reports supporting permanency applications; cultural plan especially for Aboriginal children
- Case plans and objective, discrepancy between initial case objective and at final orders
- Court processes – dates of protection applications, orders, conciliation conferences, directions hearings, contested hearings, mentions and reasons for adjournments, and time from initiation to finalisation
- Sequence and timing of court orders, and conditions on orders
- Out-of-home care placements such as care arrangements, durations, dates of placement etc.
- Children's contact with family members in out-of-home care
- Any legal representation of the child and parents.

These data were supplemented by information from CRIS provided by DHHS on the longer-term outcomes for the children involved in these applications – whether there were further reports, substantiations, placement changes, court orders and reports for court proceedings subsequent to the last action/orders in the court files. These data were also useful for

[6] Attempting to select on the number of children in each case/sibling group was not feasible because of the lack of reliable definition and data available to the research team from CRIS.

[7] Age at the end of investigation phase was grouped into five categories (0 years, 1–5 years, 6–9 years, 10–13 years, and 14–17 years).

validating and checking the history, dates and applications, including some missing data from the court file extraction process.

In compliance with the ethics approval from the University of Melbourne, the court and CRIS data files are password protected and accessible only by the two researchers working on these data. All data transfers were conducted using secure, encrypted protocols and stored on the secure server environment at the Sydney Law School (USYD) with access restricted to the authorised research staff.

All procedures in relation to data transfer, management, storage and analysis are compliant with the University Code, the Health Records Act 2001, the Privacy and Data Protection Act 2014 (VIC), Privacy and Personal Information Protection Regulation 2014 (NSW), and the Privacy Act 1988.

2.2 Data analysis

The data analysis in this court file study is mostly qualitative, based on information collected from the 51 Children's Court files[8] and supplemented by DHHS CRIS information and reports to update and supplement the information from the court files as required.

The analyses and conclusions are qualified by the small numbers of cases involved but the focus is on the patterns and on providing substance and 'rich data' to complement the CRIS analysis and the findings from the key informant interviews and focus groups. These preliminary findings are qualified by the recognition that the court files cannot tell the 'whole story' because the way that negotiations and discussion in and outside the Court influence the decisions that are made is not documented in the court files.

2.3 Case file characteristics

The 25 post-amendment cases had protection applications from February to November 2017; and the 26 pre-amendment cases from March 2013 to September 2015.

Most post-amendment court files involved a protection application for one child. Three of the 25 files included applications for two children (total of 28 children) but 14 children who were the subject of the application had siblings who had been or were subsequently the subject of child protection intervention. Ten of the 26 pre-amendment court files involved more than one child in the protection application, with the numbers of siblings ranging from 2 to 6, giving

[8] The dates of the protection application, of the various reports including the protection and disposition and other reports, of the orders and of court processes such as conciliation conferences, directions hearings, mentions and adjournments were recorded to allow some quantitative comparisons of timing and durations using SPSS.

a total of 45 children. In addition, the children in six cases had siblings including half-siblings who were not involved in the protection application.

The age of the mothers and fathers in the pre- and post-amendment cases was similar. In the pre-amendment cases, the mean age of the mothers was 30.1 (9.3) and fathers 33.9 (9.9); the median age for mothers was 30, ranging from 18 to 52, and for fathers, median of 35, ranging from 19 to 51 years.[9] In the post-amendment cases, the mean age of the mothers was 30.1 (7.2) and fathers 32.8 (7.1) with a median age for mothers of 30, ranging from 19 to 44, and for fathers, median of 33.5, ranging from 22 to 47 years.[10]

In the pre-amendment cases, two mothers and one father was deceased prior to or died during the course of the court proceedings, and one mother and one father in the post-amendment cases.

Aboriginal cultural background

Six pre-amendment matters involved Aboriginal children – one child in five cases and six children in the other. In four cases, the children's mother was Aboriginal and in two, both parents were Aboriginal. The children ranged in age from 7 months to 7 years; 7 of the 11 children were aged 3 or younger.

Six children in five post-amendment files were Aboriginal; one protection application involved two children. Both parents were Aboriginal in two cases, the mother was Aboriginal in two, and in the other, the father was Aboriginal. All the children were aged 3 or younger, ranging in age from newborn to three years.

Other cultural background

There were more children whose cultural background was culturally and linguistically diverse (CALD) in the post- than in the pre-amendment cases. The parents in just under half the post-amendment cases (*n* = 12/25) had cultural backgrounds from Africa (Sudan, Somalia, West Africa), Asia (India and Vietnam), South America (Brazil), Turkey, and PNG; one of these children had an Aboriginal mother. The parents in 7 of the 26 pre-amendment cases had CALD backgrounds from China, Vietnam, Italian, Turkey and Sudan, and two were Maori.

The mean and median age of the children in the pre-amendment cases at the time of protection application was older than in the post-amendment files (Tables 2.1 and 2.2).

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[9] The age of 6 mothers and 6 fathers (both parents in 4 cases) was not recorded in the pre-amendment files.

[10] The age of one mother and one father in separate cases was not recorded in the post-amendment files. In two cases, the mother did not disclose who the father was.

Half of the children who were the subject of protection applications in the post-amendment files were 24 months old or younger compared with 1 in 3 in the pre-amendment files. This partly reflects the fact that there were more sibling groups, and larger sibling groups in the pre-amendment cases.

Table 2.1 Children's age at (first) protection application

Child's age at protection application (in months)	Pre-amendment (*n* = 45)	Post-amendment (*n* = 28)
Mean (SD)	65.8 (59.4)	50.1 (61.2)
Median	46.0	23.0
Range	Birth to 197 months (16 years)	Birth to 202 months (16.8 years)

Table 2.2 Children's age group at (first) protection application

Child's age at protection application	Pre-amendment (*n* = 45)	Post-amendment (*n* = 28)
Birth to 12 months	11	12
12 to 24 months	4	2
2 to 5 years	10	6
6 to 11 years	13	5
12 to 18 years +	7	3
Total *n* children	45	28

In the pre-amendment cases, the mean age of children at the last final order on record as at October 2020 was 95.5 months (SD = 58.9), with a median age of 89, ranging from 13 to 213 months.

In the post-amendment cases, the mean age of children at the last final order on record as at October 2020 was 72.9 months (SD = 60.8), with a median age of 49.5, ranging from 14 to 203 months.

Table 2.3 Children's age group at final order

Child’s age at last final order	Pre-amendment (*n* = 45)	Post-amendment (*n* = 28)
Birth to 12 months	0	0
12 to 24 months	6	8
2 to < 5 years	10	7
5 to <10 years	13	7
10 years +	16	6

The overall older age of children in the pre-amendment cases at the time of the last order on record reflects the older age of children at the protection application, the larger sibling group sizes, and also the fact that the ‘window of opportunity’ for the pre-amendment cases to be finalised is longer than for the post-amendment cases (protection applications predominantly from March 2017 compared with 2013 to 2015 for the pre-amendment cases).

The mean time from the protection application to the last order on record was 22.6 months (SD = 9.3), median = 22 months (ranging from 2 to 41 months) for the post-amendment cases and 28.9 months (SD = 21.9), median = 24.5 months (ranging from 1 to 75 months) for the pre-amendment cases.

2.4 Grounds for application

The most common ground for the protection application in both the pre- and post-amendment files was the likelihood of emotional or psychological harm[11] (24/26 cases in the pre-amendment files and 20/25 in the post-amendment files). It was combined with physical injury[12] and/or ‘physical neglect’[13] for most of these cases. There were four cases in the pre- and 3 in the post-amendment files with grounds relating to sexual abuse.[14]

The most common grounds were associated with parental substance abuse, mental health problems and family violence, typically in combination. In several cases in both the pre- and post-amendment files, a parent’s criminal offending or intellectual disability were additional concerns. Substance abuse and mental health problems were commonly a problem for both

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[11] s 162 (1) (e).

[12] s 162 (1) (c).

[13] s 162 (1) (f): the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care. This is similar to ‘neglect’.

[14] s 162 (1) (d).

parents. There was a great deal of similarity in the patterns for the pre- and post-amendment cases indicating little change in the profile of the cases before and after the amendments.

In summary, the pre- and post-amendment files were very similar, indicating the success of the matching process, which also extended to characteristics such as parents' deaths, criminal offending, and being incarcerated.

3. Protection applications

The court process begins with a protection application, either by emergency care or by notice, to the Children's Court when a child is assessed by DHHS Child Protection as needing protection. The protection application is based on and supported by protection and disposition reports and assessments as to whether family preservation or reunification is possible, and the steps to be taken to manage the risks for the child. Following the permanency amendments, Child Protection are required to be explicit about the permanency objective for children subject to a protection application.

3.1 Higher quality information/clearer evidence in protection applications?

The court files include the protection and disposition reports and other information to support the protection application. As intended, there do appear to be notable improvements in the quality and documentation of case plans and the clarity of permanency objectives from the pre-to post-amendment cases. Many of the pre-amendments files (12 of 26) did not have first case plans or clear case plans up to 12 months after the protection application.[15] The case plans in a number of these files also did not provide clear directions towards permanency through reunification, in some cases continuing to support reunification when this did not seem to be realistic given the comments about parents' lack of engagement with services, ongoing exposure of risk of harm to children, contact with the children, and willingness to engage with DHHS. In one case, for example, where there was no clear case plan, the child remained in the parent's care on an IAO to the parent and then an IPO for over 26 months despite concerns about neglect and risks to the child associated with the parent's mental health and substance abuse problems and lack of proper housing. The child experienced harm that required hospitalisation due to severe malnourishment and bruising.[16]

In contrast, nearly all the post-amendment court files (23 of 25) had clear first case plans and permanency objectives at the start of the protection application that were generally of better quality (ie more detailed, assessment of the strengths and risks of the parent/family).

Adjournments were sought in a number of cases to complete reports in time or to conduct assessments on suitable carers [17] but this was the case in more, in fact in the majority of the pre-amendments files.[18] In several pre-amendment cases, the magistrate directed DHHS to

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[15] Prior to the amendments in 2016, DHHS was not required to prepare a case plan until after a protection order was made following the finalisation of a protection application.

[16] File 9B – Aboriginal child.

[17] Post files – 1A, 3A, 5A, 8A, 12A, 14A, 18A, 19A, 20A.

[18] Pre-files – 2B, 3B, 4B*, 5B*, 6B*, 7B, 8B, 11B*, 22B*,12B,13B,16B, 20B*, 21B*, 22B*, 23B*, 24B*, 25B*, 26B*.

seek an adjournment to complete reports because they lacked detail in the case plans and the disposition reports were incomplete.

3.2 Interim accommodation orders (IAOs) – before and after the amendments

The first order made by the Children's Court following the protection application was an **interim accommodation order (IAO)** in all except one pre- and one post-amendment matters.

Interim accommodation orders were available to the Court before and after the amendments; they allow the Court to specify the care arrangements for a child (parent, suitable person/relative/kin, declared hospital, parent and baby unit, community service/foster care) and to attach a range of conditions, generally as sought by Child Protection.[19]

The major change introduced by the amendments (s 262(5A)) was that the Court must not make an interim accommodation order "if the Court is satisfied that—

(a) a protection order could be made in respect of the child … or

(b) a permanent care order could be made in respect of the child …".

The aim was to reduce the time that children spent on interim accommodation orders until a (final) protection order was made so that timely decisions can be made to progress plans for their return home if, and as soon as, possible or to have a permanent placement. A related change to the same end in determining the best interests of the child (s 10) was the addition of "the desirability of making decisions as expeditiously as possible and" to the pre-existing best interests principle regarding the possible harmful effect of delay in making a decision or taking an action (previously s 10(3)(p), now s 10(3)(fa)).

IAOs were the initial orders made *prior* to any protection order in all except one pre- and one post-amendment matter in which the protection application was by notice.[20]

In the *post-amendment matters*, an IAO was most commonly to a suitable person – maternal or paternal grandparents, aunts, an older sibling, or a family friend (n = 13). In the remaining cases, there was a fairly even split between an IAO to a parent (n = 5),[21] to a hospital (n =5)

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[19] A typical set of conditions on an IAO to a suitable person such as the child's grandparents include contact arrangements, requirements that the parent/s agree to undergo urinalysis, mental health assessments, attend various services appointments and allow the child to be assessed, and allow these reports to be submitted to DHHS.

[20] In both cases, no IAOs were made after a protection application by notice (cases 15A and 15B). In the pre-amendment case, the first order was a Custody to Secretary Order and in the post-amendment case, the first order was a family reunification order. In four post-amendment cases, in which a family preservation order was made and then breached, further IAOs were made until the next final order.

[21] There were no indications from the court files that IAOs to parents with supervision from a relative were being used to 'stop the clock ticking' because that means the children are not then in out-of-home care. There were

and to an OOHC agency, foster carer or residential care (*n* = 4). Only one final order, a family reunification order, was made the first time it was dealt with at court for a post-amendment matter; this involved a five year-old who was placed with a relative when her mother faced with mental health and substance use problems 'removed herself from the child's life and refused to engage with DHHS or any services'.[22]

Similarly, in the majority of *pre-amendments court matters*, an IAO to a relative (*n* = 12) was the most common first court order following the protection application; IAO to a hospital (*n* = 4), to OOHC (*n* = 5) or IAO-OOHC foster (*n* = 4) or a parent (*n* = 3) were less common. Again, a final order was uncommon at first instance; a supervision order and a custody to Secretary order were made at first instance. The custody to Secretary order which lasted for 16 months was the only final order made in the case of a 7 year-old old. The other first court order was an interim protection order.

While the permanency amendments specify that an IAO must not be made if the Court is satisfied that a protection order can be made (s 262(5A), there appears to be little difference in the number of such orders prior to the first protection order that were made before and after the amendments. As Table 3.1 shows, the overall number of IAOs of the various types was similar for both the pre- and post-amendment matters. IAOs to parents were relatively uncommon, with fewer than one in three such orders in both the pre and post amendment matters.

several cases where an IAO was varied to allow a parent to live with the child and a relative, often a grandparent, but this is still included in the cumulative total for the child's time in out-of-home care.

[22] Note in a CP report in the court file.

Table 3.1 Number of IAOs (including extensions and variations)

Numbers of IAOs	Pre-amendment (*n*= 26)	Post-amendment (*n* = 25)
IAOs to parents		
Number	*n* = 11	*n* = 8
Mean number	2.3	2.0
Median	1.0	1.5
Range	0 to 8	0 to 4
IAOs to declared hospital/unit		
Number	*n* = 6	*n* = 8
Mean number	1.7	1.1
Median	1.0	1.0
Range	0 to 3	0 to 2
IAOs suitable persons		
Number	*n* = 18	*n* = 14
Mean number (SD)	2.2 (1.56)	2.2 (2.55)
Median	2.0	2.0
Range	0 to 6	0 to 6
IAOs OOHC		
Number	*n* = 11	*n* = 12
Mean number (SD)	2.5 (1.57)	2.2 (2.55)
Median	2.0	2.0
Range	0 to 5	0 to 5
Total – all IAOs		
Number	*n* = 25	*n* = 24
Mean number (SD)	4.0 (2.32)	3.0 (2.19)
Median	3.0	3.0
Range	0 to 9	0 to 10
Total no of files	26	25

While the number and pattern of IAOs was similar in both the pre- and post-amendment files, the overall time that children were on IAOs prior to the first final order was substantially greater for the post-amendment period than for the pre-amendment period (Table 3.2).[23] The greater time applied to cases where children were on IAOs to out-of-home care agencies and residential care and those on IAOs with suitable persons (generally maternal or paternal

[23] As indicated by both the mean and median days. The medians are more reliable indicators of the time on IAOs since the range is very wide and medians are less affected by the few very large (or small) values (outliers).

relatives). There was little difference in the median time for IAOs to parents but the *average* time was shorter in the post-amendment than the pre-amendment matters.

Table 3.2. Time (days) child subject to IAOs in pre- and post-amendment files prior to first final order

Time children subject to IAOs	Pre-amendment (*n*= 26)	Post-amendment (*n* = 24)
IAOs to parents		
Number of cases	*n* = 8	*n* = 8
Mean days (SD)	141.1 (146.7)	101.6 (87.9)
Median	89.5	91.0
Range	16 to 397	9 to 231
IAOs to hospital /baby unit		
Number of cases	5	6
Mean days (SD)	21.0 (17.8)	12.8 (2.9)
Median	21.0	8.0
Range	5 to 49	2 to 38
IAOs suitable persons		
Number of cases	18	13
Mean days (SD)	124.2 (183.5)	149.9 (106.8)
Median	**91.0**	**124.0**
Range	17 to 465	5 to 290
IAOs OOHC		
Number of cases	12	13
Mean days (SD)	67.7 (82.7)	106.3 (103.2)
Median	**22.0**	**62.0**
Range	3 to 267	1 to 390
Overall time (days) on all IAOs		
Number of cases	25	23
Mean (SD)	155.5 (111.3)	178.4 (134.0)
Median	**126.0**	**161.0**
Range	22 to 465	39 to 508
Total no of files	26	25

The overall increase in both the mean and median days for the overall time on IAOs in the post-amendment matters (Table 3.2) is consistent with the finding of the CRIS data analysis of a substantial increase in the number of days that children were subject to an IAO prior to the first protection order from the pre to post-amendments periods. There was no correlation or association between the child's age (in months) at the time of the protection application and the time taken to the first protection order or the time that children were subject to IAOs in either the pre- or post-amendments files.

Only one child in each of the pre- and post- files had no IAOs; both children were aged 5-6 years and the first and last final orders were a CSO for the pre-amendments matter, and a 12 month FRO and then a care by Secretary order which was extended (post-amendments). Both children were placed with their maternal grandparents.

Interim protection orders (no longer available following the amendments) were used in only four pre-amendment matters, and both followed and preceded IAOs either to parents or to relatives.[24]

Short IAOs

There were about the same number of cases with short IAOs of two months or less for both the pre-amendments (*n* = 8) and post-amendments (*n* = 7) matters. The pre-amendments cases were split between those involving young children up to 3 years and adolescents; the children in the post-amendments cases were all under two years including infants within days or weeks of birth with the exception of a 17 year-old. Most were in the care of relatives. None of these cases involved any contestation (reserved submissions, directions hearings or full or half-day contests).

Lengthy IAOs

There were 7 pre-amendment matters and 9 post-amendment matters in which an IAO (and/or an IPO) was made, extended and varied after that first interim order with the effect that children were on IAOs beyond 210 days (approx. 7 months). The 7 pre-amendment matters had IAOs lasting for periods of 219 to 465 days; the 9 post-amendment matters, 212 to 508 days. These cases were similar in that they mostly involved young children living with maternal and paternal grandparents or aunts/uncles providing care.

Pre-amendment cases

In the pre-amendment matters, with IAOs that extended over 210 days, seven children were five years of age or younger, and five were under 18 months of age. Six of the eight cases involved children who were being cared for by their grandparents or aunts/uncles, or in the cases of two older children, by family friends.

The two longest lasting series of IAOs were both contested matters. In one case [14B], a series of IAOs were made, as sought or agreed to by DHHS, for three children to live with their mother for five months with the support of services, and then with their father and his partner for six months. The father then relinquished the care of the children to their maternal grandparents; they also had difficulties managing the children's behaviours. By the time a

[24] Aboriginal children were on IAOs for a shorter time in both the pre- and post-amendment files but this did not necessarily mean that there was an earlier resolution of their matter to permanency (outlined later).

supervised custody order was made, the children had been on IAOs to their parents for 333 days and a further 49 days with their grandparents (382 days).

In another pre-amendment case (7B), there was no identified case plan on file but Child Protection was seeking a care by Secretary order. The reports indicated that 'time was needed to assess the parents' parenting capacity and mental health and to provide services' to them; both parents had intellectual disabilities and were supported by the father's parents. The child who was under two years of age at the time of the protection application was living with her grandparents and remained there on IAOs and an interim protection order for 465 days before a supervised custody order was made, following some contestation. The Court documentation indicated that it was DHHS, not the Court, that extended the interim protection order (which was considered a breach) rather than seek a final order, and that 'DHHS took responsibility' for this. This case returned to the Children's Court in mid-2019 and there has again been a series of IAOs to OOHC, to a suitable person, and then to the parent/s.

Post-amendment cases

In the nine lengthy IAO **post-amendment matters**, with IAOs that extended beyond 210 days, four involved infants within days or weeks of their birth and the other five were 7 to 14 years old. Six of the nine cases involved children who were being cared for by their grandparents or aunts/uncles or an older sibling.

The two longest lasting series of IAOs, with children subject to IAOs for over 500 days, were both cases that involved some contestation about the orders that resulted in long-term permanency orders with no family reunification orders having been made. DHHS sought a family reunification order in one case, and a care by Secretary order in both cases. One case dealt with in a regional court involved a newborn who was placed in foster care with an agency for 390 days before she was placed with her paternal grandparents after it took 8 months to undertake their carer assessment. The case plan and objectives changed from family reunification to non-reunification five months after the protection application following the recommendation of a detailed assessment of the parents' intellectual disability and capacity to care for an infant. The child remained on IAOs, first in foster care and then in the care of her paternal grandmother until a permanent care order to them was made in the post-amendment period [20A]. In the other, a 9 year-old was on a series of IAOs with one parent and then the other for 231 days (approx. 7.5 months) followed by a family preservation order to the father [8A]. After the conditions of this order were breached within several months, further IAOs were made to the maternal grandparents for 19 months until a long-term care order was made, 632 days after the initial protection application.

The children in the other post-amendment matters with long IAOs, with the exception of two matters involving older children who spent some time in foster care or residential care, were in the care of grandparents or an aunt or uncle for all or nearly all the time they were subject

to an interim accommodation order. These cases may be seen to be consistent with the view that it can take some months to allow parents' response and access to and engagement with supports and services to be assessed and to ensure the current placement is suitable. IAOs are therefore largely a holding 'operation'. A typical case, for example, involved a young child where DHHS was recommending a family reunification order for 12 months, and also sought an interim 3-month IAO with conditions while the parents 'engage with and accept DHHS and support services, attend residential or home parenting assessment, go to a psychologist or psychiatrist as agreed with DHHS for assessment and treatment and allow reports to be provided to DHHS'.

In summary, the overall length of IAOs was longer in the post- than the pre-amendments period though the number of each of the various types of IAOs was similar. There were about equal numbers of cases in both the pre- and post-amendment files in which children were subject to IAOs for short periods, of two months or less. There were also children in both the pre- and post-amendment files who spent substantial periods of time on IAOs prior to a final protection order being made. These cases were very similar in terms of the ages of the children involved, with whom they were placed (mostly extended family but also some very young children with foster carers), and the degree of contestation that is evident in the files. The main difference was the number of cases in the pre-amendment files in which the case plan and the permanency objectives were not clear or confusing. In some reports, there was no clear recommendation or plan apart from seeking to have the children 'remain living with their grandparents' or to support 'family reunification once the protective concerns have been addressed'. The lack of clarity was also commented upon in notes by several magistrates since the Court requires clear plans and supporting evidence on which to base their orders. It should also be noted that extensions to an IAO are subject to s 267 (1) such that "at any time while an interim accommodation order made by the Court is in force, an application for an extension or further extension of the period of the order may be made to the Court by a protective intervener". The series and extensions to IAOs are a function of the interventions and actions of DHHS as protective intervener as well as the orders made by the Court.

3.3 First protection order

The first protection order made by the Children's Court orders and the orders that DHHS initially sought are shown in Table 3.3 for the **post-amendment court files**, together with the time taken from the protection application to the final order. Overall, the first final protection order was, as sought by DHHS Child Protection in the initial application, in 15/25 matters. The time from the protection application to the orders that were initially sought ranged from 91 to 267 days for a family preservation order (FPO) and from 42 to 395 days family reunification order (FRO). A care by Secretary order took the least amount of time: 40 and 48 days in only two cases.

There was little difference between the pre- and post-amendment court files in the time taken from the protection application to the first final order: a mean of 163.9 days (SD = 118.6) for the pre-amendment and 166.4 days (SD = 109.5) for the post-amendment court matters. The median for the post-amendment cases was, however, lower at 147.5 days compared with 161.5 days, and the range was smaller (from 29 to 395 days compared with 19 to 462 days).

Post-amendment cases

As Table 3.3 shows, the most common order sought, in just over half the matters (16/25), was a family reunification order**,** which varied in length from 6 to 12 months. This was also the most common first final protection order made (16 matters) and, as sought in 10 matters; it was also the last final order in two of these cases.[25]

Table 3.3 Initial order sought by DHHS and first final order made and timing for post-amendment matters

Order sought → First protection order	Number of matters	Time to first protection order
FPO → FPO	**3**	91 to 267 days
FPO → FRO	2	130 to 240 days
FRO → FRO	**10**	42 to 395 days
FRO → FPO	1	161 days
FRO → CBSO	2	187 to 382 days
FRO → no PO – IAOs only	1	NA
Not specific → FRO	2	125 to 168 days
CBSO → CBSO	**2**	40 to 48 days
CBSO → FRO	2	108 to 279 days
Total	25	

The reasons that DHHS cited in recommending a 12-month family reunification order were typically the well-recognised 'triumvirate' of parental substance abuse, mental health, and family violence, in the context of concerns about parents' lack of compliance and engagement with services, and parents' lack of acknowledgement of the risks to the child's safety and

[25] This is in contrast with the findings of the CRIS data analysis in which the first protection order was most commonly a family preservation order (62.3%) with the child remaining at home, followed by a family reunification order (31.4%) but the court files were selected according to the criteria outlined in section 2 of this report which included children having a final protection order placing them in care at some point.

emotional security and safety. The reasons for reunification 'being possible' and '*not* being possible' were typically articulated in the examples below. For example, the reasons in the disposition report were summarised in typical format as follows:

Case 4A (18 month-old child, 3 older siblings in kinship care)

> Mother previously demonstrated positive responses to service but has relapsed (substance use), has mental health concerns, DV history, and non-compliance with medication and services. Maternal grandmother is supportive of her daughter and child. DHHS has tried to engage mother in services.
>
> *Reasons why reunification may not be possible*: Mother is non-compliant. Father is unknown. Child placed with her maternal grandparents who are suitable carers, and caring for one of the child's siblings.

In two post-amendment cases, the stated goal was reunification but there was no clear case plan or recommendation for a specific order; in both cases, a 12-month family reunification order was made after 3 to 4 months.

The next most common order being sought at the point of the protection application in post-amendment matters was a **family preservation order** (*n* = 5) (ranging in length from 6 to 12 months) in line with a family preservation or reunification case plan. A family preservation order was made in three matters and also in one in which a family reunification order had been sought. In all four cases, this was not the final court order; two transitioned to permanency care or long-term care orders; the other two to a family reunification order or care by Secretary order. DHHS's recommendation was based, in one case, on Child Protection's 'belief' that the 'clear conditions and structure of a court order will assist in mitigating current concerns in the home' in their 'attempt to maintain the children in their home through ongoing engagement and structure'. That belief was not borne out. Family preservation orders were also sought in several cases despite some doubts about the likely success of such orders. In one case, for example, where the young child's five older siblings were in relative/kinship care, the case plan and disposition report stated that 'DHHS is seeking an FPO to engage [mother] with the aim of child being returned to parental care'. The report noted that the mother 'has not complied with any recommendations/undertakings, has not responded to the Child Protection practitioner's efforts to contact her, has left the infant with her mother for days at a time and is not contactable, and was unable to comply with the recommendations for an older child now placed in the care of his maternal grandmother'.

In four cases, DHHS sought a **care by Secretary order,** in two cases of effective relinquishment of young children and two involving adolescents unable to continue living at home. This order was the first final protection order in the case of a 3 week-old baby and a 17 year-old. In two cases, involving an 11-year-old and a 13 year-old, a family reunification order was made instead of the care by Secretary order. These two types of orders, a family reunification order and a care by Secretary order are discussed in more detail in sections 4 and 5 of this report.

Pre-amendment cases

Table 3.4 shows the first orders sought by DHHS in the pre-amendment matters together with the first final order made by the Court. The two most common final orders immediately following the interim orders were custody to Secretary orders (*n* = 11) and supervised custody orders (*n* = 5). As Table 3.4 indicates, the first final order was made more quickly for custody to Secretary orders that were made, as sought, on average 101 days from the protection application and within 19 to 62 days for five cases. Supervised custody orders took longer, and were made on average 262 days from the protection application. For both orders, the most common first placement was with grandparents or aunts. A supervision order was made in five matters, on average 220 days after the protection application.

In four cases, there were no clearly recommended orders or permanency objective specified in the first disposition report apart from a general comment such as 'all children to remain with their parents (or with family) at this stage'. This seems to reflect the uncertainty 'at this stage' given the realities of the circumstances of some families. In one case involving a large sibling group of Aboriginal children, for example, the report stated that 'all the children are to be placed with their paternal grandparents in the short term – given the number of children, their needs, and their ages, the grandmother indicated that she was unable to provide long-term care for X children'.

The pre-amendment cases included some cases with protection applications in 2015 or earlier in which the first or second protection orders were made during the transition period and transitioned to the new post-amendment orders.

Table 3.4 Initial order sought by DHHS and first final order made for pre-amendment matters and timing (*n* = 25)* (PCO only in one case)

Order sought → First protection order	Number of matters	Time to first protection order (days)
IPO → SCO	1	171 days
SPO → SPO	2	188, 231
CSO → SPO	1	168
SPO → FPO	1	92
No specific order → SPO	1	358
No specific order → SCO	2	382, 462
No specific order → FPO	1	192
SCO → SCO	1	243
CSO → SCO	1	53
SPO → CSO	2	248, 382
SCO → CSO	2	22, 43
CSO → CSO	**8**	**19 to 62** , 142, 168, 267
GSO → CSO	1	56
GSO → GSO	2	114, 200

4. Family reunification order

Family reunification orders replaced custody to third party and supervised custody orders and most custody to Secretary orders where the child had been out of parental care for less than 12 months, and in some circumstance up to 24 months. The aim of the family reunification order is to facilitate parents' engagement with services and focus attention on parents' need to address protective concerns to enable children's safe earlier return home. It confers parental responsibility for the child on the Secretary (s 287 (1)) in relation to daily care and control and decisions about short-term issues, without affecting parents' parental responsibility in relation to decisions about major long-term issues (equivalent to custody but not guardianship) (s. 287(2)) and may include conditions that the Court considers to be in the best interests of the child and that promote the child's reunification with their parent/s (s 287(1)(d)). It can be made for a period determined by the length of time the child has spent, cumulative in out-of-home care since the protection application, initially not exceeding 12 months in care, with additional time only where the Children's Court is satisfied there is 'compelling evidence'[26] that the child will return permanently to their parent's care during the period of extension, and that the child will not be in out-of-home care for a cumulative period of more than 24 months (s 294(A)(1)(a)).[i] What constitutes 'compelling evidence' is not defined in the legislation.

A family reunification order[ii] was sought by DHHS in 21 of the 25 post-amendment cases, and made at some stage in 18 cases, mostly following interim accommodation orders (*n* = 16).[27] In three cases, DHHS was seeking a 12-month family reunification order in the initial disposition report but no family reunification order was made. All three matters involved babies within days of their birth; two had several siblings who were already in out-of-home care. A care by Secretary order was made within six months of the protection application for two of these babies, and a permanent care order in the other.[28]

The family reunification order sought by DHHS at the protection application, as recommended in the initial disposition report, was generally for 12 months. At this stage, children were not in out-of-home care so the full 12-month period was 'available' for the order. Once children entered out-of-home care on another order including interim accommodation orders, this

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[26] 'Compelling evidence' could, for example, be evidence of progress towards reunification achieved in the first 12 months.

[27] The DHHS Child Protection Guidance indicates that the *exceptions to the initial use* of a family reunification order may include: where a child has older siblings already in permanent care and child's parents' circumstances have not changed, making family reunification unlikely; where the child's parents are dead or significantly incapacitated, or child abandoned, or parents insist they do not wish to resume care of child and want other arrangements made for child's care.

[28] These cases are discussed later.

period reduced to take account of the time that the child had already been in out-of-home care, in line with the permanency amendment provisions ((s 287A(2)).[29] In some cases it appears that short orders were the only family reunification order that could be made. There were also cases in which an adjournment was sought which effectively meant that the child would then have been in out-of-home care for more than 12 months which then allowed a longer order up to 12 months to be made.[30] DHHS did not necessarily seek the full length of time available on a family reunification order, however, once the child had been in care for several months. Shorter orders of 4 to 6 months were also sought, and made well within the available time frame. These orders were made on average within 7.5 months (median = 5 months) of the protection application and 6.5 months (median = 4.9 months) after the child's entry to out-of-home care.[31]

The reasons for seeking a family reunification order were, as expected, to allow parents to address the department's protective concerns for the children. The report template requires caseworkers to outline the reasons for their recommendation, as well as why they consider reunification to be possible and any reasons why it would not be, together with the steps taken. While the recommendation for a 12-month family reunification order may be the same, the reasons and the implied assessments of the likelihood of reunification can vary markedly. For example, the reasons may focus heavily on the reasons why reunification *is* possible, with little or no reasons given as to why it is not possible; in another matter, the focus may be the reverse or there may be clear statements that reunification is *not* possible. In cases such as these, it is not clear why DHHS is seeking a reunification order. In some matters, there was not much detail about the reasons or the timeframe for the recommended services. While this study can rely only on the information available in the court file and CRIS reports without any of the court discussion and legal negotiation, the variance between the orders and the

[29] If the child has been in out-of-home care for less than 12 months under any order, the period that is specified in the family reunification order must not have the effect that the child will have been in out-of-home care for more than 12 months by the time that order expires; this includes any time that the child has been on any order that places the child in out-of-home care (s 287(2)).

[30] This is consistent with the comment of several magistrates who indicated, for example, that 'everybody will be trying to push a case, both the Court and the parties, and the Department representatives, will be trying to delay a case until it hits that 12 month period so that a 12-month order can be made'; 'where a Family Reunification Order can only be made for a few more weeks because you need to get into the second 12-month period, the Department itself asks for those adjournments'.

[31] In two cases in which a family reunification order was made following a family preservation order, it was made 20 and 28 months, respectively, after the protection application. It followed the child's return to out-of-home care after a period of about 12 months at home with one or both parents on a family preservation order [cases 4A and 21A]. This time is disregarded in determining a cumulative period for a family reunification order (s 287 (4).

associated time period in terms of what DHHS is seeking and what is ordered may reflect differences such as these in the disposition reports.

Reasons for recommendation for a family reunification order

> *Case example 4.1*:
>
> As a result of [mother's] lack of engagement with services and her inability to live with her children in a supportive environment along with her partner, DHHS are recommending a 12 month FRO for [child] and [sister] to remain in the primary care of family. This time will allow DHHS to assess the engagement of mother and partner, along with assessing and monitoring ongoing sustained change to ensure that there is no harm posed to the child and his sister. [Case 24A, initial case plan]
>
> *Case example 4.2*:
>
> Infant born drug affected. Mother using ICE during pregnancy and does not have the capacity to provide safe and stable accommodation for herself and child and meet the emotional needs of child. She is unwilling to undertake urinalysis and comply with undertakings for AOD screening/ assessment and is hostile with hospital and DHHS staff. She has only attended 14 out of 117 contact visits. Child is vulnerable, FRO to give mother chance to address substance use, non-compliance with contact, urinalysis, being uncontactable, and unwilling to cooperate with DHHS. [Case 11A]

The overall average length of time that children in the 18 cases were on family reunification orders was 12.9 months, with a range from 3 to 22 months and a median of 12 months. The children in 15 cases who commenced a family reunification order were in out-of-home care for more than 12 months, and in five cases were still on family reunification orders after they had been in out-of-home care for 24 months or more. The overall average time in out-of-home care for children who were on a family reunification order by the end of that type of order was 18.7 months, with a median of 18.5 months, and a range of 11.9 to 32 months overall. In 8 cases, one family reunification order was made and in 10 cases, the order was extended, in some cases more than once.[32]

4.1 Extensions to a family reunification order

A family reunification order may be extended where there is 'compelling evidence' that reunification is likely within the period of the extension, but the extended period cannot have the effect that the child will have been in out-of-home care for a cumulative period of more

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[32] As in the CRIS data analysis report, 'time in out-of-home care' is measured as 'court-ordered time in OOHC' which is the time that children spend on interim and protection orders that transfer the care responsibility for the child to the Secretary or a nominated third party. This allows direct comparison of the durations pre- and post-amendments, based on the information about the type and duration of court orders in the court files and the CRIS data updated for these cases to October 2020.

than 24 months.[33] The 10 cases in which an extension to a family reunification order was made were a 'mixed bag'. In several cases, the reasons outlined in the disposition and addendum reports for an extension appear to be similar to those outlined to support the initial application for a family reunification order. These appear to be influenced by whether the parents had engaged in services/supports and with Child Protection.

In some cases, however, the information provided in DHHS reports on the court file does not paint a clear picture of why reunification would be 'likely' within the period of the extension. The reports supporting an extension to the family reunification order were often more detailed in relation to the reasons why reunification was *not* possible or likely than for why it *was* possible. Case example 4.4 involved an infant who was the youngest of four children for an Aboriginal mother in a regional area, and the extension was supported by DHHS and the child's legal representative.

Case example 4.3:

> *Reasons for recommendation*: DHHS seeking FRO for 12 months to engage mother with the aim of child being returned to parental care. Report notes that mother's contact/communication with DHHS has been 'minimal' and 'little is known about mother's current situation'. Father is seeking contact with his child though he is currently in a correctional centre 3 hours away. Report states contact plan required for paternal family.
> *Reasons why reunification is possible*: DHHS is seeking to engage mother to address child protective concerns.
> *Reasons why reunification is not possible:* Mother has not returned calls or communication with DHHS, is not attending urinalysis, and is engaging with men who are known substance users. [12A]

Case example 4.4:

> *Reasons for recommendation*: Protective concerns listed: exposure to parental substance use including methamphetamine; parental lack of engagement with supports; mother involved in a violent relationship; exposure to family violence; father uncontactable and not making himself available to Child Protection or supports to discuss the children's needs.
>
> *Reasons why reunification is possible*: Parents have voluntarily agreed in consultation with DHHS Child Protection that children would be placed with their paternal grandmother (at first application). No reasons why reunification might be possible at application to extend FRO (13 months later).

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[33] See s 287(3) and s 294A (1).

> *Reasons why reunification is not possible:* Mother is continuing to use substances, and has not engaged with AOD services, and concerns about family violence with her new partner; father's non-engagement with local Aboriginal Services, men's behaviour change service. [21A][34]

In several cases, an extension to a family reunification order was made although Child Protection was seeking a care by Secretary order on the basis that the protective concerns had not been addressed.[35] For example, the reasons for Child Protection's recommendation for a care by Secretary order a year after the protection application, and why reunification was, and was not possible, are summarised in the following case examples: [36]

Case example 4.5:

> *Reasons for recommendation*: Long series of ongoing concerns about family violence, substance abuse, lack of insight/compliance. Both parents have not addressed protective concerns that led to a protection application by Emergency Care, as well as during the family reunification order which has now expired [previous month]. DHHS do not consider reunification to be in the children's best interests – parents continuing to lead and prioritise a chaotic lifestyle and both have minimal capacity to provide for children's needs, due to ongoing parental substance abuse issues, parental conflict, ongoing family violence and mental health issues dominating their lives. Lack of meaningful engagement with CP and professional support services.
>
> *Reasons why reunification is possible*: no reasons given in the report.
>
> *Reasons why reunification is not possible:* as above. [case 2A]

Case example 4.6:

> *Reasons for recommendation*: The mother was initially compliant with medication, returned six negative urinalysis and was engaging with DHSS but suffered substance use (relapse), mental health concerns, and was non-compliant with her medication and services.
>
> *Reasons why reunification is possible*: The maternal grandmother is supportive of the mother and her child. [The child was the youngest of the mother's four children; the other children were in care with their paternal relatives.]
>
> *Reasons why reunification is not possible:* Mother is non-compliant; father is unknown. Mother's new partner has limited insight but is cooperating. Child is placed with her maternal grandparents who are suitable carers. [case 4A][37]

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[34] Case 21A - FPO for 5 months, followed by 8 months on FPO and then FRO for 7 months, then extended for 12 months.

[35] These cases all preceded the Supreme Court appeal judgment DHHS v Brown - [2018] VSC 775.

[36] In several cases, there was some inconsistency in the court file information with the report still stating that the permanency objective was reunification when other notation indicated in the case plan that the objective had changed to long term care.

[37] The reasons were similar or identical/copied across some reports over 20 months.

In several other cases, DHHS was seeking an extension to the order although the reported circumstances and reasons in the report did not appear to indicate that reunification would be likely.

Case example 4.7:

> *Reasons for recommendation*: [Mother] has declined to engage with child protection about reunification in relation to the child; her mental health is observed to impact her capacity to care for child; she is currently reported to be homeless and has no fixed address. Concerns in relation to father's illicit substance use, his negative peer associates; he does not have suitable accommodation and his parenting capacity remains untested. Both parents' substance use.
> *Reasons why reunification is possible*: "It would be of significant concern if the child was to be placed back into the father's care at this time, however child protection have the desire to continue to work with the father exploring reunification of the child to him."
> *Reasons why reunification is not possible:* [Mother] has not engaged with child and has not attended contact. "Child Protection have assessed the likelihood of physical, emotional and psychological harm would be high if the child was returned to his mother, due to her limited capacity to address the protective concerns". [case 22A]

Case example 4.8:

> *Reasons for recommendation*: Parents are unable to meet the basic care needs of a new infant due to the mother's intellectual disability, paternal substance use, parental mental health concerns and homelessness.
> *Reasons why reunification is possible*: No reasons given.
> *Reasons why reunification is not possible:* Extensive deficits in parental capacity identified by parenting assessment, maternal neuropsychological assessment still pending, parents engaging but concerns not mitigated: lack of parental understanding of basic care requirements for an infant, an inability to act on advice in this regard, and mother unable to prioritise the infant's needs over other concerns. [case 13A][38]

This analysis is of course based on the information available in the files and qualified on that basis. It is, however, consistent with comments in the interviews with the judicial officers and lawyers who work in the Children's Court on a daily basis and are familiar with the processes and legislation before and after the amendments. One view was that there is a presumption that everyone is working towards a default of two years and the legislative requirement for 'compelling evidence' that this will lead to a permanent outcome for the child tends to be 'overlooked'.

There was no evidence in these cases, however, that tactical adjournments were being sought and made, without reason, in order to extend the period that children were in out-of-home care beyond the 12 month mark so that an extension to a family reunification order could be

[38] The permanency objective was reported as 'reunification' in the case plan section of the report, when the case plan had changed to long-term out-of-home care.

made. In several cases involving Aboriginal children, short-term family reunification orders of 3 or 4 months were made when longer family reunification orders of 10 or 12 months were sought by DHHS which may have been to provide some Court oversight of the process.

4.2 What follows a family reunification order?

The most common order following a family reunification order was a care by Secretary order (*n* = 9). The average length of their family reunification orders was 8.8 months and the average overall time the children were in out-of-home care before the care by Secretary order was 14.7 months. Five of the children were 5 years and older, four were two years of age or younger at the time of the protection application. Half had older siblings who had already been subject to Child Protection intervention. Only three had extensions to the family reunification order and these were short (one, two, and five months, respectively).

A family reunification order was the last final order as at October 2020[39] for three children, more than three years after the protection application in all three cases. The extensions to the family reunification order in all three cases were sought by DHHS. The prospects for reunification were positive in at least one case, with the father engaged and supported by his relatives who were caring for his 5 year-old child. The family reunification order was varied to allow him to live with his parents and his child when he was released from prison, and then extended. That order expired in late 2018 and there has been no further court action recorded on CRIS [Case 1A].

In summary, of the 18 children on family reunification orders at some stage, it appears that only one has been reunified and was still at home with no further orders at the end of the data collection period in 2020. The children in 15 cases who commenced a family reunification order were in out-of-home care for more than 12 months, and in five cases were still on FROs after they had been in out-of-home care for 24 months or more.

[39] This was the last final order on CRIS as at October 2020.

5. Care by Secretary order stage

A care by Secretary order is made when reunification is not possible in a timely way or the child has been in out-of-home care for 24 months and the objective is to make arrangements for the permanent or long-term care of the child. In exceptional circumstances, the Department (or authorised Aboriginal agency) can work towards family reunification. Conditions cannot be attached to this order and DHHS (or authorised Aboriginal agency) has exclusive parental responsibility with decisions relevant to the care of the child being managed through the case planning process. This includes the child's contact arrangements with their birth family.[40] A care by Secretary order is a 24-month order which may be extended if the Court is satisfied that first, a permanent care order is not appropriate, second, a long-term care order is not appropriate; or there are exceptional circumstances that justify such an extension (s 294A).[41]

Three in four (19/25) post-amendment matters involved at least one application for a care by Secretary order at some stage of the process. An order was made in 15 matters and it was the last final order in 12 matters, on average 14.8 months after the protection application. The children were on average just six years of age (73.1 months, SD = 70.2) at the start of the care by Secretary order, ranging from two months of age to nearly 17 years. As Table 5.1 shows, the average time that children were on a care by Secretary order was 26.2 months (median = 24).[42, 43]

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[40] The Department's information for parents about a care by Secretary order provides the following explanation about contact:

> ***Can I see my child?***
>
> It is very important for your child that you keep in touch with them. Decisions about contact will be made by the case planner for your child. Arrangements for your child to have contact with you can be made with the worker. If you have any difficulties keeping the arrangements made for you to see your child, talk to the worker so that new arrangements can be made. [https://www.cpmanual.vic.gov.au/care-secretary-order-information-parents-v4]

[41] The information for parents about a care by Secretary order also states that:

> If a permanent or long-term carer has not been found for your child, the department can apply for the order to be extended. If the Court agrees, it will last for a further two years. This can continue to happen until your child is 18 years old if necessary, with the department returning to Court every two years to seek an extension.

It does not refer to the Court being satisfied that there are 'exceptional circumstances'.

[42] A first custody to Secretary order was for up to 1 year but could be extended by further 1 or 2 year periods without limit. Guardianship remained with parents; contact and other conditions could be attached.

[43] The guardianship to Secretary order could be made for up to 2 years and was typically for 1 or 2 years; it could also be extended by further periods up to 2 year without limit. Although the maximum period of a GSO was 2 years, it was relatively uncommon for an initial GSO to be made for more than 12 months. DHHS held custody and guardianship and no conditions could be attached.

There were only three Guardianship to Secretary orders among the 26 pre-amendment cases; its relatively uncommon use may reflect concerns about the change in guardianship and the inability to attach conditions, similar to the concerns expressed by legal professionals and Aboriginal and other agency workers about the care by Secretary order.

As Table 5.1 shows, the time from the protection application to a care by Secretary order (post-amendments) ranged from 1 to 32 months; the median time was 13 months, and the average 14.8 months (SD = 8.2). This was substantially longer than the time taken in the pre-amendment cases for a custody to Secretary order (median 2 months) and a guardianship to Secretary order (median 6.6 months) to be made following the protection application.

A care by Secretary order was most commonly made after a family reunification order (9 cases); in four cases, a care by Secretary order followed an IAO – promptly so within two months in two matters; in two cases, it followed a family preservation order, 20 months later in one case, and 32 months later in the other.

Table 5.1. Number and time on order (months) and time from protection application to CSO, GSO (pre-) and care by Secretary orders (post)

Time	Pre-amendment (*n* = 26)		Post-amendment (*n* = 24)
	Custody to Secretary (CSO)	Guardianship to Secretary (GSO)	Care by Secretary order (CBSO)
Number on order	*n* = 13	*n* = 3	*n* = 15
Mean time on order(months)	13.7 (8.4)	16.5 (10.9)	26.2 (9.3)
Mean time from PA to order (months)	4.7 (6.8)	8.8 (6.4)	14.8 (8.2)
Median time to order	2.0	6.6	13.0
Range (months)	1 to 26	3.7 to 16	1 to 32

A care by Secretary order was made in three cases within one, two or 6 months of the protection application, respectively. Two involved babies, one at birth and another for a 3 week-old baby; the other was a 16 year-old, placed in residential care following his sexual offending against a family member. A permanent care order was made for the 3 week-old just prior to the expiry of the care by Secretary order. The newborn whose six older siblings were in out-of-home care was returned to her mother's care at five months of age on an interim accommodation order after a contest but, following a breach of the conditions, her mother relinquished care within a week. A care by Secretary order was made within a month

and then extended to December 2021; this was the last final order on the matter within the data collection period.

There were 11 post-amendment cases in which children were on a care by Secretary order or an extension of that order at the end of the data collection period in October 2020; only two were old enough that the expiry of the care by Secretary order was to occur on their 18th birthday or just before. In two cases, a care by Secretary order was followed by a permanent care order, 13 and 22 months after the care by Secretary order. In two cases, it was followed by a long-term care order, 12 months and 24 months later. Three of the four children were 3 years or younger at the start of the care by Secretary order.

There was only one post-amendment case in which a care by Secretary order was followed by a family reunification order with the intention that the child, an adolescent, would return home. This was not successful.[44]

There were also 10 pre-amendment cases in which children or young people had transitioned to a care by Secretary order in March 2016 or were subsequently placed on one. The time from the protection application to the start of the care by Secretary order was 30 months but ranged from 16 to 57 months. The median of 30 months is substantially longer than that for the post-amendment cases (13 months) reflecting the time on earlier pre-amendment orders and delays in the court process. By the time the care by Secretary order expired, these children and young people had been in out-of-home care for just under four years on average (median = 45 months), ranging from 19 to 65 months. For the children in six of these cases, the care by Secretary order was the last final order and expired in four cases when they were 18 years old. The other two children were Aboriginal and 3 and 5 years old; by the end of their care by Secretary order or extension to this order, they had been or would have been in out-of-home care for over 5 years. For the children in four cases, the care by Secretary order was followed by a permanent care order (3 cases) or a long-term care order (1 case).

5.1 Reasons for seeking an extension of a care by Secretary order

Four of the 51 cases involved an extension to a care by Secretary order by October 2020. Two of these had protection applications in 2013 and 2014 (as pre-amendment cases) with supervised custody orders and custody to Secretary orders that transitioned to family reunification orders and then to care by Secretary orders in 2016 and beyond.

[44] The young person was alienated from his mother when she was imprisoned for certain child-related offences.

Two cases involved young children (one pre- and one post-amendment) and two (again one pre- and one post-amendment) involved young adolescents when the care by Secretary order and the extensions were applied for and granted.

The two cases involving young children differed in that one involved the only child of Aboriginal parents [case 9B], and the other, the youngest of seven non-Aboriginal children, no longer in the care of their parents [case 25A]. Case 9B involved an Aboriginal child who was 9 months old at the protection application and 5 years old when the application for an extension to care by Secretary order was made. The protection application was followed by a series of IAOs to her young mother, then a supervision order which lasted for 14 months. A month later another protection application for emergency care resulted in a supervised custody order. This transitioned to a family reunification order, and then an application to extend it but a care by Secretary order was made instead because the child was hospitalised with unexplained non-accidental injuries and significant weight loss. An application to extend the care by Secretary order was made with the following recommendation:

- Should C require the input of a guardian into decision making, neither parent is available. C deserves the best possible opportunity to reach her full potential and part of this includes being able to participate in activities and have her needs met (including those pertaining to medical or legal requirements). It is assessed as being in C's best interests to extend the current Care by Secretary Order for a further 24 months. This will allow Child Protection and VACCA the opportunity to explore permanency for her, while ensuring that she is strongly connected to her family, culture and country. A Cultural Support Plan (CSP) is currently being completed and an Aboriginal Family-Led Decision Making (AFLDM) meeting is being scheduled as Child Protection requires this time to ensure both the CSP and AFLDM have been implemented before seeking a permanent order for C. [As at October 2020, the care by Secretary order was the last order on file.]

In the second case involving a young child, a post-amendment matter [case 25A], a protection application was made for the baby at birth, and the first care by Secretary order was made when she was 7 months old after a series of IAOs first to relatives, and then to out-of-home care. There was one unsuccessful attempt to reunify her with her mother when she was 4 months old. She was 29 months old and had been in foster care for 27 months when the application to extend the care by Secretary order until December 2021 was made because of her mother's failure to engage with services to address long-standing mental health and substance abuse problems. The identity of the child's father was not known/disclosed by the mother. The reasons for the extension in the DHHS report were outlined as follows:

- "A case planning meeting held [mid 2019] where case planner Z endorsed a permanent care plan for C 'after extensive exploration of a finding families assessment was completed with no one in a position to care for her. She has been in a stable foster care placement for 18 months. Her current carers have expressed a wish to care for her permanently. This assessment is currently taking place. C has a strong attachment to her carers eg

looking for her carer's when in a room, when [carer] leaves the room she will cry but when [carer] returns she settles).

- C has not had any contact with her mother since she was 6 months of age. Her mother advised DHHS in late 2017 that she does not wish to have any further contact with C. Attempts have been made with [mother] in recent months via prison to discuss further, but she refused to speak to CAFS and DHHS workers. Attempts have been made to identify C's father with no outcome."

The two cases where extensions to care by Secretary orders were sought for adolescents present a different challenge with both involving young adolescents with very difficult to manage behaviours associated with serious and long-standing mental health problems in one case and an intellectual disability in the other.

In the first case [case 25B], the adolescent was 13 at the time of the protection application by emergency care, and DHHS immediately sought a custody to Secretary order for 12 months, which was then extended and then an application was made in late 2016 for a care by Secretary order, and then extended in late 2018 at age 17. This young person had been subject to more than 25 s 587 (Emergency Care) warrants over a period of four years and periods in secure welfare as well as long-term residential care. The DHHS disposition report supporting an extension of the care by Secretary order until the age of 18 provided the following reasons, based on her significant history of self-harm, suicide attempts, sexual risk-taking behaviours and mental health diagnoses of schizophrenia, PTSD and Borderline Personality Disorder:

- C advised he is happy for Child Protection to seek a care by Secretary order as the most appropriate order to promote his safety and stability;
- C requires intensive support from his current care team due to his multiple and complex needs;
- Mother acknowledges that she is unable to have him return to her care as she cannot keep him safe. C has not had contact with his father since he was a small child;
- Mother resides interstate and if C were to return to her care at this stage it would impact his access and engagement with his care team, specifically his mental health treatment.

The second case [case 16A] involved an 11 year-old with an intellectual disability at the time of the protection application. His mother was in prison and his father was not involved in his life. He had a series of 18 unplanned and planned placement changes over 9 months due to his violent difficult behaviour and emotional outbursts but was then placed with his older sister in her early 20s on a family reunification order and then on a care by Secretary order when he was 12. His sister was supported with new housing when she was evicted, her

brother settled at school and has remained with her since on an extended care by Secretary order.

5.2 Contestation over care by Secretary orders or orders not made as sought

Concerns about the lack of conditions, particularly in relation to contact, on care by Secretary orders were evident in at least 6 post-amendment as well as several pre-amendment cases that began in 2013–2015 but transitioned to the new suite of orders after March 2016. Contact conditions or the absence of any guarantee of contact was the subject of dispute in five applications, though the contestation resulted in a contested hearing in only two.[45] A care by Secretary order was made in three of these cases where a parent was relinquishing care of the child or no longer seeking reunification. A permanent care order was finally made in the other two matters. In several cases, the dispute related to the concern that children in the care of the children's paternal relatives may not facilitate contact or make it comfortable, particularly where there was a history of family violence; this was also evident in contests over IAOs and FROs (see also section 10 for a discussion of the concerns about contact being reduced with a change in orders). In one matter in which a care by Secretary order was granted after a contested hearing, the Child Protection report indicates that the mother "may have contact minimum 1 day per week as agreed by DHHS and carer" although there are no conditions on a care by Secretary order.

The lack of a specified placement on a care by Secretary order was also the subject of dispute in a matter involving two Aboriginal children that finally settled by consent 32 months after the protection application – following a conciliation conference and with a departmental guarantee. The department indicated there was no intention to change the children's placement with their maternal aunt, and that if they did intend to do so later, they committed to inform the mother and her legal representative.

There were four cases in which an application for a care by Secretary order was not granted or was delayed by contestation. In three matters, an order other than a care by Secretary order was made instead.[46]

- In the first case, the department applied for a care by Secretary order for a young child 37 months after the first protection application and 18 months after a second

[45] A care by Secretary order was made in two of the five contested matters, within 6 and 13 months of the protection application. The other three contested matters without a care by Secretary order were finalised by a PCO or LTCO.

[46] Extensions to an interim accommodation order [20A), an extension to a family reunification order [4A] or a family preservation order instead [17A].

application. This followed the child's return home on a family preservation order for 12 months; the child subsequently returned to out-of-home care on a family reunification order. An extension of the family reunification order was made instead of the care by Secretary order DHHS was seeking but the mother's death precipitated a permanent care order to the maternal grandparents (case 4A).

- In the second case, an application for a care by Secretary order was pending for a child whose father had relinquished care on an IAO to out-of-home care 30 months after the first protection application. This followed an earlier application for a care by Secretary order being struck out and DHSS's revised application for a family preservation order being granted [case 17A].
- In the third case, a fully contested matter, an application was made for a care by Secretary order 12 months after the protection application and after a series of IAOs; a further IAO was made instead; the matter was finalised by a permanent care order to the paternal grandparents when the child was 17 months old with no final protection orders having been made during the court process [case 20A].

On the other hand, there were also several cases where an application for a care by Secretary order was made and a permanent or long-term care order seemingly delayed where permanent carers were willing and able. In one case, for example, the child's mother and maternal grandparents preferred a permanent care order but could not apply for it. The child was placed at two weeks of age with his maternal grandparents and his three older siblings in response to DHHS concerns about family violence and the mental health of both parents. The case plan was for family reunification, and DHHS sought a 12 month family reunification order and then a care by Secretary order, with reunification as the objective, 12 months after the protection application although there were ongoing concerns about the parents' capacity to meet the infant's needs for safety and nurturance. The child was reported to be thriving in the care of her grandparents and the parents advised DHHS that they were unable to care for the child and wanted him to remain in the care of his grandparents who also wanted permanent care. The magistrate noted on the file that the reunification objective was incorrect, and should be NON-reunification. A long-term care order was made two years after the protection application because the grandparents needed the support of agency and contact arrangements [case 3A].

In summary, a care by Secretary order was made or applied for in most post-amendment matters and in a number of pre-amendment matters that transitioned to the new orders after March 2016. The lack of contact or placement conditions was clearly a matter of dispute in at least nine matters, and there was also evidence in reports to the court that parents had disengaged with the court process after a care by Secretary order application and order was made.

6. Permanent care order

The primary intent of the permanency amendments and the preferred permanency outcome for children in the legislative hierarchy is that children are able to remain safely at home or return home (on a family preservation order or no order) as soon as possible. This is not possible for some children. After the amendments, the two main alternative long-term arrangements are long-term care orders (LTCO) and permanent care orders (PCOs). Long-term care orders (now with no age restrictions) have replaced the pre-amendment long-term guardianship orders which were available only to children who were at least 12 years of age. Parental responsibility for the child remains with the Secretary of the Department until the age of 18 under these orders whereas it is transferred to the approved carers, mostly relatives or kin who become the child's legal parent (again until the age of 18), on a permanent care order. Permanent care orders existed before the amendments but the conditions and procedures changed with the amendments. The legislation gives preference to permanent care over long-term care. (s 167(d) and (e); and 294A(2)(a) and (b))

To provide a context for the numbers of cases in which a long-term or permanent care order for ongoing alternative care was made, Table 6.1 shows the frequency of the last court order for both pre- and post-amendment cases.

Table 6.1 Frequency of last court order for pre- and post-amendment matters

Last court order	Pre-amendment (*n* = 26)	Post-amendment (*n* = 25)
IAO Undertaking Parent	1	–
CSO	4	NA
SCO / FRO / FRO extension	2	3
CBSO /extension	6	12
GSO	1	NA
LTCO	2	3
PCO	10	7

Post-amendment cases

Ten of the post-amendment cases were finalised with a permanent care order (7 PCOs) or a long-term care order (3 LTCOs). All except two of the children on a permanent care order was an infant, ranging in age from several days to six months at the time of the protection application. They were younger than children who did not go onto a permanency order during the data collection period (22.7 months at the time of the protection application compared

with 68.3 months). Their average age when the permanency order was made was 50 months or 4.2 years (median = 29 months). Four infants were in the care of their maternal or paternal grandparents or aunt/uncle; two were placed with permanent carers within nine months. None of these children were Aboriginal.

There was relatively little variation in the time taken for a PCO or a LTCO to be made in the post-amendment cases, with most (*n* = 7) being made within 26 months of the protection application. The shortest period was 17 months and the longest 40.8 months. The two cases in which a LTCO was the last final order took 21 and 23 months respectively.[47] The average time from the first protection application to a permanency order was 25.0 months (SD = 6.6) with a median of 23.5 months.[48]

In a number of cases, children's entry into out-of-home care was within days of the protection application being heard or an emergency order being made. In one contested case, two children were on a series of interim accommodation orders to their mother, then their father for nearly 8 months, and then a family preservation order for 13 months before a LTCO was made. On average, children were in out-of-home care for 21.5 (SD = 5.3) months until the permanent care order or long-term care order was made, ranging from 9 to 26 months; the median was 23.0 months.

There was no typical pathway to either a permanent care order or long-term care order. In six cases, the preceding order was a family reunification order (*n* = 1) or an extension to one (*n* = 4) or a family preservation order (*n* = 1); in four, a care by Secretary order preceded the permanent care order or long-term care order, and in two cases, the care by Secretary order was preceded by a family reunification order.[49] The initial order that DHHS was seeking in most cases was a family reunification order, generally for 12 months; in two, DHHS sought a family preservation order, and in one, a care by Secretary order.

Case example 6.1:

> *Case plan*: Initial plan and objective was family reunification. [Mother] indicated that neither parent was able to care for their vulnerable newborn baby given their mental health issues and her own physical health issues. It was agreed the child was to live with his maternal grandmother, as agreed with his parents while they addressed their physical and emotional

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[47] Another case has an application for an LTCO pending, after 36.7 months, the last 4 months during the Covid lockdown period.

[48] The average time from the first protection application to a permanent care order (PCO) was 25.8 months (SD = 7.3) and a median of 25 months.

[49] A CBSO was sought in all ten cases but granted in only four. The court file review relies on the information in the reports and on the court file but it is not clear what the DHHS's final position was in court and it is possible, DHHS may have ultimately consented to a FRO in some of these cases.

> health issues and were to seek long-term housing and the father to re-engage with Men's Behaviour Change.
>
> *Reasons for DHHS recommendation for LTCO*: Both children are thriving in the care of their maternal grandparents and are in childcare, and being supported by Enhanced Maternal Child Health Nurse. Permanency objectives can be met by a Long-Term Care Order – currently on a care by Secretary order for a further 14 months. [Case 3A]

In this case, it was clear that the maternal grandparents preferred a permanent care order but they needed agency support and assistance in managing the contact arrangements with the father because of their concern about his mental health and threatened violence messages. Similarly, in another case, DHHS discussed the supports that a long-term care order could provide for the older sister who was caring for an adolescent boy with behavioural difficulties.

Pre-amendment cases

Just under half the pre-amendment cases (*n* = 12) were finalised with a permanent care order (10 PCOs) or a long-term care order (2 LTCOs). Six of the children involved were infants under 12 months old, one was under 3 years, and the other five children were aged 5 to 11 years. Like the children in the post-amendment cases, these children were younger than children who did not go onto a permanent or long-term care order (49.5 months at the time of the protection application compared with 77.2 months). Their average age when the ongoing order was made was 67 months or 5.6 years (median = 49 months). A permanent care order was sought by DHHS at first instance in only one case, for a baby, and that was the only order made in that matter, 7 months after the protection application. One child removed at birth, and then on a guardianship to Secretary order (GSO), was adopted by permanent carers following the death of his mother, with his father's identity unknown.

The time from the first protection application to an ongoing order was somewhat longer than for the post-amendment cases, with a mean of 37.6 months (SD = 25.8) and a median of 29.5 months. The shortest was 9 months and the longest 85 months.[50] Two of the children were Aboriginal (one on a PCO and the other on a LTCO). Ten of these orders were finalised in 2016–2018 although the initial protection application was made in 2013–2014; two were made in 2015.

The time that children were in out-of-home care was, however, substantially shorter for several cases where children were on IAOs to parents, particularly in contested matters. In one contested matter, for example, and one that is very similar to the contested matter in the post-amendment cases, there was a series of IAOs for 11 months, first to the mother, then to

[50] The mean length of the PCOs was 29.5 (19.0) months, median of 22 months. The two long-term care orders were made 72 and 85 months after the protection application.

the father before final orders (SCO, SCO extension, a family reunification order and then a permanent care order) were made. On average, children in the pre-amendment cases were in out-of-home care for 36.0 (SD = 24.1) months until the permanency order was made, ranging from 9 to 78 months; the median was 24.0 months.

There were two main pathways to a permanent care order in the pre-amendment cases. The first was an expeditious and direct route, with DHHS seeking a long-term or permanent care order at the time of the protection application or soon after when the assessment was that the parents were unable to care for their infant or very young child or unable or unwilling to comply with DHHS' requirements to keep the child safe and well cared for. The protection application was made within days or months of birth for these five children and a permanent care order was made within 9 to 19 months. DHHS's reports indicated little optimism that reunification would be possible, with the reasons why reunification might *not* be possible outlined in some detail. In several of these cases, the parents indicated they were not able to provide adequate safe care for their child.

Case example 6.2:

> *Case plan*: For family reunification, once protective concerns are addressed – at the same time, the child was moved from an emergency foster care placement to a 'concurrent long-term placement'.
> *Reasons for recommendation*: Safety concerns – non-accidental serious head injury to child's older sibling at xx days of age and family violence between parents, and between father and maternal grandmother, and grandmother and her partner. Maternal substance use, lack of antenatal care, family violence, transience; serious non-accidental serious head injury to older sibling at xx days of age, older two siblings in care with non-reunification plan; concerns re maternal grandmother's parenting capacity, because of her partner's family violence and criminal history.
>
> *Reasons why reunification is possible*: No reasons given.
>
> *Reasons why reunification is not possible:* Parents have not been able to address any of the protective concerns – family violence, own trauma histories, mental health and substance abuse, transcience and homelessness. Not engaged with any service, not complied with drug screen requests and not keeping contact appointments and parents admit not capable of caring for the child at that time. Not engaged with case plan meetings or contact. Safety concerns and continuing non-reunification plan for older siblings. [Case 6B][51]

Two of these infants had been placed with their paternal grandparents soon after birth and remained with them on the ongoing order. Three were placed with foster carers who became their permanent carers, after an early hospital or emergency care placement. One child was co-placed with his brother. One was an Aboriginal child who was placed in a non-Aboriginal

[51] The permanency objective was reported as 'reunification' in the case plan section of the report, when the case plan had changed to long-term out-of-home care.

placement with the consent of his mother and VACCA's approval of the child's permanent care cultural assessment.

At the other end of the spectrum, in four of the pre-amendment cases, the permanent care order or long-term care order was made close to five years or longer after the protection application (57 and 64 months for the permanent care order, and 72 and 85 months for the LTCO). Three of these four were contested and two were dealt with in regional courts. The pathway to a PCO or LTCO for these cases involved a progression in the orders from less to more intrusive orders, and finally to an ongoing order. For the permanent care order matters, this involved an initial supervised custody order followed by a custody to Secretary order, which transitioned to a care by Secretary order and then was followed by a permanent care order [cases 19B and 24B]. The early objective (as outlined in the first protection and disposition reports) was to reunify the children when their parents addressed the identified protective concerns. Both children were under the age of 3 and had been in the care of their paternal grandparents, apart from a short stint in a mother-baby residential unit for one.

The two cases which were finalised with a long-term care order involved some contestation, with several directions hearings in both, and a five day hearing in one; there were 7 and 10 reports respectively to the Court over a period of about five years. The initial aim (again as outlined in the first protection and disposition reports) in both cases was for the children to remain with their mother on a supervision order. Both were complex matters, with multiple children in the protection application or in previous applications. Both progressed from a supervised custody order or custody to Secretary order to a care by Secretary order after the transition arrangements, and then to a long-term care order 72 months and 85 months, respectively, after the protection application [cases 18B and 20B]. The children in both matters were placed with grandparents but the Aboriginal grandmother in one was unable to cope with multiple children with complex needs so the 7 year-old who was the subject of the court file was placed with non-Aboriginal carers, with regular joint care team meetings with the siblings' kinship case contracted support workers and Aboriginal Child Care Specialist Service (ACSASS) workers.[52]

Case example 6.3:

> *Case plan*: Initially for children to remain with mother on a supervision order: necessary in order 'to continue providing intensive support to the family to lessen the risk of further emotional and psychological harm and support ongoing sustainable change'.

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[52] In addition, there were three pre-amendment cases in which a PCO was made 25, 34 and 41 months after the protection application. The common pattern here was a progression from a supervised custody order or a custody to Secretary order to a permanent care order but with little or no contestation; they involved two or three children but no Aboriginal children.

> *Reasons for initial recommendation*: Child Protection have assessed that mother requires significant support to develop the skills and strategies to prevent further criminal offending as well as managing her drug and alcohol misuse. Mother also requires support to address concerns in relation to providing appropriate care and in accessing supports for younger children and supervision to the children, as well as addressing the home environment.
>
> *Reasons why reunification is possible*: Maternal grandmother is significant support.
> *Reasons why reunification is not possible:* Initial disposition report: [Mother] and her new partner's difficulties addressing concerns. A number of family violence incidents occurred since a full Intervention Order was granted, resulting in breaches, identified substance misuse (including alcohol, marijuana and ICE); financial difficulties resulting in family violence contributed to the relationship breakdown.
> The final disposition report 3½ years later listed a series of issues: Mother's ongoing drug use (methamphetamine), continuing to engage in a violent relationship; instability in her mental health; inability to maintain care for the children and to manage their behaviours; her continuing criminal offending which has resulted in her imprisonment. 'It is Child Protection's respectful recommendation that reunification is not a viable option and is not in the best interests of the children.' [case 18B]

In summary, the main difference between the pre- and post-amendment cases was the time from the protection application to a permanent or long-term care order being made: a median of 29.5 months for the pre- and 23.5 months for the post-amendment cases. [53] For half of the pre-amendment cases, an ongoing order was made from 34 to 85 months after the protection application but only one of the post-amendment cases was made beyond 26 months and this was an exceptional case in several ways. [54]

The average time that children were in out-of-home care until the ongoing order was made was also substantially longer for the pre- than for the post-amendment cases: 36.0 months (SD = 24.1) and 21.5 (SD = 5.3) months, respectively. There was much less difference between the medians (24 and 23.0 months). This reflects the much 'longer tail' for the pre-amendment cases, with the children in 5 of the 12 matters being in out-of-home care for periods ranging from 41 to 78 months whereas no children in the post-amendment cases were in out-of-home care longer than 25.9 months. This indicates that the amendments appear to have 'put a cap' on the time that children are in out-of-home care prior to a permanent or long-term care order.

It is consistent with the findings of the CRIS analysis which indicate a reduction in time that children were in out-of-home care from the pre- to past-amendment phase when they were

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[53] Nine of the 25 post-amendment cases had 'reached' finalisation by a permanency order compared with 12 of the 26 pre-amendment cases.

[54] This case was exceptional in that the mother died 21 months after the second protection application, following the child's earlier return home.

placed on a PCO or LTCOs (section 7.2). As in that analysis, the differential follow-up time for the pre- and post-amendment cases needs to be considered since the post-amendment cases have had a maximum of under four years (since March 2016) to 'reach' a PCO or LTCO.[55]

[55] Nine of the 25 post-amendment cases had 'reached' finalisation by a permanency order compared with 12 of the 26 pre-amendment cases.

7. Reunification and unsuccessful restorations

The main aims of the permanency amendments were to support and facilitate parents' capacity to provide safe and enduring care for their children within their family and to minimise the time that children spend in out-of-home care, providing enduring care for them, either by their safe return home or in long-term or permanent care. The court files do not allow any assessment of the outcomes for children in terms of their safety and socio-emotional wellbeing but they do provide a window into the court outcomes, whether children who have a final protection order made under which they are out of parental care subsequently return home, and how long they are in out-of-home care.

7.1 How many children were reunified with their parents following a final protection order to care and are likely to remain there? What difference, if any, is evident between the pre- and post-amendment matters?

As outlined in section 4.2, it appears that only one child in the 18 post-amendment cases in which family reunification orders were made at some stage, was reunified with no further court orders or substantiations at the end of 2020. In this case, the child was not reunified with the parent from whose care the child had been removed. The mother was reportedly not able to address the protective concerns for the child due to problems associated with her multiple substance use, and lack of housing and supports. The child's father engaged with DHHS and was supported by his parents who were caring for the child. The family reunification order was varied to allow him to live with his parents and his child when he was released from prison, and it was then extended. There has been no further action recorded on CRIS since the extended family reunification order expired in late 2018 [Case 1A].[56]

Similarly, one pre-amendment case appears to be a possible successful restoration [Case 2B]. In this case, two children under 4 were placed with their maternal grandmother on IAOs and then supervised custody orders, for a period of 44 months. The mother had left her former violent partner and moved to a regional area to live close to her children, with substantial support from her mother. DHHS closed the case in early 2016 and there have been no further orders and no DHHS intervention since.

7.2 How many children were reunified with their parents but are no longer in their care?

As outlined earlier, some children remained in the care of their parents immediately after the protection application on interim orders (IAOs or IPOs) or on supervision orders or family preservation orders, and some returned home at some stage on these orders. For all except

[56] DHHS closed the case in late 2018 at the expiry of the family reunification order.

two children in the 51 pre- and post-amendment cases, their return home was not able to be sustained and they re-entered out-of-home care.[57]

There were 12 pre-amendment cases and 9 post-amendment cases in which there were:

- unsuccessful attempts at reunification (6 pre- and 5 post-amendment cases)
- parents, mainly fathers, relinquishing the care of their children (2 pre- and 3 post)
- adolescents absconding from home, self-placing and self-restoring in a series of generally unplanned moves (4 pre- and 1 post).

Unsuccessful attempts at reunification

The most common scenario was unsuccessful and generally short-lived attempts at reunification in six pre- and five post-amendment matters. This typically involved a breach of the order (IAOs to parents, or supervision or family preservation orders) as a result of not complying with the conditions of the order. This included allowing others with a history of violence to live in or visit their home, relapses of substance abuse or mental health problems, criminal offending, and neglecting or physically assaulting the child.

In one pre-amendment case, for example, dealt with in a regional court, a supervision order was sought and made for four children aged 3 to 14 years 'in order to continue providing intensive support to the family to lessen the risk of further emotional and psychological harm and support ongoing sustainable change'. Within five months, the children were placed with their maternal relatives on an IAO for three months but then returned to their mother's care on a 3-month family preservation order in the post-transition phase of the amendments. The initial case plan was not realised and was probably not realistic. The children remained in and returned to their mother's care despite more than 30 reports received by DHHS about the family – concerns about her lack of supervision, mental health problems, substance use, criminal activity, and neglect of the children. The children were again removed from her care and placed with their maternal relatives. A care by Secretary order was sought but a family reunification order was made instead, and then extended; 16 months later a CSBO was made, and 27 months later, a long-term care order was made. The children's respective fathers were in agreement that the children needed to remain in care [case 18B].

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[57] Using criteria similar to those outlined in the CRIS analysis, a child is considered to re-enter care if:

- A supervision order *or* family preservation order *or* IAO undertaking parent is followed by an order transferring custody and/or parental responsibilities to the Secretary or a nominated party *or*
- A child is subject to an order transferring custody and/or parental responsibilities to the Secretary or a nominated party after having been reunified *or*
- A child is subject to an order transferring custody and/or parental responsibilities to the Secretary or a nominated party after expiry of this order.

Seemingly unrealistic case planning was also evident in several post-amendment cases. In a matter involving two children, aged 7 and 8, Child Protection reports to the Court indicated that they were 'attempting to preserve the family through ongoing supports to the mother'. While DHHS was concerned about the 'lack of maternal progress towards addressing the protective concerns', the father was identified as 'willing and able to provide an adequate level of care for the child, and to engage with supports as required'. The children were placed with their father on IAOs, and then a family preservation order. When the father breached the conditions of the order, by exposing the children to family violence and physically harming one of the children, the children were placed on a series of IAOs over nine months to the mother's step-mother before a long-term care order was made [case 8A].

In both these cases, early case planning around family preservation seems somewhat optimistic and unrealistic, and the changes in case plan seemed reactive and dependent on incidents occurring rather than on an assessment of likely cumulative harm and proactive case planning.

Parents relinquishing the care of their children

In two pre- and three post-amendment matters, parents relinquished the care of their children, after attempts to return them home. Several of these children had disabilities or behavioural difficulties. In one pre-amendment matter, attempts were made to keep three children under 6 with their mother on IAOs and extensions of the order to her on condition that she 'keep the home environment above minimum standard as assessed by DHHS', accept support services and cooperate with DHHS. Her inability to satisfy these conditions to meet the needs of the children resulted in them being placed with their father and his partner, also on IAOs. Within six months, the father and his partner relinquished care of the children because they were unable to manage the behaviour of the oldest child and meet the needs of all three. The children were placed with their maternal grandparents on a supervised custody order, and DHHS sought an extension of this order outlining the grounds:

- 'The oldest child is a 7 year-old who at times displays challenging behaviours. She has reportedly had a very chaotic childhood, and has witnessed her younger sibling being emotionally and physically abused by her mother with the complacency of her father not intervening regarding this abuse. As the mother does not currently have suitable housing and the father has relinquished care of the child, it is respectfully recommended that [child] remain on a Supervised Custody Order for a further 12 months and to remain in the care of her maternal grandparents with her siblings. [Case 14B]

Within two years, a permanent care order was made, with the following summary:

- 'Child Protection is seeking a Permanent Care order to further support the children's long term stability, safety and well-being. It is the assessment of Child Protection that whilst in the care of the maternal grandparents, the children are safe, their best interests are being prioritised, their grandparents ensure the children's developmental needs are met

> and promote their social and emotional well-being as well as providing them with a nurturing home environment. The children further have a sense of belonging to a family household, a strong attachment to their grandparents as their primary caregivers and a protective network of support around them'.

In two post-amendment matters, fathers relinquished the care of their children. In both cases, the fathers had not previously had primary care of their children. In one case, the mother's mental health, substance abuse and drug-related offending resulted in 14 reports about the children over several years. Two of her children were placed with their paternal grandparents and the oldest, a 10 year-old, was placed in the care of his father who had had minimal contact with him previously. The initial order was an IAO for 8 weeks, and family preservation was listed as the permanency objective, with the note that: 'If further assessments return successful, Child Protection will be withdrawing from any further involvement with [child]'. The IAO was extended to 7 months, a family preservation order made, as sought by DHHS, but the father relinquished care of his son 10 months later, by placing him in the care of the child's mother, who was not able to provide adequate care to meet his needs. A care by Secretary order was sought and made, placing the child with his half-siblings and their grandparents [Case 23A].

In the other post-amendment case, the child's mother had died several years before, and the father had had limited contact with his daughter, then 10. Her behaviour was very difficult to manage and she was diagnosed with autism and moderate to significant intellectual disability. He indicated that he was unable to cope but according to DHHS reports did not engage with supports, including Child Protection and Disability Services. He relinquished care and the child was placed in a disability service for 13 months. He resumed care for her on a family preservation order for 4 months before relinquishing care again, and she returned to out-of-home care in a disability service [Case 17A].

- Departmental records indicate that 'attempts have been made to support [father] to provide full-time care. C reunified with her father late last year but due to C's complex needs as well as father's capacity to provide adequate care, assessed that a more structured and intensive day-to-day support is needed to ensure the safety and well-being of C. ... [Father] has demonstrated that he has made attempts to provide care and protection for C but due to her high needs, he has reported that he is not able to provide adequate care for his daughter. Given her complex and high needs, and the number of support services required to care for her on a 24 hour basis, DHHS cannot support her being reunified to her father's care.

Absconding self-placing and self-reunifying adolescents

Five adolescents self-placed and self-reunified and absconded from their home or out-of-home care placement. Four adolescents aged 13 to 17 in the pre-amendment matters and a

14 year-old in a post-amendment matter[58] had multiple placements, both planned and unplanned; most had longstanding difficult family circumstances and child protection concerns. Their planned placements were in residential care and with a parent; the unplanned placements included friends' parents, relatives, and with parents. The stays with parents were short-lived and often ended in conflict, with the young person absconding. None of these planned or unplanned reunifications appear to have been successful in terms of longevity but the longer term outcomes for these young people, and indeed for all the children involved in these court files, remain unknown in the absence of a longitudinal study.

In summary, there appear to be few differences between the pre- and post-amendment matters in the presentation of cases in relation to children being reunified with their parent/family and the 'success' of those restorations. The common element to a number of these families is the combination of protective concerns and the limited support available to parents, particularly for children who have disabilities and challenging behaviours.

[58] Cases 4B, 5B, 13B, and 22B, and 5A.

8. How have these matters been dealt with in the Court process?

The timeliness of decision-making starts with the intake and substantiation process by DHHS and the time it takes for a protection application to be made.

8.1 Conciliation conferences

As outlined in the Children's Court annual reports since 2014–15, conciliation conferences are 'intended to facilitate the early resolution of applications through a non-adversarial process'.[59] The statewide rollout of conciliation conferences was completed in early 2014 and there was been an increase in the numbers since then from 2,128 in 2014–15 to 3,275 in 2018–19 (a 53.9% increase), while the number of primary and secondary applications increased over the same period by 26.6% (Figure 8.1).[60]

Conciliation conferences were conducted in 11 of the 26 pre-amendment court file cases and 18 of the 25 post-amendment cases, but as noted, the protection applications in the 2013–14 pre-amendment cases were made in the early part of the state-wide implementation of these conferences. The 'non-resolution' rate of these conciliation conferences was calculated as the number in which the conference was followed by a directions hearing.[61] For the pre-amendments matters:

- 15 conciliation conferences were conducted in 11 cases
- 10 conferences in 6 cases were followed by a directions hearing
- 4 of these 6 cases went on to a contested hearing.

In the post-amendment cases:

- 27 conciliation conferences were conducted in 18 cases
- 16 conferences in 10 cases were followed by a directions hearing

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[59] The conciliation conference process provides for:
- Better preparation by participants;
- More time for discussion in an appropriate environment;
- Department of Health & Human Services decision-makers being present at the conference;
- An appropriate process for those children who wish to participate (Annual Report of the Children's Court of Victoria 2018-19, p. 44).

[60] 'The Statewide rollout of conciliation conferences was completed in early 2014. The figures are sourced from the Annual Reports of the Children's Court of Victoria 2015-15 to 218–19.

[61] In 2014–15, for example, over 1,600 matters listed for a conference were resolved or partially resolved without a directions hearing' (Annual Report of the Children's Court of Victoria 2014–15, p. 25). In 2018–19, 'In 2018-19, over 2,450 matters listed for a conference were resolved or partially resolved without a directions hearing before a magistrate'; 798 of the 3,275 conciliation conferences (24.4%) that were conducted resulted in a directions hearing(Annual report of the Children's Court of Victoria, p. 44).

- 4 of these 10 matters went to a contested hearing.

The non-resolution rate of more than half conciliation conferences[62] in these court file matters (ie those that were followed by/resulted in a directions hearing) is notably higher than the state-wide figures of around 20–25%.[63] This may be partly explained by the broader range of conciliation conferences in the state-wide data.

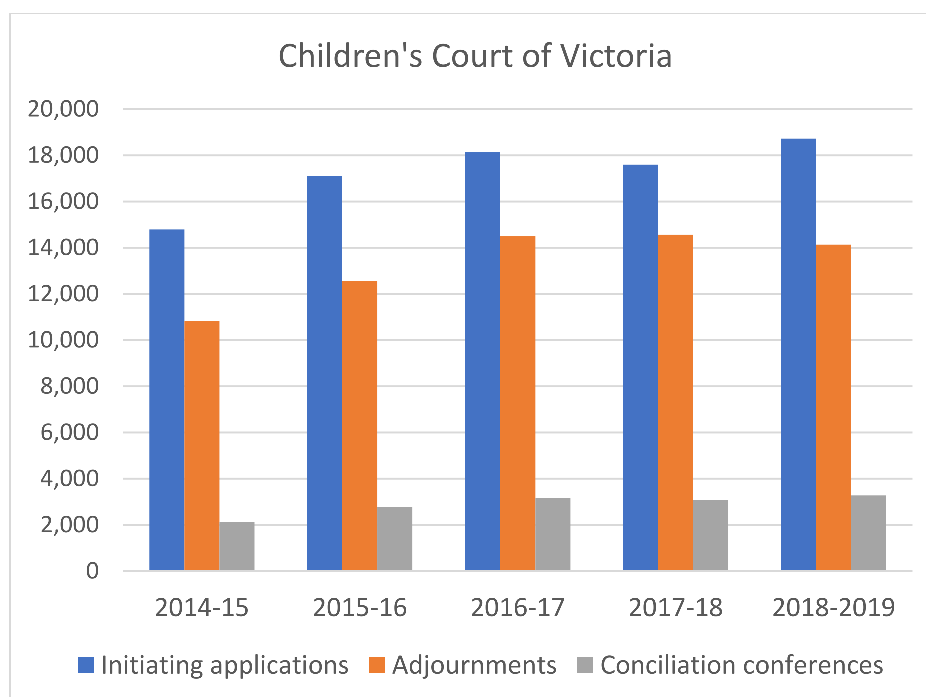

Figure 8.1 Number of primary and secondary applications, conciliation conferences and adjournments by year.

Source: Annual Reports of Children's Court of Victoria

The median period of 4 months between the protection application and the (first) conciliation conference was considerably shorter for the post-amendment cases than for the pre-amendment matters (8.5 months).[64]

8.2 Reasons for adjournments – timeliness of decisions

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[62] Pre-amendments, 6 out of 10 conferences and 6 of 11 cases; post-amendments, 10 out of 16 conferences and 6 of 11 cases.

[63] As indicated by the figures in the Annual Report 2018–19 for the numbers of conciliation conferences which resulted in a directions hearing for the years 2016–17 to 2018–19, approximately 21.6% to 24.1%.

[64] Mean time between the protection application and the first conciliation conference was 12.8 months (SD = 8.6) for the pre-amendment cases and 8.6 months (SD = 8.9) for the post-amendment cases.

The *Children, Youth and Families Act 2005* provides the Children's Court with the power to adjourn a proceeding and specifies the parameters (s 530 (8) to (11):

- s 530 (8) The Court must proceed with as much expedition as the requirements of the Act and a proper hearing of the proceeding permit.
- s 530 (9) The Court should avoid the granting of adjournments in Family Division proceedings to the maximum extent possible.
- s 530 (10) The Court must not grant an adjournment of a proceeding in the Family Division unless it is of the opinion that –
    - (a) it is in the best interest of the child to do so; or
    - (b) there is some other cogent or substantial reason to do so.
- s 530 (11) In deciding whether and for how long to adjourn a proceeding under this section, the Court must have regard to the requirements in subsection (8) to (10).

The data provided in the Children's Court's Annual Reports (see Figure 8.1) indicate a substantial 26.6% increase in the number of primary and secondary applications from 14,789 in 2014–15 to 18,772 in 2018–19. The number of adjournments over this period also increased, by 36%, suggesting that adjournments are becoming more common (from 70.2% of applications in 2014–15 to a high of 82.7% in 2017–18 and 75.5% in 2018–19).

The court files indicate little change in the number of adjournments in the pre-and post-amendment cases. There were substantial numbers of adjournments and mentions in some cases, with up to 13 in the pre- and 17 in the post-amendment matters. The average in both was more than 5 (5.4 in the pre and 5.75 in the post cases, with a median of 5 and 4.5, respectively). There are a number of reasons why adjournments are sought and made but there appears to be relatively little change in the reasons, apart from fewer adjournments in post-amendment cases for DHHS to complete a report or to review their disposition (18 pre- and 12 post-amendment cases). There were, as indicated earlier, some clear messages from some magistrates about the inadequacy of information in some of the pre-amendment case plan and disposition reports, and the need to review the disposition. There were also 18 pre-amendment cases in which an adjournment was sought to conduct assessments of the parents, carers or young people, including neuro-psychological and cognitive assessments but only 10 post-amendment cases. Only one case involved a Children's Court Clinic report. A delay in obtaining the lack of a cultural plan was indicated in several matters.

Parents not attending court or conciliation conferences was a common reason for adjournments in both the pre- and post-amendment cases (13 and 14 cases, respectively). In some cases, it was clear the parents had disengaged from the process, particularly after a non-reunification case plan and order such as care by Secretary order was being sought. In one

post-amendment matter, the Aboriginal parents did not attend court at all prior to a permanent care order being made. Parents were uncontactable in several cases,[65] and the identity of the child's father was not always known or at least not communicated, with paternity testing required in several cases.

The court files indicate that there were seven pre- and seven post-amendment cases where the adjournment concerned parents' or children's involvement with services and the need to await entry to or discharge from services such as mental health facilities, specialist parent-baby residential services and residential services for young people. There was an indication in some files that parents were apparently not being offered services. For example, a Somalian mother who was seen to be 'hostile and uncooperative' was required to attend for regular urinalysis but there was no indication of any services recommended or provided to meet her needs and that of her child for housing, mental health services, AOD services or parenting skills.

Of much concern, however, as discussed in section 3, based on DHHS disposition reports and reports was parental non-compliance with DHHS and parents' lack of engagement with services. Parental non-compliance was frequently reported by DHHS in court reports as one of the main reasons for the permanency objective changing from reunification to non-reunification and for recommending orders such as care by Secretary order or a permanency order. A review of the court reports revealed that mothers in only two of the 51 cases [cases 17B and 25A] were reportedly showing fairly consistent compliance. Despite their compliance and cooperation with DHHS, however, these mothers were not able to resolve or adequately address protective concerns due to their longstanding mental health and substance abuse problems.

In summary, in these court files, there was little difference between the pre- and post-amendment matters in the time taken by DHHS to make a protection application from the date of the last substantiated intake or in the time from the protection application to the first final protection order. On average, it took about six months from substantiated intake to the first final protection order. There were more conciliation conferences, and they were conducted more quickly after the protection application in the post-amendment matters than the pre-amendment matters. There was little difference in the number of adjournments, apart from there being fewer adjournments in the post-amendment matters for DHHS to complete a report or conduct an assessment.

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[65] Adjournments were sought to send registered letters to parents in a number of these cases, and also to dispense with service for parents who could not be located or did not respond to attempts to contact them.

9. Aboriginal children

Special provisions come into play for Aboriginal children at several stages of the child protection and court process. In particular, the case plan for Aboriginal children placed in out-of-home care must include a Cultural Plan that is endorsed within 19 weeks of their entry to out-of-home care (s 166(3)(b) CYF Act). These plans must set out how the child is to remain connected to community and culture (s 176(3) CYFA) and must be regularly reviewed and updated (s 169 CYFA).

The Court is also restricted in making a permanent care order for an Aboriginal child in several ways. The Court must have received a report from an Aboriginal agency that recommends the making of that order and a cultural plan must have been prepared for the child (s 323(2) CYF Act). The Court must also not make a permanent care order for an Aboriginal child to be 'placed solely with a non-Aboriginal person or persons unless the disposition report states that (a) no suitable placement can be found with an Aboriginal person or persons; (b) the decision to seek the order has been made in consultation with the child, where appropriate; and (c) the Secretary is satisfied that the order sought will accord with the Aboriginal Child Placement Principle (s 323(1)).

9.1 Cultural plans

The court files provided limited information about the cultural plans and arrangements for Aboriginal children.

Post-amendment court files

Six children in five post-amendment files were Aboriginal; both parents were Aboriginal for two children; one protection application involved two children. All the children with the exception of one were placed with Aboriginal grandmothers and aunts; the other child was placed with non-Aboriginal foster carers. The last final order for all except one of these children was a care by Secretary order and a family reunification order for the other (orders that were made from 12 to 32 months after the initial protection application).

There were no cultural plans on any of these court files but a late referral to VACCA had been made in one case and in another, Child Protection had facilitated an Aboriginal Family-led Decision Making meeting in recent proceedings. There was no cultural plan for the child who was placed with non-Aboriginal foster carers but a referral had been made to VACCA, 17 months after the child entered care. His mother was incarcerated on serious offences. The decision on a permanent care application in another case was delayed, awaiting a cultural plan.

Pre-amendment court files

Six pre-amendment matters involved Aboriginal children – one child in five cases and six children in the other. In four cases, the children's mother was Aboriginal and in two, both parents were Aboriginal. In three cases, the children were placed with Aboriginal kinship carers, maternal grandmothers and maternal aunts. In three of the four cases where children were living with Aboriginal family, there was no detailed cultural assessment. The case plan stated in one case, for example, that '[Child] is supported by her maternal aunt who ensures she is being culturally appropriate'. In another, a cultural assessment was conducted by Ballarat and District Aboriginal Cooperative (BDAC) after the case transitioned to the post-amendment arrangements on a care by Secretary order, five years after the child was first placed in out-of-home care; the child's current placement was endorsed by VACCA. There were delays and contests in this case because the mother was seeking the completion of the cultural plan prior to final orders being made.

In two pre-amendment cases, the children were placed with family who were not Aboriginal. In one case, the cultural plan stated:

- 'Child has mentioned she feels different from her non-Aboriginal carers due to skin colour and is seeking more cultural connectiveness and more contact with her [Aboriginal] mother.'

The case plan also stated: ''Every effort is made for [Child] to be culturally aware and build a positive connection to her culture/community", but there was no information in the case plan as to how DHHS or carers would facilitate more contact with her mother [case 20B]. In another case [case 12B], the case plan did not include cultural considerations, and made reference to culture on only one occasion:

- 'Child is of Aboriginal descent and has been linked with an Aboriginal play group to further develop his culture'.

The most detailed assessment involved a child whose mother and father were both Aboriginal who was placed with non-Aboriginal carers on a permanent care order [case 8B]. Victorian Aboriginal Child Care Agency Co-operative (VACCA) commenced their assessment 12 months after the protection application on the carers' ability to ensure the maintenance of child's culture and identity through contact with the child's community, and their ability to promote the child's Aboriginal cultural identity. The VACCA report on the court file was submitted as part of the PCO application. The assessment was conducted in a timely manner and the report on the court file was detailed and thorough. It was agreed by the family at an Aboriginal Family-led Decision-Making meeting (AFLDM) that the child would remain in this non-Aboriginal placement with carers who were linked to the local Aboriginal community and that the child would attend weekly visits to the Aboriginal playgroup with his maternal grandparents. The carers had completed 'Cultural Competency Training' and the Aboriginal

Child Specialist Advice and Support Service (ACSASS) continued to be involved with the care team to promote the child's involvement with his culture and promoting the involvement with carers.

9.2 Differences in court outcomes and processes

Aboriginal children in both the pre- and post-amendment cases were younger at the time of the initial protection application than children of CALD or non-CALD/non-Aboriginal background (Table 9.1), suggesting that the concerns about very young Aboriginal children arise and are responded to earlier in their lives. All of the Aboriginal children in the post-amendment cases were under the age of 3 and 7 of the 11 in the pre-amendment cases. Although the numbers are small, there was also a trend for the children in the post-amendment cases to be younger than those in the pre-amendment cases for Aboriginal, CALD and other children.

Table 9.1 Children's mean age (SD) at (first) protection application by cultural background

Child’s age at protection application (in months)	Pre-amendment (*n* = 45)	Post-amendment (*n* = 28)
Aboriginal	31.9 (26.4) (*n* = 11)	19.0 (18.3) (*n* = 6)
CALD	76.1 (72.2 (*n* = 11)	62.8 (72.6) (*n* = 12)
Other children	72.5 (60.5) (*n* = 23)	54.1 (61.2) (*n* = 10)

There was, however, no indication that for these cases at least, Aboriginal children waited longer than other children for a protection application to be resolved, as reported in the CRIS data analysis. The mean time between a protection application and the first final order was in fact shorter for Aboriginal children in the post- than the pre-amendment cases (121 days on average compared with 174.7 days pre-amendments). It was also shorter than for CALD children (186.6 days) and other children (166.7 days) in the post-amendment cases. The Aboriginal children in the post-amendment cases also spent less time on IAOs (121.0 days) than CALD children (151.5 days) or other children (235.8 days).[66] There was no difference by cultural background, however, in the number of mentions, adjournments or conciliation conferences. No post-amendment cases involving Aboriginal children were contested and only one pre-amendment matter was contested.

[66] This was also the case for the pre-amendment matters: Aboriginal children were on IAOs for 137.2 days prior to the first protection order compared with 177.1 days for CALD and 152.5 days for other children.

While there was no difference in the time that Aboriginal children were in out-of-home care up to the start of their last court order (prior to October 2020) compared with CALD and other children, none of the Aboriginal children in the post-amendment cases had a permanency order so their time in out-of-home care is continuing.[67] The last court order was a care by Secretary order for the Aboriginal children in four post-amendment cases matters; the other was an extension of a family reunification order.[68] It is likely then that these Aboriginal children will spend longer in out-of-home care unless their order expires and is not extended or until a permanent/long-term care order if such an order is made.[69]

The pattern of orders for children in the post-amendment matters also showed some differences though again the numbers are small. For the Aboriginal children, the pattern was much the same – a short-term family reunification order (3–8 months),[70] followed by another FRO or two short-term FROs or FRO extensions, followed then by a care by Secretary order for the children in 4 of the 5 matters. The other child remained on a family reunification order which was extended twice after being on a family preservation order which was breached. The extension of the family reunification orders was consistent with the DHHS recommendations in the reports that supported the application for an extension. In four of the five matters involving Aboriginal children, DHHS sought a family reunification order in the first disposition report; this recommendation/application was maintained for a minimum of 13 months, 17 or 28 months respectively before a change in the recommendation and an application for a care by Secretary order was made.

There were at least six reports in each case.[71] There was more detail and documentation in nearly all these reports about the reasons why reunification was *not* seen to be possible than the reasons that it was possible. In one case, for example, the disposition report stated:

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[67] The differential follow-up time means that the pre-amendment cases have had more time since the protection application.

[68] One Aboriginal child in the pre-amendment group was on a long-term care order (made five years after the protection application) and another was on a permanent care order (made 14 months after the protection application); both were in non-Aboriginal placements.

[69] The time to event analysis of CRIS data showed that the transition to permanent/long-term care is a slower process for Aboriginal children compared with non-Aboriginal children but this does not appear to be a by-product of the permanency amendments.

[70] The IAOs that preceded the FROs were short, ranging from 2 months (2 cases) to 4 months (2 cases) and one longer at 10 months.

[71] Each of these cases had at least six reports including disposition reports, conciliation conference reports and reports supporting an application for an extension of a family reunification order or a care by Secretary order over a period of 28 months or longer.

- ‘No evidence that reunification is possible as yet. Reunification is sought particularly due to the age of the child, two other siblings and Aboriginal background.’

The reasons why reunification was deemed possible included the provision of family support for the children and the parents, the engagement of Aboriginal services and a range of recommended services. Whether or not these services were accessed is not clear.

While none of these cases was fully contested, there were reserved submissions and some contestation about the order or contact in three, with parents also disengaging from the process. In one case, it was clear that the parents wanted their child to remain in the care of the paternal grandparents on a permanent care order; the grandparents were supportive of the parents, and allowed the mother to stay in the home with the child, facilitating regular contact with the child [case 13A]. In the second case, the child’s mother indicated that she was seeking a permanent care order with her mother and her three other children and was not agreeable to a care by Secretary order although the father had consented to it. She withdrew from communication with DHHS and a care by Secretary order was made three months later [case 21A]. In the third case, the father contested the child’s placement with the child’s maternal aunt on an interim accommodation order on the basis that he had problems having contact with his children, and that DHHS had failed to facilitate it [24A].

In contrast to the pattern of orders for Aboriginal children, only two of the 10 children of non-CALD/non-Aboriginal background had a care by Secretary order at any stage though the first final order in four matters was also a family reunification order (generally 8–12 months). In three matters, a family preservation order was the first final order. Half were finalised with a permanent care order or a long-term care order. The pattern for the CALD matters was somewhat different again; 9 of the 12 CALD children were on a care by Secretary order at some stage, generally following a 9–12 month family reunification order; four then went onto a permanent care order. The last court order for seven CALD children was a care by Secretary order.

In summary, there were several differences between the cases involving Aboriginal and non-Aboriginal and CALD children in the post-amendment files. First, the Aboriginal children in both the pre- and post-amendment cases were younger than other children at the time of the protection application. Second, the Aboriginal children in these post-amendment cases did not wait longer than other children for a protection application to be resolved. They were on interim accommodation orders for a shorter time than other children and then on shorter-term family reunification orders that were extended once or twice, and then followed by care by Secretary orders for most. None of the Aboriginal children in the post-amendment cases were on permanency orders, and only two in the pre-amendment cases. There were no cultural plans on file in the in the post-amendment cases.

10. Conclusions

The aim of the court file study, as one arm of the Permanency Amendment Longitudinal Study, was to provide some insight into the impact of the permanency amendments on the way matters progress through the Children's Court and the orders made by the Court following protection applications for children in the Family Division of the Court. It involved a comparison of a matched sample of 26 files prior to the amendments (with protection applications in 2013 to 2015) and 25 files after the implementation of the amendments in March 2016 (protection applications in 2017). The purpose was to complement the large-scale analysis of the CRIS data and the data derived from interview and focus groups with caseworkers, agency stakeholders, parents, legal practitioners, and judicial officers. understand the implementation and outcomes of the amendments via the court process and the evidence presented to the court.

10.1 What were the permanency outcomes for children?

The permanency amendments (s 167 of the Act) introduced a hierarchy of permanency objectives to be considered 'in the following order of preference as determined to be appropriate in the best interests of the child:

a. *Family preservation* – the objective of ensuring a child who is in the care of a parent of the child remains in the care of a parent

b. *Family reunification* – the objective of ensuring that a child who has been removed from the care of a parent of the child is returned to the care of a parent

c. *Adoption* – the objective of placing the child who is unable to safety return to the care of a parent for adoption under the Adoption Act and Adoption Regulations

d. *Permanent care* – the objective of placing the child who is unable to safety return to the care of a parent with a permanent carer of carers and

e. *Long-term OOHC* – the objective of placing the child who is unable to safety return to the care of a parent in a stable, long-term care arrangement with a specified carer or carers."

In the court files reviewed, the first preference, family preservation, was the permanency objective in 5 of 25 post-amendment cases, with DHHS's recommendation typically based on the rationale that DHHS is seeking to engage with the parent to address the various child protection concerns and maintain the children at home. In each case, the reasons why family preservation was possible relied on family support, and engaging the parent in services and as expressed in one case, the 'belief' that the 'clear conditions and structure of a court order will assist in mitigating current concerns in the home … through ongoing engagement and

structure'. In the court reports in which family preservation was the recommended order, there was generally as many reasons given as to why this would not be likely or possible as there were reasons that it would be. The less optimistic reasons and expectation were generally borne out. There was only one post-amendment case in which a child was placed on a family preservation order and remained at home, and this was not the first final order in the case.

The second preferred objective in the hierarchy, family reunification, was the most common permanency objective (in 16 of the 25 post-amendment cases) and reflected in the initial order sought by DHHS. A family reunification order was the most common final order following the protection application, often after one or more interim accommodation orders, and also later in the sequence of court orders. The rationale for family reunification is to allow parents to address the department's protective concerns for the children. Like the recommendations for family preservation, the reasons outlined in the court reports why reunification may *not* be possible were often more detailed and cogent than the reasons why it would be possible. In some cases, there was not much detail about the reasons or the timeframe for the recommended services to support such a recommendation and it was not clear on the papers alone why DHHS was seeking a reunification order. In a number of cases, reunification was maintained as the permanency objective in the court reports over considerable periods of time despite multiple ongoing problems and reported non-compliance.

The permanency objective of permanent care or long-term out-of-home care was rare in the first case plan or early in the court process; this was the case for one adolescent whose parents had rejected him as a result of his sexual offending and for one very young child where the parents' history with a number of the child's older siblings and their lack of compliance and engagement with services was documented early. In most cases, a change in the objective occurred later in the process after parents breached the conditions of their orders, did not acknowledge or address the safety and other concerns for the children or relinquished care of the children.

How many children remained home or were reunified and remained there?

Was there any change in the likelihood of family preservation?

Relatively few children in either the pre- or post-amendment cases remained at home with their parents for any length of time following a protection application.[72] In the post-amendment cases, children were on interim accommodation orders to their parents or on family preservation orders for 8 to 18 months in three cases, and these longer interim

[72] DHHS sought a preservation type order in three post-amendment cases and a supervision order or interim protection order in four pre-amendment cases.

accommodation orders were in the context of contestation. In five cases, the interim accommodation orders to parents were short-lived, less than four months. None remained there. While the children in six pre-amendment cases had longer periods with their parents on interim accommodation orders and/or supervision orders for over 12 months, only one child was living with a parent by October 2020, according to available information.

Was there any change in the likelihood of family reunification? And its 'success'?

The children in 13 pre-amendment cases and in 11 post-amendment cases were reunified with their parent/s at some stage on an interim accommodation order to a parent, a family preservation order or supervision order. In about half the matters in each of the pre- and post-amendment cases, the reunification attempt was unsuccessful, with parents breaching the conditions of the order and by exposing the children to family violence or neglecting or assaulting the child. Five children were effectively relinquished by their parents – three in the post-amendment cases, and two in the pre-amendment cases. The other 'unsuccessful' reunification attempts involved adolescents in conflict with their parents in both the pre- and post-amendment cases self-restoring and then absconding or leaving. The children in only two cases – one in the pre- and one in the post-amendment matters – appear to have been successfully reunified, with no further DHHS intervention in the several years since the expiry of their court order. There appear therefore to be few differences between the pre- and post-amendment matters in the presentation of cases in which children are reunified with their parents/family following a final protection order to care and the 'success' of those reunifications. While the court file analysis and CRIS datasets are very different, the CRIS data also indicated that there was little difference in the probability of children re-entering out-of-home care following reunification: 24.9% of children in pre-amendment (first substantiated) cases who exited out-of-home care returned to care compared with 25.2% in the post-transition amendment cases.

How many children achieved permanency in permanent or long-term care placements?

Permanency was achieved for 10 children in the post-amendment cases and 12 children in the pre-amendment cases on either a permanent care order (*n* = 17) or a long-term care order (*n* = 5). In a pre-amendment case, one child removed at birth was later adopted by his permanent care parents after his mother died and his father was not known.

Permanent care orders were more common than long-term care orders in both the pre- and post-amendment cases. In both cases, about half of the children were infants at the time of the protection application. The children in the post-amendment cases were, however, younger than those in the post-amendment cases (50 months compared with 67 months). In both the pre- and post-amendment cases, the children who went onto a permanency order were younger at the time of the protection application than children who did not go onto a

permanency order. They were commonly placed with maternal or paternal grandparents or aunts but about one in three were with non-related carers.

As outlined earlier, the children in only one pre- and one post-amendment case appear to have been successful reunified with their family and appear to have achieved permanency via that route. The remaining children – in just under half the post-amendment cases (11/25) – were still without a permanency outcome, on care by Secretary orders as at October 2020, at least three years after the protection application. This is consistent with the findings of the CRIS data analysis that 70% of CBSOs issued post-amendments had not ended; only 16% had transitioned to a permanent care order or long-term care order.

Similarly, the permanency outcome for the children in some of the pre-amendment cases was not certain at the expiry of their orders, with these children at that time on a supervised custody order, a guardianship to Secretary order or a family reunification order with no case closure date. The care by Secretary orders for four young people expired when they turned 18 and their permanency outcomes before and after leaving out-of-home care are uncertain.

10.2 Has permanency been achieved in a timely way?

The work towards permanency begins with clarity about the permanency objective and the case plan that is intended to assist parents and DHHS achieve that objective. At the earliest stage, there was little difference between the pre- and post-amendment court files in the time taken by DHHS to make a protection application from the last substantiated intake.[73] There was also little difference in the time taken from the protection application to the first final protection order.[74]

Interim accommodation orders

One of the main aims of the permanency amendments was to improve the timeliness of the decision-making and court process, with the first strategy to reduce the time that children spend on interim accommodation orders before a (final) protection order is made. The legislation was amended to specify that the Court must not make an interim accommodation order if satisfied that either a protection order or a permanent care order could be made (s 262(5A)) and to emphasise the possible harmful effects of delay in decision-making a decision by adding the 'desirability of making decisions as expeditiously as possible' (s 10(3)(fa)). Consistent with the findings of the CRIS data analysis, the overall time that children were on

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[73] Pre-amendment cases: 19.8 days (SD = 28.6), median of 3; range from 0 to 98 days; post-amendment cases: 21.9 days (SD = 36.1), median of 4; range from 0 to 111 days.

[74] Pre-amendments: 163.9 days (SD = 118.6), median of 161.5; range from 19 to 462 days; post-amendments: 166.4 days (SD = 109.5), median of 147.5; range from 29 to 392 days. This small increase is consistent with the small increase from the pre to the post-amendment stage in the CRIS data (section 5.1).

IAOs prior to the first final order was substantially greater for the post-amendment period than for the pre-amendment period. The number and pattern of IAOs was, however, similar in both the pre- and post-amendment files. The greater time applied to cases where children were on IAOs to out-of-home care agencies and residential care and those on IAOs with suitable persons (generally maternal or paternal relatives) but not on IAOs to parents which were less common.

One of the reasons for the longer time that children spent on IAOs in the post-amendment matters was the degree of contestation including contest over contact conditions, with parents in some cases objecting to the contact they could have when the children were in the care of the other parent or in the care of the relatives of the other parent. Contestation did not mean that these matters proceeded to a fully contested hearing but they involved reserved submissions, conciliation conferences and directions hearings. While the amended legislation specifies that the Court not make an interim accommodation order if satisfied that a protection order or permanency order could be made, such an order cannot be made without the grounds for the protection application being proven (s 162). Typically, IAOs are therefore often a 'holding operation' while parents' response and engagement with supports and services is assessed and contestation is resolved. The prospect of a family reunification order, the most common order that DHHS was seeking in the case plan, appeared to harden that resolve, while paradoxically reducing the time available to work toward reunification under the order designed to achieve it.

Family reunification orders

The family reunification order is one of the new suite of orders, with the aim of facilitating parents' engagement with services and focussing attention on parents' need to address protective concerns to enable children's safe early return home. A family reunification order can be made covering a cumulative period in out-of-home care no longer than 12 months, with an additional 12 months in care only where the Children's Court is satisfied there is 'compelling evidence' that the child will return permanently to their parent's care during the period of the extension, and that the child will not be in out-of-home care for a cumulative period of more than two years in total (s 294(A)(1)(a) of the CYFA 2005). A family reunification order was the most common sought by DHHS as the first final order and typically followed one or more interim accommodation orders. As outlined earlier, only one child was reunified following a family reunification order and was still at home with no further orders at the end of the data collection period in 2020. A family reunification order was most commonly followed by a care by Secretary order but was the last court order for three children at the end of the data collection period. Extensions to a family reunification order were made in ten cases, typically with similar reasons to those supporting the initial application for a family reunification order, and appearing to be strongly influenced by whether the parents had engaged in services/supports and with Child Protection.

The children in 15 cases who commenced a family reunification order were in out-of-home care for more than 12 months, and in five cases were still on a family reunification order after they had been in out-of-home care for 24 months or more. This is consistent with the findings of the CRIS analysis that:

- 78% children who commenced a family reunification order were in out-of-home care for more than 12 months, and
- 30% of FROs were still in force after the children had been in care for 24 months;
- a low proportion of all children who enter out-of-home care exit care from a family reunification order.

Care by Secretary order

The new care by Secretary order replaced those custody to Secretary orders with a non-reunification case plan goal or where the child had been out of parental care, cumulatively for 24 months, and guardianship to Secretary orders. The aim of the care by Secretary order is to find a permanent or long-term care placement for a child, except in exceptional circumstances. Conditions cannot be attached to a care by Secretary order and DHHS (or authorised Aboriginal agency) has exclusive parental responsibility with decisions about the care of the child managed through the case planning process. This includes the child's contact arrangements with their birth family. A care by Secretary order is a 24 months order, and cannot be extended unless a permanent care order or a long-term care order is not appropriate, or there are exceptional circumstances that justify an extension.

An application for a care by Secretary order was made at some stage of the process for three in four of the post-amendment cases, and an order made in the majority of cases, though not necessarily as sought and on average nearly 15 months after the protection application. At the start of the care by Secretary order, children ranged in age from two months of age to nearly 17 years. Children were on a care by Secretary order for a median period of 24 months. It may be the only order that can be made in some cases where children have been in care for more than 24 months and reunification is not a realistic or safe option and it appears to function as a 'holding operation' despite the intention that it should be used to find and assess and prepare for permanent or long-term care. It was, however, the last final court order in 14 matters, including two pre-amendment matters that transitioned to the new orders after March 2016.

Permanency under an ongoing order

Permanency on either a permanent care order or a long-term care order appears to be more timely with these orders being made sooner after the protection application in the post- than the pre-amendment cases (an average of 25 months compared with 37.6 months). The time that children spent in out-of-home care before the permanency order was also longer for the

pre-amendment cases, consistent with the findings of the CRIS data analysis. In the cases in the court file samples then, it appears that the permanency amendments may have put a 'cap' on the longer time-frames to the finalisation of permanency orders, and also that the children involved were younger when the protection application was made.[75]

In summary, there were several differences **between the cases involving Aboriginal and non-Aboriginal and CALD children in the post-amendment files**. First, the Aboriginal children in both the pre- and post-amendment cases were younger than other children at the time of the protection application. Second, the Aboriginal children in these post-amendment cases did not wait longer than other children for a protection application to be resolved. They were on interim accommodation orders for a shorter time than other children and then on shorter-term family reunification orders that were extended once or twice, and then followed by care by Secretary orders for most. None of the Aboriginal children in the post-amendment cases were on permanency orders, and only two in the pre-amendment cases. There were no cultural plans on file in the post-amendment cases indicating amendments significantly expanding the requirement to prepare a cultural plan for all Aboriginal children in care had not had the intended impact.

10.3 Barriers, concerns and unintended consequences

Concerns were expressed by judicial officers and legal professionals about some systemic barriers, delays and adjournments, and increased contestation following the amendments. This section deals with some of the concerns about systemic issues hindering timely and fair decision-making.

Mentions, adjournments, and delays

Systemic impediments to more timely decision-making for children are delays caused by unnecessary adjournments and mentions, and by the time caseworkers spend preparing reports for court and attending court for mentions and other hearings. While there were substantial numbers of adjournments and mentions in some cases, there were few differences in the number of adjournments or mentions in the pre-and post-amendment files. Adjournments where parents did not attend court or a conciliation conference were typically after an application for a family reunification order or a care by Secretary order was made. There was also a reduction in the number of adjournments in post-amendment cases so that DHHS could complete reports, conduct assessments or review their disposition. A delay in obtaining a cultural plan was also indicated in several matters.

[75] The children in these files were younger than those in the CRIS data but other trends were similar.

The information on the files also provides little evidence about the impact of waiting lists for services or parents being unable to access the required services, apart from some adjournments related to service dates. While it is likely that this type of concern would be raised in court and in negotiating outcomes, it was not evident in DHHS reports to the Court or recorded in these files.

There were, however, more conciliation conferences, and they were conducted more quickly after the protection application in the post-amendment matters than the pre-amendment matters. There was little difference in the resolution rate of these conferences.

Concerns about the reduction in contact

One of the main reasons for parents objecting to and contesting orders was their concern about the level of contact they could have with their children, particularly in relation to care by Secretary orders and permanent care orders. The Court is unable to make any conditions on care by Secretary orders and the level of contact is determined by DHHS or an authorised Aboriginal agency as case planning decisions. On permanent care orders, the Court can include a maximum of four contact visits per year when the order is first made,[76] although s 321(1A) of the Act states that additional contact may be 'arranged from time to time by agreement in the child's best interests' and a standard condition requires permanent care parents to reserve the child's identity, connection to culture and relationships with their birth family (s.321(1)ca). When including conditions, the court is required to have regard to 'the primacy of the child's relationship with the child's permanent care family' and whether the condition, among other things, is 'necessary to promote the child's continuing connection to the child's parents, siblings or culture'. [77]

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[76] This restriction no longer applies if an application to vary the order is made after 12 months (s 327(2).

[77] Under s 321: A permanent care order—

(ca) must include a condition that the person caring for the child must, in the best interests of the child and unless the Court otherwise provides, preserve—
the child's identity and connection to the child's culture of origin; and
the child's relationships with the child's birth family; and

(d) may include conditions that the Court considers in the best interests of the child concerning contact with the child's parent which may provide for contact up to 4 times a year; and

(e) may include conditions that the Court considers to be in the best interests of the child concerning contact with the child's siblings and other persons significant to the child; and

(1A) A condition referred to in subsection (1)(d) or (e) does not prevent additional contact being arranged from time to time by agreement in the child's best interests.

(1B) Before including a condition referred to in subsection (1)(d), (e) or (f), the Court must have regard to the primacy of the child's relationship with the child's permanent care family and whether the condition—
(a) is necessary to protect the child or support the permanence of the placement; and
(b) is necessary to promote the child's continuing connection to the child's parents, siblings or culture; and

Contact on interim accommodation orders

The greatest frequency of contact for both the pre- and post-amendment cases was for infants and children on interim accommodation orders. For infants and very young children, the contact conditions ranged from two hours a day for three days a week to as many as six or seven days a week with their mothers, and generally fewer hours for fathers. For children between two and 14 years of age, contact was generally from two to four times per week. Children between 14 to 17 years of age were able to instigate contact with their parents and siblings, provided there were no safety concerns. Several parents who were permitted to reside with kinship carers (ie mothers residing with maternal or paternal grandparents) were able to have daily contact with their children, particularly children younger than two years of age [cases 12A and 13A]. Typical contact conditions on an IAO to a relative were as follows:

- Contact a minimum of 3 times per week, 3 hours at a time at times and places as agreed between the parties. Contact may occur at the parent's home. Contact to be monitored by DHHS or other nominee assessed as appropriate by DHHS until DHHS assesses that monitoring is no longer necessary. Parents may have further contact including overnight contact at times and places as agreed between the parents and paternal grandparents. DHHS to be kept informed. Contact at paternal grandparents' or parents' home to be monitored by paternal grandparents or other nominee assessed as appropriate by DHHS, until DHHS assess that monitoring is no longer needed.

While the contact conditions on IAOs provided for contact at these levels, this did not mean that it occurred. It was conditional on parents' compliance with other conditions and undertakings such as accepting supervision at contact, keeping to the arrangements,[78] attending for urinalysis, and not having used substances prior to scheduled contact visits. [79] In some cases, DHHS decreased the frequency of contact between parents and children based on parents' non-compliance with urinalysis.[80]

(c) is sufficiently flexible to accommodate the child's changing developmental needs over time; and
(d) is reasonable in the context of the child's permanent care family's life; and
(e) is necessary given the capacity of the person caring for the child to meet the condition referred to in subsection (1)(ca).

[78] In one case, the child's mother was to have supervised contact each third week for an hour but this was to become fortnightly if she attended three consecutive contact visits a arranged [case 23A].

[79] For example, in case 24B, the documentation indicated that DHHS reduced contact to one day per week for both parents unless they completed urinalysis.

[80] Contact was also reduced in two cases to minimise the child's reactivity following visits with their parents due to their parents' behaviours [2A and 16A]. In several other cases, contact was substantially reduced or stopped when their parents were incarcerated [cases 20B, 12A, 24A, 25A]; in one case, phone contact was facilitated between incarcerated the parents and children.

As outlined earlier, there was also some contestation over contact arrangements for children on interim accommodation orders, arising from tensions between the parent and kinship carer, particularly between fathers and the child's maternal grandparents or aunts. Some kinship carers experienced difficulties managing boundaries and parents' potentially challenging behaviours during contact, particularly where kinship carers were supervising contact without DHHS or agency support [cases 2A, 3A, 21A, 24B].

Contact following the transition to final orders

An increase in the frequency of contact was rare, apart from one case in which the case plan transitioned to family preservation; in this case, contact between the child and her father increased from two days per week to daily when the family preservation order was made but the attempted reunification was not sustained [case 17A].

The transition from an interim accommodation order to a family reunification order was associated with a reduction in contact frequency (eg from 3 times per week to once a week) but the greatest change in frequency of contact occurred when a care by Secretary order or a permanent care order was made. In some cases, it appears from the reports that contact between children and parents ceased altogether when there was an application for a care by Secretary order or the order was made. Some parents disengaged with their children and with DHHS, and stopped attending contact during the application for a care by Secretary order [Cases 21B, 23B, and 25A]. On the other hand, it was clear that children in kinship care experienced greater opportunities for contact with their parents as their grandparents and aunts were more likely to facilitate contact on an 'as agreed between carers and parents' basis. In one case [18A], the maternal aunt 'unilaterally permitted additional contact between mother and child without seeking endorsement' from DHHS. Consistent with research findings in Australia and elsewhere, children in foster care and residential care were less likely to have sustained regular contact with their parents and significant others than children in relative or kinship care.

When a permanent care order is made, it appears that contact 'automatically' reduced to four times per year in line with the Court's capacity to include contact conditions on this order. In some cases, this change was abrupt, following a series of interim accommodation orders with the potential, if not the actuality, of at least weekly contact [case 2A]. Even though a number of parents were not attending contact visits and not exercising the contact visits that they had, it is not surprising that parents were concerned about the very marked reduction in contact that accompanies non-reunification orders. On the basis of the information in the court reports, it also seems that a number of parents disengaged from the process and withdrew from contact with both their children and with DHHS, particularly when non-reunification orders were being sought.

10.5 Qualifications and limitations of the court file study

In trying to determine whether there have been changes in the process and the court outcomes associated with the permanency amendments, it is important to examine whether and in what ways the cases in the pre-and post-amendment files differ and to what extent they can provide a window on the process.

The focus of the court file analysis was on matters that involved children whose cases involved at least one protection order including a family reunification order (post-amendments) or a supervised custody order or custody to Secretary order (pre-amendments).[81] It did not include children who were on supervision orders or who entered out-of-home care under an interim accommodation order and were reunified before a family reunification order was made or by making a family preservation order. This means that the children whose permanency pathway was a return home, with only supervision and family preservation orders, were not included. The analysis focussed on those cases in which the protective concerns were more substantial and persistent. This applied to both pre- and post-amendment cases.

There are several important qualifications on the findings and limitations of a court file based analysis. First, the pre- and post-amendment court files were selected using a matching process to draw two similar sets of cases, matched on a number of characteristics, including the child's age at substantiation, the child's Aboriginal status, a final protection or permanency order, and court location. While the two sets of files are very similar in relation to these and other factors including the intellectual disability of children and parents, the incarceration and death of some parents, and the grounds for the protection application, the selection process was not fully random and some files were excluded because they contained few reports and limited information. Second, the numbers of cases (26 pre- and 25 post-amendment files) are small and cannot be representative of all the cases before the Court. The case file analysis is, however, designed to throw some light on the outcomes and the way these cases were dealt with before and after the amendments, using the detailed information that is available in these files and to complement and enrich the data in the other studies in this overall research project. Third, the data in the court file study is based on the information in the Children's Court files and from CRIS data on any further DHHS intervention or orders beyond that available in the court files at the time of the data extraction. The decisions and the outcomes in the court process are, however, influenced by the discussions between the legal representatives in and outside the Court, and between DHHS caseworkers and the

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[81] The case file selection included substantiated cases that had at least one of the following protection orders:

a. Family reunification order (post), supervised custody order or custody to Secretary order (pre-amendments)
b. Care by Secretary order (post) or guardianship to Secretary order (pre)
c. Long-term care order (post) or long-term guardianship order (pre)
d. Permanent care order.

parents. This study cannot speak to those discussions and the concerns that parents and others may have had that are not recorded in the files. Fourth, court files, like other documentary material and administrative records have missing information and documents, repetitions, errors of recording, and illegible writing. They are administrative records, not research documents, and extracting information from them to provide a narrative and piece together the patterns is very time-consuming. Despite these cautions and limitations, where comparable, these early findings are consistent with a number of those from the CRIS data analysis and do highlight patterns and a narrative that provides some richness to the other data and findings.

NOTES

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[i] 287A Determining the period of a family reunification order

(1) This section applies to the determination of the period of a family reunification order for a child who is or has been in out of home care as a result of any of the following orders—

(a) an interim accommodation order;

(b) a family reunification order;

(c) a care by Secretary order;

(d) a long-term care order;

(e) a therapeutic treatment (placement) order.

(2) If the child has been in out of home care for less than 12 months under one or more orders specified in subsection (1), the period specified in a family reunification order must not have the effect that the child will be placed in out of home care for a cumulative period that exceeds 12 months commencing on the date that the child is first placed in out of home care under the first of those orders.

(3) If the child has been in out of home care for 12 months or more but less than 24 months under one or more orders specified in subsection (1), the period specified in a family reunification order must not have the effect that the child will be placed in out of home care for a cumulative period that exceeds 24 months commencing on the date that the child is first placed in out of home care under the first of those orders.

(4) For the purposes of determining a cumulative period under this section—

(a) any period that the child is in out of home care under a child care agreement under Part 3 or under a private arrangement made by a parent is to be disregarded; and

(b) any period that the child is being cared for by a parent under an interim accommodation order, an undertaking or a family preservation order under this Part, including after that order or undertaking ceases to be in force, must be disregarded; and

(c) any period that the child was in out of home care must be disregarded if the child has subsequently been in the care of a parent without the child being subject to any order under this Part.

[ii] **Family reunification** will initially be the appropriate permanency objective where child has been placed in out-of-home care under an order where:

- a child has been in out-of-home care for > 24 months and is subject to a CBSO, and there are **exceptional** circumstances justifying a belief that successful reunification can be achieved in a timely way, and is in the child's best interests
- the court has made or extended a FRO, and the circumstances have not changed since the order was made. [If family reunification is no longer in child's best interests due to changes since the order was made, the objective is to be changed, consistent with the child's best

interests; and either the order is to be taken to be a FPO within six weeks, or an application for a consistent order is to be made within six weeks.]

- aim is "to mobilise supports and services to assist parents to resume permanent care of their child within one year" Vic Parlt LA so important to take **all reasonable steps** to achieve sustainable family reunification; failure to do so in a timely way is contrary to child's best interests and may weaken any future application to Children's Court to place child in out-of-home, long-term, or permanent care.

Exceptions to initial use of FRO may include: where a child has older siblings already in permanent care and child's parents' circumstances have not changed, making family reunification unlikely; where the child's parents are dead or significantly incapacitated, or child abandoned, or parents insist they do not wish to resume care of child and want other arrangements made for child's care.

If family reunification is assessed as not achievable during the course of an **initial or extended FRO**, the permanency objective should be changed to permanent or long-term out-of-home care and an application made to the Children's Court for a CBSO or – if the current carer has been assessed as being suitable, and is ready and able to offer permanent or long-term out-of-home care – a PCO or LTCO.

If the Children's Court chooses to make a further FRO (up to the 24 month timeline), the permanency objective is to revert to family reunification and further efforts are to be made to achieve this objective.

A **family reunification permanency objective** may continue to be appropriate where child has been in out-of-home care for > 24 months (in which case should be subject to CBSO), where there are **exceptional** circumstances such that successful reunification can be achieved and is in child's best interests despite length of time they have spent in out-of-home care eg (a) parent expected to recover from an illness or (b) incarcerated for a crime unrelated to their parenting capacity.

As and from 01/03/2016 s.276A requires the Court to have regard to certain advice from the Secretary in determining whether to make a protection order:

- s.276A(1) requires the Court, in determining whether to make a protection order, to have regard to advice from the Secretary as to–
  - (a) the objectives of any case plan prepared in relation to the child; and
  - (b) the arrangements in place for the care of any siblings under the age of 18 years; and
  - (c) the age of the child and the period that the child has spent in out of home care during the child's lifetime (whether or not as a consequence of a court order).

- s.276A(2) requires the Court, in determining whether to make a protection order that has the effect of conferring parental responsibility for a child on the Secretary, to "**have regard to advice from the Secretary as to –**
  - (a) the likelihood of a parent permanently resuming care of the child during the term of the protection order; and
  - (b) the outcome of any previous attempts to reunify any child with the parent; and
  - (c) if a parent has previously had another child permanently removed from his or her care, the desirability of making an early decision about the future permanent care arrangements for the current child; and
  - (d) the benefits to the child of making a care by Secretary order to facilitate alternative arrangements for the permanent care of the child [curiously there is no reference to a long-term care order] if–

(i) the child is in out of home care as a result of an order under this Part and has been in out of home care under such an order for a cumulative period of 12 months determined in accord with s.287A(4); and

(ii) there appears to be no realistic prospect of the child being able to safely return to the care of the parent within a further period of 12 months; and

(iii) there are no permanent care arrangements already available for the child; and

(e) the desirability of making a permanent care order, if the child is placed with a person who is intended to have permanent care of the child."

Neither of these sub-sections require the Court to accept the advice from the Secretary in any particular case for to do so would probably violate the constitutional prohibition against administrative interference in the exercise of judicial power:

162 When is a child in need of protection?

(1) For the purposes of this Act a child is in need of protection if any of the following grounds exist—

(a) the child has been abandoned by his or her parents and after reasonable inquiries—

(i) the parents cannot be found; and

(ii) no other suitable person can be found who is willing and able to care for the child;

(b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

(c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.

(2) For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.

(3) For the purposes of subsection (1)(c), (d), (e) and (f)—

(a) the Court may find that a future state of affairs is likely even if the Court is not satisfied that the future state of affairs is more likely than not to happen;

(b) the Court may find that a future state of affairs is unlikely even if the Court is not satisfied that the future state of affairs is more unlikely than not to happen.

Division 2—Responsibilities of Secretary for a child for whom Secretary has parental responsibility

176 Cultural support for Aboriginal child

(1) The case plan for an Aboriginal child placed in out of home care must address the cultural support needs of the child.

(2) The Secretary must provide a cultural plan to each Aboriginal child in out of home care that is aligned with the case plan for the child.

(3) The case plan must reflect and be consistent with the child's cultural support needs, having regard to the child's circumstances, so as to—

(a) maintain and develop the child's Aboriginal identity; and

(b) encourage the child's connection to the child's Aboriginal community and culture.

(4) For the purposes of subsection (3), the child's cultural support needs may vary depending on—

(a) the length of time that the child has spent in out of home care; and

(b) the age of the child; and

(c) the length of time that the child is expected to remain in out of home care; and

(d) the extent of the child's contact with the child's Aboriginal family members; and

(e) whether the child is placed within the child's own Aboriginal community, another Aboriginal community or with non-Aboriginal carers.

(5) For the purposes of subsection (4), a child's Aboriginal community is—

(a) the Aboriginal community to which the child has a sense of belonging, if this can be ascertained by the Secretary; or

(b) if paragraph (a) does not apply, the Aboriginal community in which the child has primarily lived; or

(c) if paragraphs (a) and (b) do not apply, the Aboriginal community of the child's parent or grandparent.

APPENDIX 1

Data extraction from CRIS to select cases for court files was conducted in two tranches. The following inclusion criteria were applied for the selection of files in the first tranche:

1. Cases substantiated prior to the Permanency Amendments in the period March 2015 to September 2015 [Pre-files] or from March 2017 to September 2017 [Post-files]
2. Substantiated cases had at least one of the following protection orders or a permanent care order issued:
    a. Family reunification order (FRO), supervised custody order or custody to Secretary order
    b. Care by Secretary order (CBSO) or guardianship to Secretary order
    c. Long-term care order (LTCO) or long-term guardianship order
    d. Permanent care order.
3. Recorded court location was either Melbourne (four courts), Moorabbin, Broadmeadows, or Shepparton.

Following extraction of eligible post-amendment cases from CRIS, a comparison group was generated by matching the pre-files on the following characteristics: [ii]

- Child's age at substantiation[ii]
- Child's gender
- Child's Aboriginal status
- Whether the child had a previous placement in out-of-home care (OOHC)
- The last recorded order type and court location (see above).

DHHS identified 90 child protection matters based on the sample provided by the research team using the selection criteria outlined above.

- 5 files could not be identified from the information provided.
- 13 files were ongoing/pending matters and were not retrieved on that basis.

The President of the Children's Court reviewed the remaining 72 files and declined to release 25 files because the files for those matters contained only the originating application, affidavit/s of service and the decision sheet/s with few or no reports as a result of "historical sub-optimal file management and storage practices at some venues of the Children's Court". In 2016, the Children's Court commenced and completed a file management improvement project which significantly enhanced the way the registry prepares, maintains, stores and audits case files across the Children's Court to ensure availability, accuracy and completeness of material held within the court file.[ii] [ii]

Following the finalisation of case files available for the analysis from the first extraction, a second tranche files was retrieved from CRIS. The initial selection of court files was supplemented by a second tranche of files for the following reasons:

- To obtain the required numbers of pre-amendment and post-amendment files following a shortfall in the number of files in the first sample of finalised matters, particularly for the pre-amendment matters, 15 of which extended into the post-amendment period;
- To obtain pre-amendments files that were *finalised* prior to the implementation of the amendments in March 2016; the selection period was extended to 2013 since most of the initial selection of files for March–September 2015 were not finalised prior to March 2016; they were 'transition' files with court work that continued into 2016, 2017, 2018 and even 2019. This was important not to bias the pre-amendment files to those that were finalised more quickly. The 2013 selection criteria also matched the CRIS analysis dates.
- To sample for more Aboriginal cases in both the pre- and post-amendment files to more closely match the expected proportion of matters involving Aboriginal children (about 1 in 4);
- To sample for more cases in regional areas where there are non-specialist magistrates ie Shepparton, La Trobe, Ballarat, and Mildura.

Based on the file retrieval results from the first extraction, the following inclusion criteria were applied for the second tranche of file extractions:

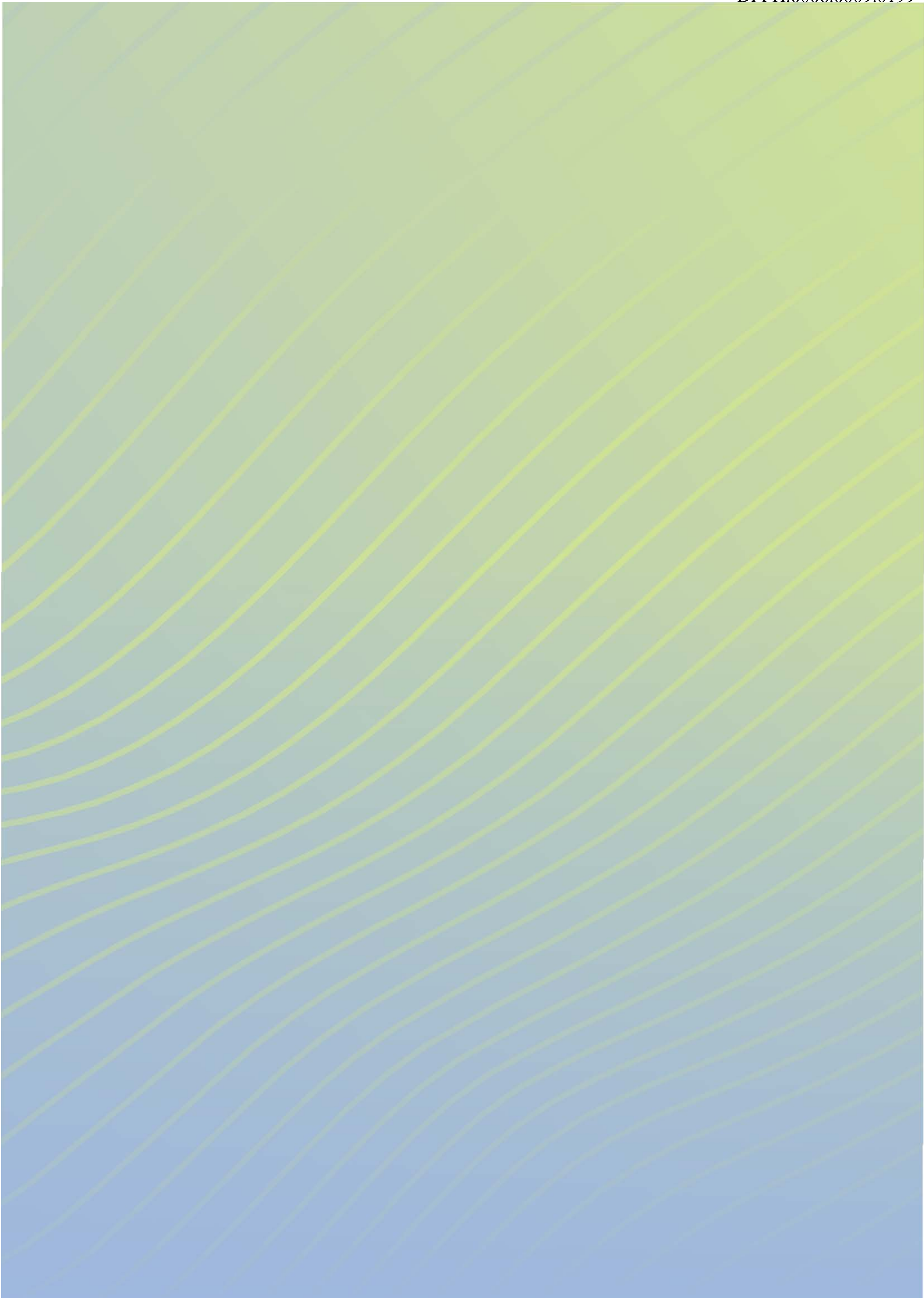
1. Cases substantiated prior to the Permanency Amendments in the period March 2013 to September 2015 [Pre-files] or March 2017 to September 2017 [Post-files]
2. Substantiated cases had at least one of the following protection orders issued:
    a. Family reunification order (FRO), supervised custody order or custody to Secretary order
    b. Care by Secretary order (CBSO) or guardianship to Secretary order
    c. Long-term care order (LTCO) or long-term guardianship order
    d. Permanent care order (PCO)
3. Recorded court location was either Melbourne (four courts), Moorabbin, Broadmeadows, Shepparton, Latrobe, Mildura, or Ballarat.

To increase the likelihood of identifying a suitable comparison group, especially in rural and regional areas and for Aboriginal children, the matching criteria were revised. A comparison group was established based on matching pre-amendment cases using the following criteria:

- Child's age at substantiation
- Child's Aboriginal status
- Court location (see above)

Overall, the second tranche resulted in the inclusion of 20 additional matched comparison cases for the previously extracted post-amendment files as well as five additional pre-amendment cases and five additional post-amendment cases for the additional court locations.

A secure room was provided to the researchers at the Children's Court to hold the files, some of which had to be brought in from other courts; initially the files were reviewed there. When the covid-19 constraints meant that on-site visits were no longer possible, secure arrangements approved by the President of the Court allowed access to the scanned court-specific information on the files; other relevant material including reports to the court was provided by DHHS. DHHS also provided further information, as requested on various fields, so that the final orders and 'outcomes' could be updated to September 2020.



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