

AMENDMENTS TO CYFA – ACT NR.61 OF 2014

SUMMARY FOR COURT OFFICIALS & COURT USERS

BACKGROUND

On 09/09/2014 the **Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic)** [No.61 of 2014] received the Royal Assent. This Act makes very substantial amendments to the **Children, Youth and Families Act 2005 (Vic)** [No.96 of 2005]. This paper summarizes the major amendments that affect the Children's Court. The section references are to the amended CYFA.

FAMILY DIVISION AMENDMENTS IN OPERATION AS AT 27/03/2015

The only relevant Family Division amendments in operation as at 27/03/2015 are as follows–

- **Section 175A** A new provision which allows the Secretary DHHS to specify certain issues relating to a child in out of home care about which a person who has care of the child may be authorized to make decisions. The specification may relate either to a particular child, a child subject to a particular type of order or a person who provides a certain category of care. If the child is subject to an interim accommodation order [IAO], interim protection order, supervised custody order or custody to Secretary order, the specification must not relate to “a major long-term issue”, defined in s.3(1) as “an issue about the care, wellbeing and development of a child that is of a long-term nature and includes an issue of that nature about-
(a) the child's education (both current or future);
(b) the child's religious and cultural upbringing;
(c) the child's health; and
(d) the child's name.”
Issues to which s.175A(1) applies include the signing of school consent forms, obtaining routine medical care for a child or the day to day treatment of a child who suffers from a chronic or serious health condition.
- **Section 175B** A new provision which empowers the carer of a child placed in out of home care under an IAO or a protection order to make a decision in relation to the child on a issue specified under s.175A(1) without consulting the Secretary DHHS, if authorized by the Secretary or by the person in charge of an out of home care service to make decisions on the issue.
- **Sections 554, 561, 562, 565 + 569** Minor amendments to provisions governing the filing of protection reports, additional reports, Clinic reports and therapeutic treatment application or placement reports.

CRIMINAL DIVISION AMENDMENTS IN OPERATION AS AT 27/03/2015

The relevant Criminal Division amendments in operation as at 27/03/2015 are as follows–

- A GROUP CONFERENCES** **Sections 410(1)(f), 412(1)(f) + 415(1)** expand the power of the Court to order a group conference [previously restricted to cases where the Court was considering imposing probation or a YSO] and allow the Court to make a YAO or YRC or YJC order notwithstanding that the child has participated in a group conference.
- B DEFERRAL OF SENTENCE** **Section 414(3)(b)** restricts the maximum period of deferral of sentence to 2 months if the child has been remanded in custody for the purpose of the child's participation in a group conference.
- C YOUTH RESIDENTIAL BOARD ABOLISHED** Functions transferred to Youth Parole Board.
- D INADMISSIBILITY OF STATEMENTS MADE BY CHILD PARTICIPATING IN TREATMENT UNDER TTO EXPANDED TO INCLUDE VOLUNTARY TREATMENT** **Section 251**
- E MATTERS TO BE CONSIDERED IN DECIDING WHETHER TO DISCHARGE CHILD WHO HAS PARTICIPATED IN THERAPEUTIC TREATMENT EITHER VOLUNTARILY OR UNDER A THERAPEUTIC TREATMENT ORDER** **Sections 354, 354A**
- F TIME LIMIT FOR BREACH OF BOND APPLICATION** **Section 372(b)** expanded to 3 months.

COMMENCEMENT OF THE REST OF THE AMENDING ACT

None of the other relevant amendments are yet in operation. It is believed unlikely that the following amendments will come into operation prior to the default commencement date, 01/03/2016.

FAMILY DIVISION AMENDMENTS NOT YET IN OPERATION

Amendments to relevant Family Division provisions not yet in operation include the following–

G DEFINITIONS & TERMINOLOGY

- **Section 3(1) + repeal of ss.4-5** The concepts of “custody” and “guardianship” are replaced by the concept of “parental responsibility”, defined as “all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children”. However, the CYFA does retain the concept of “major long-term issues” for a child [guardianship by another name], which include issues about the child’s education, religious and cultural upbringing, health and name.
- **Sections 3(1) + 275** The names of the following protection orders are changed–
 - ⊛ Supervision order → Family preservation order [FPO]
 - ⊛ Custody to Secretary order → Family reunification order [FRO]
 - ⊛ Guardianship to Secretary order → Care by Secretary order [CBO]
 - ⊛ Long-term Guardianship to Secretary order → Long-term care order [LCO]
- **Section 3(1)(d)** The definition of parent is amended to include “any person who has parental responsibility for the child, other than the Secretary”.
- **Section 10(3)** All but two of the 18 best interests considerations in this sub-section are unchanged. However, s.10(3)(f) is varied to read “the desirability of continuity and **permanency** in the child’s care”. The delay provision, formerly in s.10(3)(p), is reworded and renumbered s.10(3)(fa).

H NEW OBLIGATION & PROHIBITION ON SECRETARY DHHS

- **Sections 175C(1) + (2)** apply to any child subject to an IAO which places him/her in out of home care or for whom the Secretary DHHS has parental responsibility under a FRO or TT(P)O. It requires the Secretary to work with and engage, to the fullest extent possible, any parent with whom such a child is intended to be reunified in making case planning decisions for the child.
- **Sections 175C(3) + (4)** prohibit the Secretary DHHS from making a decision – other than a decision the Secretary is expressly authorised to make under the CYFA – about a major long-term issue in relation to a child if a parent who has parental responsibility for the child disagrees with the decision.

I INTERIM ACCOMMODATION ORDERS

- **Section 263(1)(fa)** Placement with a disability service provider added as an option for an IAO.
- **Section 262(5A)** Court must not make an IAO if satisfied that a protection order or a permanent care order [PCO] could be made in respect of the child.

J COURT TO HAVE REGARD TO CERTAIN MATTERS RE PROTECTION ORDER DECISION

Section 276A New provision requiring the Court to have regard to [but not obliged to act on] advice from the Secretary DHHS about–

- (1) in determining whether to make a protection order generally– the objectives of any case plan, the care arrangements for any siblings under the age of 18, the age of the child and the period the child has spent in out of home care during his/her lifetime; and
- (2) in determining whether to make a protection order that confers parental responsibility on the Secretary–
 - (a) the likelihood of a parent permanently resuming care of the child during the term of the order; and
 - (b) the outcome of any previous reunification attempts; and
 - (c) if a parent has previously had another child permanently removed from his/her care, the desirability of making an early decision about future permanent care arrangements for the 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 if–
 - (i) the child has been in out of home case for a cumulative period of 12 months [as to the calculation of which s.287A(4) applies]; and
 - (ii) there appears no realistic prospect of child being able safely to return permanently to care of a parent within a further 12 months; and
 - (iii) there are no permanent care arrangements already available for the child; and
 - (e) the desirability of making a PCO, if the child is placed with a person who is intended to have permanent care of the child.

K ABOLITION OF INTERIM PROTECTION ORDERS, CUSTODY TO THIRD PARTY ORDERS AND SUPERVISED CUSTODY ORDERS

The writer believes that abolition of both interim protection orders and supervised custody orders – especially the latter – are likely to have a significant adverse effect on the settlement rates from conciliation conferences and hence result in many more contested hearings leading to concomitant delay, the antithesis of what the amendments are said to be trying to achieve.

L FAMILY PRESERVATION ORDER [FPO]

- **Section 281(1A)** The pre-requisites for including conditions on an FPO are expanded. Any condition must not only be in the best interests of the child but must be reasonably capable of being carried out by the person the subject of the condition and must promote the continuing care of the child by a parent.
- **Sections 280(3)-(7)** The obligation of the Court to direct the Secretary DHHS to review before the end of 12 months the operation of an FPO which exceeds 12 months in length remains. The effect of a failure by the Secretary to comply with the direction is not specified. Following such review the Secretary may, with the agreement of the child (if 10 or older) and the child's parent, determine administratively that the FPO should end.

M FAMILY REUNIFICATION ORDER [FRO]

- **Section 287(1)(d)** The pre-requisites for including conditions on an FRO are expanded. Any condition must not only be in the best interests of the child but must be reasonably capable of being carried out by the person the subject of the condition and must promote the reunification of the child with a parent.
- **Section 287(1)(e)** A new sub-section requiring an FRO to provide that if, while the order is in force, the Secretary DHHS is satisfied that it is in the child's best interests, the Secretary may in writing direct a parent of the child is to resume parental responsibility for the child to the exclusion of the Secretary.
- **Sections 287(1)(c) + 287A** The maximum period of an FRO is 12 months. However, new s.287A reduces this maximum in any case in which a child has been in out of home care (defined as care by a person other than a parent) as a result of an IAQ, FRO, CBO, LCO or a therapeutic treatment (placement) order–
 - ✦ **If child in out of home care for less than 12 months**– period of FRO must not have the effect that child will be placed in out of home care for a cumulative period that exceeds 12 months commencing on the date the child is first placed in out of home care under the first such order.
 - ✦ **If child in out of home care for more than 12 months but less than 24 months**– period of FRO must not have the effect that child will be placed in out of home care for a cumulative period that exceeds 24 months commencing on the date the child is first placed in out of home care under the first such order.

Any period that the child is in out of home care under a child care agreement or a private arrangement is not counted nor is any period the child was in out of home care if the child was subsequently returned to the care of a parent without being subject to any order under Part 4.9. **In reality s.287A is likely to lead to the Court simply being unable to make an FRO at all – as opposed to a CBO – in many cases. How this can work if the Court considers it not to be in the best interests of the child is not clear.**

- **Sections 287A, 294A(1) + 296** The Court must not extend an FRO unless satisfied that–
 - (a) there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension; and
 - (b) the extension will not have the effect that the child will be placed in out of home care for a cumulative period that exceeds 24 months calculated in accordance with s.287A.

Section 287A limits the duration of the extension of an FRO in the same way as it limits the duration of an original FRO.

- **Section 288A** An FRO may be converted into an FPO by administrative direction [in the same way as a supervised custody order can currently be converted into a supervision order]. In such case, the Secretary DHHS may apply to the Court to determine that the FPO is to include conditions. The Court may determine that the FPO is to include conditions of a kind referred to in s.281 without requiring the parties to attend or be represented at the proceeding.
- **Section 300A** The Secretary DHHS may apply to the Court for a variation of the conditions of an FRO without serving notice if satisfied on reasonable grounds that–
 - (a) there has been an unexpected change in circumstances; and
 - (b) the application is necessary for the safety and wellbeing of the child.
- **Section 302(1)** There is no longer a pre-requisite that there be exceptional circumstances before the Court may make an interim variation of conditions of a FRO.

N CARE BY SECRETARY ORDER [CBO]

- **Section 289(1)(b) + 289(2)-(7)** The length of a CBO is a non-variable 2 years (or until the child turns 18 whichever is the lesser). It is not expressed as a maximum of 2 years. The obligation of the Court to direct the Secretary DHHS to review before the end of 12 months the operation of a CBO remains. The effect of a failure by the Secretary to comply with the direction is not specified. Following such review the Secretary may, with the agreement of the child (if 10 or older) and the child's parent, determine administratively that the CBO should end.
- **Section 289A** A CBO may be converted into an FPO by administrative direction [in the same way as a supervised custody order can currently be converted into a supervision order]. In such case, the Secretary DHHS may apply to the Court to determine that the FPO is to include conditions. The Court may determine that the FPO is to include conditions of a kind referred to in s.281 without requiring the parties to attend or be represented at the proceeding.
- **Section 294A(2)-(3)** The Court must not extend a CBO unless there are exceptional circumstances or unless satisfied that–
 - (a) firstly, a PCO is not appropriate in the circumstances; and
 - (b) secondly, an LCO is not appropriate in the circumstances.

O LONG-TERM CARE ORDER [LCO]

- **Section 290(1)** An LCO may be made for a child of any age. Unlike a long-term guardianship to Secretary order it is not restricted to children of or over the age of 12 years.
- **Section 290(2)** The pre-requisite that the child consents to the making of the order is changed to: "if the child is of or over the age of 10 years, the child does not oppose the making of the order". There is an added pre-requisite that the carer "will not consent to the making of a PCO".
- **Sections 290(3)-(7)** The obligation of the Court to direct the Secretary DHHS to review the operation of the LCO before the end of each period of 12 months remains. The effect of a failure by the Secretary to comply with the direction is not specified. Following such review the Secretary may, with the agreement of the child (if 10 or older) and the child's parent, determine administratively that the LCO should end.

P PERMANENT CARE ORDER [PCO]

- Provisions governing conditions on a permanent care order are very substantially amended as follows–
 - ✦ **Sections 320(1A), 321(1)(ca)** The Court 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–
 - (i) the child's identity and connection to the child's culture of origin; and
 - (ii) the child's relationships with the child's birth family.The Secretary is prohibited from approving a person as suitable to have parental responsibility for a child under a PCO unless it is satisfied that the person will comply with this condition.
 - ✦ **Section 321(1)(d)-(f), 321(1A)-(1C), 327(2)** In addition to the existing provisions for contact with siblings and other persons significant to the child and for a condition incorporating a cultural plan for an Aboriginal child, the Court may include conditions on a PCO 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. These contact conditions do not prevent additional contact being arranged from time to time by agreement in the child's best interests. In addition to an obligation on the Court to have regard to the primacy of the child's relationship with the permanent care family, there are 5 new pre-conditions in s.321(1B) which must be met before the Court can include any parental or sibling contact conditions or a cultural plan condition. These are whether the condition–
 - (a) is necessary to protect the child or support the permanence of the placement;
 - (b) is necessary to promote the child's continuing connection to the child's parents, siblings or culture;
 - (c) is sufficiently flexible to accommodate the child's changing developmental needs over time;
 - (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 conditions relating to preserving the child's identity and connection to the child's culture of origin and the child's relationships with birth family.

The limitation on parental contact conditions does not apply to a variation of a PCO if the variation is made more than 12 months after the making of the PCO. New s.321(1C) empowers the Court to include a condition that the child not have contact with a parent, sibling or other person.

- **Section 323(2)** The pre-conditions for making a PCO for an Aboriginal child are strengthened. The Court is prohibited from making such an order unless–
 - (a) it has received a report from an Aboriginal agency recommending the making of a PCO; and
 - (b) a cultural plan has been prepared for the child.
 These are pre-conditions for making any PCO for an Aboriginal child, not just a PCO placing an Aboriginal child solely with a non-Aboriginal carer.
- **Section 325A** New provision relating to the change to nature of a PCO if each carer has died.
- **Section 326(1)(c), 326(1A)-(1F)** An application for variation or revocation of a PCO may be made by a parent only with leave of the Court after it has considered the 5 matters in s.326(1C). An application for variation of a PCO by a parent made before the end of 12 months after the PCO was made may only be made on the basis that a contact condition in the order has not been complied with. An application for variation may be made by a sibling as of right.

Q CASE PLAN – “PERMANENCY OBJECTIVES” – “CULTURAL SUPPORT NEEDS”

Sections 166-169, 176 Provisions involving “stability plans” are repealed and in lieu there is a requirement that a case plan must include one of 5 “permanency objectives”–

- (a) family preservation;
- (b) family reunification;
- (c) adoption;
- (d) permanent care;
- (e) long-term out of home care.

Obligations on the Secretary to prepare and to review a case plan are amended. The case plan for an Aboriginal child placed in out of home care must address the cultural support needs of the child.

R RESTRICTIONS ON MAKING PROTECTION ORDERS

- **Section 276(1)(b)** This sub-section currently prohibits the Court from making a protection order unless “it is satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child.” The amendment to s.276(1)(b) is quite different and – for reasons which are unclear – appears to remove the obligation on the Secretary to provide a child with services necessary in his or her best interests. The amendment – if not repealed – would simply prohibit the Court from making a protection order unless “it is satisfied that the child cannot be sufficiently protected without a protection order”.
- **Section 276(2)** Minor amendment to the wording of the provision prohibiting the Court from making a protection order that has the effect of removing a child from the care of the child’s parent. Such an order is prohibited unless the Court–
 - (a) has considered an order allowing the child to remain in the care of the child’s parent; and
 - (b) has rejected such an order as being contrary to the best interests of the child.

TRANSITIONAL PROVISIONS

See Schedule 5