# **1. ACTS, REGULATIONS, RULES**

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**“The rule of law is…a vital component in the proper functioning of any civilised society. Without it, civilisation cannot exist.”**

*Law Institute Victoria Ltd v Telfer* [2007] VSC 535 at [16] per Harper J.

**"Your excellency being appointed to the High and responsible position you now fill I beg most humbly as a legal colonist to draw your attention and that of your responsible Advisors (what you will surely have too much eye witness proof of) to the said condition of a very large number of houseless and homeless boys now commencing a life of nomadic and erratic wanderings without having any visible means of support, not only in and about Melbourne but in all the large towns of the colony; these boys, unless some intermediate steps be taken to stop their career and growth of idle habits will soon burst pupa shell and change into the thief, the bushranger or lawless wretch and become the worst curse of the colony and contaminars also of others than themselves and be drawn into the Vortex of Crime and Misery in Time and Forever and therefore by Your Excellencies permission I will bring before your Notice a partial Remedy which I am persuaded by God's blessing, would go far to alleviate the present sufferings of many and make them useful to their own Class and to the colony generally."**

Humble address of Thomas Bury of Melbourne to His Excellency the Governor of Victoria and His Responsible Advisors on a Reformatory for and Protection to those who have no Employment.

Melbourne, 12th October 1863.

**The Victorian Parliament duly passed the *Neglected & Criminal Children's Act 1864***

**“Laws are made to prevent the strong from always having their way.”**

Ovid.

**GENERAL NOTES ON THESE RESEARCH MATERIALS**

**ALL LEGISLATION AND SUBORDINATE LEGISLATION IN THESE RESEARCH MATERIALS IS VICTORIAN UNLESS STATED OTHERWISE**

**The Victorian child protection authority has changed its name several times in the last 30 years. In 1989 it was called Community Services Victoria. Subsequently its name changed to the Department of Human Services (DHS or DOHS), then to the Department of Health and Human Services (DHHS) and from 01/02/2021 the Department of Families, Fairness and Housing (DFFH). Colloquially it is sometimes simply called “the Department”.**

**The legal basis for the change of a Department’s name was set out by the Court of Appeal in** ***RP and VS v Maryanne Foreman & Ors* [2021] VSCA 115 at [2] as follows.**

**“Section 10 of the *Public Administration Act 2004* empowers the Governor-in-Council to make orders establishing, abolishing, or changing the name of a Department.**

**Section 38AAA of the *Interpretation of Legislation Act 1984* provides that if reference is made in an Act or subordinate instrument to a particular Department and under the Public Administration Act the name of the Department is changed, ‘the reference is, from the date when the name is changed and so far as it relates to any period on or after that date, to be taken to be a reference to the Department by its new name’.**

**Section 3 of the *Administrative Arrangements Act 1983* empowers the Governor-in-Council to make orders containing provisions requiring a reference in any Act to a Department to be construed as a reference to a Department described in the order.**

**Relevantly, the Governor-in-Council has made a number of orders, the result of which is that when the current proceedings were in the Children’s Court and the Trial Division, the correct name of the Department was the Department of Health and Human Services. After orders were made in the Trial Division, however, the Department’s name changed to the Department of Families, Fairness and Housing. Nothing turns on these changes so far as this appeal is concerned, and no party sought leave to amend the name of the third respondent (the Department of Health and Human Services).”**

**In recent years the Department of Justice has also changed its name to the Department of Justice and Regulation and is now called the Department of Justice and Community Safety.**

**Nothing turns on any of these changes so far as the processes of the Children’s Court are concerned.**

**IN THESE RESEARCH MATERIALS A REFERENCE TO “THE SECRETARY” OR “THE SECRETARY DFFH” IS A REFERENCE TO THE HEAD OF THE DEPARTMENT OF FAMILIES, FAIRNESS AND HOUSING, THE CURRENT NAME OF THE CHILD PROTECTION AUTHORITY.**

**WHERE APPROPRIATE IN THESE RESEARCH MATERIALS, A REFERENCE TO “THE SECRETARY” INCLUDES A REFERENCE TO THE PRINCIPAL OFFICER OF AN ABORIGINAL AGENCY WHICH HAS BEEN AUTHORISED UNDER S.18 CYFA TO PERFORM SPECIFIC FUNCTIONS AND EXERCISE SPECIFIC POWERS DETAILED IN S.18(2) IN RESPECT OF A CHILD OR A CLASS OF CHLDREN.**

**IN THESE RESEARCH MATERIALS A REFERENCE TO THE “FAMILY COURT” OR THE “FAMILY COURT OF AUSTRALIA” IS A REFERENCE TO WHAT IS NOW KNOWN AS THE “FEDERAL CIRCUIT COURT AND FAMILY COURT OF AUSTRALIA”.**

**CROSS-REFERENCES TO SPECIFIC CHAPTERS, PARTS, SECTIONS AND SUBSECTIONS IN THESE RESEARCH MATERIALS ARE HIGHLIGHTED IN GREEN.**

## **1.1 Acts**

The legislation underpinning the Children's Court of Victoria, as it operates today, is the product of 150 years of social, philosophical, political and legislative debate, research and development and in particular of a number of years of research and debate in the 1980s and in the 2000s.

The *Neglected & Criminal Children’s Act 1864* [Act 27 Vict. No.216] was in operation from 1865 to 1888. It was replaced by the *Neglected Children’s Act 1887* and the *Juvenile Offenders’ Act 1887* and ultimately by the *Neglected Children’s Act 1890* [Act 54 Vict. No.1121].

However, it was not until 1906 that a special Children’s Court was established in Victoria. Before that Victorian children were dealt with in the same courts and with the same procedures as adults. Under the *Children’s Court Act 1906* [No.2058] – in operation from 1906 to 1915 – the Children’s Court was established as a closed court at every place where a Court of Petty Sessions – now known as the Magistrates’ Court – was held. The rationale for the creation of the 1906 Act was described in the Introduction to “A Short Manual for the Guidance of Children’s Court Magistrates and Probation Officers” as follows:

“The repression of crime and the extinction of the criminal is one of the problems that is, with constantly increasing persistence, confronting modern civilization.

The old idea that the criminal was to be treated as one of the necessary elements of society, and that it was the duty of society merely to defend itself against him, has been gradually dissipated, and it is now generally recognised that crime is largely due to the existing conditions of society, and is, to a great extent at any rate, bred and fostered by those conditions.

For some time past most civilized communities, actuated by this latter view, have adopted measures to ameliorate these conditions. It has been realized that what is sometimes called the ‘criminal instinct’ is not so much an instinct as a habit, that such a habit is merely the result of early associations, and that this unhappy problem will probably be solved by society exercising the keenest vigilance over the education and training of the young.

Society has begun to realize that it is its duty to regard every child born into it as being under its corporate care, that as far as possible it should watch its growth, surround it with associations and tendencies that will make for its welfare, correct it mildly, yet firmly, when it shows a disposition to wander, and when it errs treat it as a sentient being to be moulded and developed, and not merely as a beast to be punished and degraded. This change of sentiment has been world-wide in its operation, and it is difficult to find any community which has not given concrete shape to it by the establishment of institutions and methods for the treatment and training of erring or unfortunate children.

Victoria has begun to follow the example set by other countries in this direction. It has started, by the establishment of Children’s Courts and the system of probation in the year 1906, what promises to be a complete recognition of what may be called the new method of facing the criminal problem.

Prior to the establishment of Children’s Courts, children coming within the pale of the law were dealt with before the same tribunals and under the same procedure as adults. This meant that they were exposed to associations which were likely to have a mischievous effect on natures which are in a plastic state, and largely affected by the activity of the imitative process.

To throw children into the company of adult perverts, whether during the period of detention before trial or during the hearing of cases before the ordinary tribunals, was likely to prove a grievous injury to their susceptibilities. Further, judicial officers dealing with children in the ordinary tribunals are likely to lose sight of the fact that the treatment of youthful offenders requires special study and consideration, that what is fitting treatment for an adult is by no means always fitting treatment for a child, and that very often what merits the severest censure in the case of an adult is deserving only of sympathy and pity in the case of a child.

It is the result of considerations of this character that has led to the establishment in almost all countries of special tribunals to deal with children and persons of immature judgment.”

The jurisdiction of this new Children’s Court was an exclusive one, confined to children under the age of 17 years with responsibility conferred by ss.12(1) & 12(2) for–

* hearing and inquiring into all charges and informations against children for felony and misdemeanour, with power to discharge or commit for trial;
* hearing and determination of all informations for offences punishable on summary conviction; and
* hearing and determination of all charges and applications in relation to the committal of children authorised by the *Neglected Children’s Act 1890* or Part II, Division 2 of the *Crimes Act 1890*.

The ‘criminalisation’ of Victorian children who were merely in need of protection – as instanced in the language of the 3rd dot point above and throughout most of the 20th century Victorian Children’s Court Acts – continued through replacement Acts until 1992, surviving the following five changes of legislation:

* *Children’s Court Act 1915* [consolidating Act No.2627], in operation 1915-1929;
* *Children’s Court Act 1928* [No.3653], in operation 1929-1957;
* *Children’s Court Act 1956* [Act No.6053], in operation 1957-1959;
* *Children’s Court Act 1958* [consolidating Act No.6218], in operation 1959-1974;
* *Children’s Court Act 1973* [Act No.8477], in operation 1974-1992.

The Children’s Court also continued largely unaltered through these legislative changes with Courts of Petty Sessions throughout the metropolitan and country areas continuing to hear and determine children’s cases. However, the location of a separate Melbourne Children’s Court was changed several times as follows:

* From 1908-1941 it sat at the Gordon Institute in Bowen Street, Melbourne.
* From 1941-1960 it sat at Carlow House in Flinders Lane, Melbourne.
* From 1960-1990 it sat in a new building in Batman Avenue, Melbourne.
* From 1990-2000 it sat in a converted factory in Queensbridge Street, Southbank.
* Thereafter it has sat in a purpose-built Children’s Court at 477 Little Lonsdale Street, Melbourne.

In 1982 the Victorian government set up the Child Welfare Practice and Legislation Review, chaired by Dr Terry Carney of Monash University. In 1984 the Committee handed down its final report, entitled “Equity and Social Justice for Children, Families and Communities”, to which was annexed a draft Bill. The Carney report recommended a number of changes to the structure and jurisdiction of the Children's Court and significantly enhancing its powers.

One of the most significant issues addressed in the Carney Report was the failure of the previous system to distinguish between children in need of protection and young people who were offending against the criminal law. Not only did the Court buildings and the Court processes and outcomes not make any clear distinction between these two classes of children, the institutions in which they were placed were often the same. Babies, children and young persons before the Court were **charged** with being in need of protection and if this charge was found proved it would appear on a police criminal history sheet. This has subsequently been recognised as a legislative evil and has been made the subject of a statement of recognition and various remedies in Chapter 7A of the *Children, Youth and Families Act 2005* [inserted by Act No.42/2018].

### **1.1.1 *Children and Young Persons Act 1989* [Act No.56/1989]**

In 1989 the Victorian legislature passed the *Children and Young Persons Act 1989* [No.56/1989] [‘CYPA’]. The CYPA adopted many of the recommendations of the Carney Review. It brought together in the one piece of legislation all the legislative provisions governing children and young persons who are in need of protection or who have committed offences while at the same time drawing a sharp distinction between the two. In effect it consolidated and replaced the *Children's Court Act 1973*, the *Children's Court (Amendment) Act 1986*, the *Community Services Bill 1986* and most provisions of the *Community Services Act 1970*.

The objectives of the CYPA were described in the Second Reading Speech [08/12/1988, p.1150] as follows:

* to provide a comprehensive and high-quality child protection service which strengthens the capacity of the community to protect children and young people who have been maltreated or who are at risk of harm and which responds appropriately to the needs of the children and families with which the service is involved;
* to strengthen the role of the Children's Court of Victoria as a specialist court responsible for dealing with matters affecting children and young people;
* to maintain and strengthen the distinction between the Family Division and the Criminal Division of the Children's Court, so as to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection and juvenile justice proceedings;
* to provide an adequate and constructive response to children and young people who have been charged with and found guilty of committing offences;
* to enhance the rights of children, young people and their families in their relationships with the court system, the child protection authority and other service providers, in accordance with justice principles; and
* to provide for an extended and more flexible range of dispositions in each of the divisions of the Court, which seek to enable children to remain at home wherever practicable and appropriate.

These objectives were consistent with the recommendations of the Child Welfare Practice and Legislation Review.

Most of the CYPA came into operation in 1991. It established a Family Division of the Children's Court, distinct and separate from the Criminal Division, with special procedures available for the hearing of protection cases. This recognised the force of the Carney Review's view: "Adjudication in offender matters is based on a philosophy focussing on the individual responsibility of the young offender whereas in protection matters responsibility for the acts or omissions by adults should not be attributed to the child." [See p.238 of the Carney report].

The CYPA also provided this new Family Division with a broader range of protection orders for children found to be in need of protection. The new hierarchy of orders was said in the Second Reading Speech (at p.1153) to be designed to ensure:

* that the dispositional powers of the Family Division range from minimum to maximum intervention in the life of the child, with principles to assist the court in choosing the least interventionist order appropriate; and
* flexibility in the range of orders available to the Family Division, including the capacity to add conditions to these orders so that the court can tailor the order to the needs of the particular child and family.

In 2004 the Victorian legislature passed the *Children and Young Persons (Koori Court) Act 2004* [No.89/2004]. This created a third Division of the Children’s Court, in effect a sub-division of the Criminal Division: see s.3(6) of the CYPA. The purposes of the 2004 Act are–

1. to establish a Koori Court (Criminal Division) of the Children’s Court; and
2. to provide for the jurisdiction and procedure of that Division–

with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Children’s Court through the role to be played in that process by the Aboriginal elder or respected person and others so as to assist in achieving more culturally appropriate sentences for young Aboriginal persons.

In order to fulfil the objective of maintaining and strengthening the distinction between the Family Division and the Criminal Division of the Children's Court, those two Divisions share no common orders and the procedures in the two Divisions are quite different. In contrast with the legislation in operation prior to 1991, the 'guardianship to Secretary order', formerly known as wardship, is no longer available as a sentencing option in the Criminal Division. Sections 8(3)-8(5) of the CYPA enshrine the philosophy:

"(3) The Court has the following Divisions–

(a) the Family Division;

(b) the Criminal Division;

(c) the Koori Court (Criminal Division).

(4) Every proceeding in the Court must be commenced, heard and determined in one of those Divisions.

(5) The Court must not sit as more than one Division at the same time in the same room."

See now ss.504(3), 504(4) & 504(5) of the CYFA.

The Second Reading Speech highlighted [08/12/1988, p.1150] the philosophy of ensuring "that protective issues are dealt with in the Family Division and do not obscure issues of criminal responsibility, which are the proper concern of the Criminal Division". This philosophy is given effect by s.18(2) of the CYPA which provides: "If at any time there are proceedings in both Divisions of the Court relating to the same child, the Court must, unless it otherwise orders, hear and determine the proceedings in the Family Division first." However, it must be said that the Court frequently has no option other than "otherwise to order", especially where there is an issue in the criminal case as to whether the child should be detained in custody. So, for example, the question of a child's placement under a Family Division order is of its nature subservient to the question of whether or not the child is to be granted bail or remanded in custody. It must also be said – and to say this is not to criticise any agency but merely to reflect reality, to reflect what is a central cause of child offending – that a disproportionate proportion of young offenders are or have been found to be in need of protection.

Thus, by and large the Family & Criminal Divisions are water-tight. The only area of overlap was to be found in the “referral” provisions of ss.132-133 of the CYPA, enabling the Court to refer a defendant in the Criminal Division to the Secretary to investigate whether grounds exist for the making of a protection application in respect of the child [see now ss.349-351 of the CYFA].

In line with the recommendations of the Carney Review, the CYPA increased the minimum age of criminal responsibility from 8 to 10 years. It also expanded the non-custodial sentencing options available to the Court to strengthen the rehabilitative focus in sentencing young offenders.

The CYPA enshrined principles of natural justice by requiring that a child or young person found guilty of an offence be treated strictly in accordance with those principles. How it achieves this was summarised in the Second Reading Speech (at p.1154) as follows:

* revising the procedures and criteria for bail to ensure that young people are not denied bail on the grounds of lack of accommodation;
* stipulating requirements relating to the content of pre-sentence reports, the right of access to such reports by young people and their legal representatives and a right to challenge information in such reports;
* setting out the matters to be taken into account by the court when it decides which sentencing order to impose; and
* setting out clearly the procedures and penalties for breaches of sentencing orders.

The CYPA also sought to ensure that the procedures operating in the Children's Court are consistent with those in the Magistrates' Court wherever practicable and unless specific provisions to the contrary are contained in the CYPA. (see p.1151).

The CYPA was replaced by the *Children, Youth and Families Act 2005* in April & October 2007.

### **1.1.2 *Children, Youth and Families Act 2005* [Act No.96/2005]**

The *Children, Youth and Families Act 2005* [‘CYFA’] received the Royal Assent on 07/12/2005. The CYFA updates and combines the CYPA and part of the *Community Services Act 1970* [‘CSA’] to create an integrated child protection and child and family support system. Much – but not all – of the contents of the CYFA had been foreshadowed in an Exposure Draft released by the Victorian Minister for Children on 03/08/2005 under the title *The Children Bill*. Amendments to the original CYFA were made by the *Children, Youth and Families (Consequential and Other Amendments) Act 2006* [assented 15/08/2006] and the *Terrorism (Community Protection) (Amendment) Act 2006* [assented 07/03/2006].

The CYFA exists, in conjunction with the *Children’s Services Act 1996* and the *Adoption Act 1984*, within the over-arching framework provided by the *Child Wellbeing and Safety Act 2005*, which sets objects and principles relevant to the broad range of services delivered to children; young people and families in Victoria and which guides the operations of the Child Safety Commissioner, the Children’s Services Coordination Board and the Victorian Children’s Council.

The CYFA replaced most of the CYPA on 23/04/2007. A few sections [involving Dispute Resolution Conferences (subsequently called Conciliation Conferences), Therapeutic Treatment & Therapeutic Treatment (Placement) Orders and s.18] did not come into operation until 01/10/2007.

In *AA v DHHS & Ors* [2020] VSC 400 at [68]-[69], Incerti J said of the CYFA:

“The Act is the bedrock legislation regulating the law in relation to children, youth and families in this State. It is one of the most important pieces of legislation in this State. At the heart of the legislation are a set of values propounded by Bell J in *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 227 at [11]:

‘Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development. Those values are inherent in the best interests of the child which is the foundational principle of the Children, Youth and Families Act. That principle is the cardinal consideration in protection proceedings in the court, including the making and revoking of custody to Secretary orders. The legislation contains a detailed scheme for identifying and protecting the child’s best interests which it is the responsibility of the Secretary to administer and the jurisdiction of the court to enforce.’

The importance of the Act and how it relates to the daily lives of children and families across the State cannot be underestimated. The Secretary wields significant power and holds tremendous responsibility in relation to these children and families.”

The purposes of the CYFA are set out in s.1 and are–

(a) to provide for community services to support children and families; and

(b) to provide for the protection of children; and

(c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and

(d) to continue the Children’s Court of Victoria as a specialist court dealing with matters relating to children.

Purpose (a) involves the incorporation into the CYFA of some of the CSA in a somewhat varied form.

The CYFA retains the largely water-tight compartmentation of the Family & Criminal Divisions established by the CYPA. The only areas of overlap are to be found in the “referral” provisions of ss.349-351 of the CYFA. Section 349(1) provides that if–

(a) a child appears as a defendant in a criminal proceeding in the Court; and

(b) the Court considers that there is prima facie evidence that grounds exist for the making of a protection application in respect of the child–

the Court may refer the protective matter to the Department of Families, Fairness and Housing for investigation.

Section 349(2) provides that if–

(a) a child appears as a defendant in a criminal proceeding in the Court; and

(b) the Court considers that there is prima facie evidence that grounds exist for the making of an application for a therapeutic treatment order in respect of the child–

the Court may refer the matter to the Department of Families, Fairness and Housing for investigation.

The powers and functions of the Koori Court (Criminal Division) of the Children’s Court in ss.517-520 of the CYFA are unchanged from those in ss.16A, 16B, 16C & 16D of the CYPA.

The CYFA made no substantial alteration to the operation of the Criminal Division of the Children’s Court other than the important addition of a power to order a Group Conference as an adjunct to the sentencing powers of the Court and a power to breach sentencing orders and to enforce fines imposed by the Children’s Court against a person who is no longer a child.

Nor did the CYFA substantially alter the existing powers of the Family Division of the Court. However, it does invest a number of new powers in the Family Division, including powers to hear and determine applications for the following new orders together with associated applications:

* temporary assessment order [ss.228-239];
* therapeutic treatment order [ss.244-251 & 255-258];
* therapeutic treatment (placement) order [ss.252-258];
* extension of supervision order (now called family preservation order) [ss.293-298];
* long-term guardianship to Secretary order (now called long-term care order) [s.290].

The CYFA assembles in ss.8-14 a number of principles to which decision makers must have regard in making any decision or taking any action under the CYFA. In particular, all judicial and administrative decisions and actions under the CYFA – other than those in relation to Chapter 5 [Children and the Criminal Law] – must be consistent with the “best interests principles”:

1. “the best interests of the child must always be paramount”; and
2. when determining whether a decision or action is in the best interests of a child, “the need to protect the child from harm, to protect his or her rights and to promote his or her development [cf. ‘welfare’ in s.87(1)(aa) and ss.119(1)(b) & 119(1)(c) of the CYPA] (taking into account his or her age and stage of development) must always be considered”; and
3. consideration must also be given, where they are relevant to the decision or action, to each of the 18 other matters listed in s.10(3), many of which are in identical or similar terms to those in s.87(1) of the CYPA.

In addition, principles which must be complied with when dealing with Aboriginal children include, in ss.13-14, the nationally agreed Aboriginal Child Placement Principle.

In an information sheet about *The Children Bill* which had been posted on the DHS website [www.dhs.vic.gov.au/protectingchildren](http://www.dhs.vic.gov.au/protectingchildren) it was said:

“Wherever possible, cases will be managed in the community, rather than through protection applications and court orders. This will require the development of collaborative case planning, case management, and consultation capacities.

Child Protection will continue to have responsibility for the investigation of notifications, for making applications to the Children’s Court, and for planning for the safety and well-being of children and young people subject to Children’s Court orders.

The voluntary placement provisions in the Act will continue.”

In her Second Reading Speech the Minister, noting that “the protection of children cannot be separated from policies and programs to improve children’s lives as a whole”, reiterated that “the Children’s Court will remain central to the statutory system of child protection”. The Minister went on to explain the intended operation of the dual gateway provisions of the new legislation and to clarify the relationship between community-based intake, assessment and referral services and child protection intake services:

“Rather than over-relying on child protection to provide a gateway into services for children and their families…[p]rofessionals and any member of the public will be able to go to [community-based intake, assessment and referral services] for help if they have concerns that a family is under stress and would benefit from support. This is before problems escalate to the point that the children are placed at risk of significant harm...Child protection will continue to be targeted at children and young people who are in need of protection, based on concerns they may be at risk of significant harm.”

The writer believes that one of the greatest impacts on the Court of the new legislation is philosophical, flowing from the changed permanent care pre-condition in s.319 of the CYFA: “Child’s parent has not had care of the child for a period of at least 6 months or for periods that total at least 6 months of the last 12 months” (not counting periods on voluntary child care agreements). This is a significant reduction on the pre-condition formerly in s.112 of the CYPA which requires out of home care for at least 2 years or periods that total at least 2 of the last 3 years.

It is clear from the Second Reading Speech that the Minister saw stability for children and associated time frames as the central legislative changes:

“An absolutely critical theme of the Act is to improve vulnerable children and young people’s stability of care. We now know more about the lasting impact of early experiences on the development of young children’s brains. Children who do not experience stable relationships in early childhood are at greater risk of significant developmental delay, learning difficulties, behavioural problems and difficulties in forming meaningful relationships throughout their lives…Time frames for the preparation of stability plans will therefore create a lever to ensure that child protection assesses whether continued attempts at reunification are in the best interests of the child. Our reforms will therefore help to prevent the additional harm that is caused by multiple failed attempts at reunification. They will provide children and young people with the stable relationships that they need to grow up healthier, happier and better able to fulfil their potential.”

This factor was ultimately the catalyst for further amendments to the CYFA as from March 2016 which are discussed below.

### **1.1.3 Amendments to *Children, Youth and Families Act 2005* from March 2016**

On 09/09/2014 the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* [No.61 of 2014] received the Royal Assent. This Act came into operation on 01/03/2016 and made very substantial amendments to the CYFA. The main purposes of the amending Act were said to be–

1. to make further provision for the protection and permanent care of children; and
2. to abolish the Youth Residential Board and transfer its functions to the Youth Parole Board; and
3. to provide for group conferences where the Children’s Court is considering making certain youth justice orders; and
4. to further improve the operation of the CYFA.

On 15/03/2016 the *Children Legislation Amendment Act 2016* [No.8 of 2016] received the Royal Assent. It came into operation on the following day. It was designed to correct errors and fill gaps in the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*.

In addition to transitional provisions, the amendments to the CYFA caused by these two Acts included–

**FAMILY DIVISION**

* replacing the concepts of “custody” and “guardianship” with 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;
* changing the definition of parent to include “any person who has parental responsibility for the child, other than the Secretary”;
* adding two circumstances in which the Court must not make an interim accommodation order;
* adding placement with a disability service provider as a placement option for an IAO;
* amending the restrictions on making a protection order;
* requiring the Court to have regard to [but not necessarily to accept] advice from the Secretary about certain matters in determining whether to make a protection order;
* renaming certain protection orders: supervision order -> “family preservation order”, custody to Secretary order -> “family reunification order”, guardianship to Secretary order -> “care by Secretary order” and long-term guardianship to Secretary order -> “long-term care order”;
* abolishing interim protection orders, custody to third party orders and supervised custody orders;
* changing the pre-requisites for conditions on family preservation and family reunification orders;
* imposing significant restrictions on both the length of a family reunification order and the extension of such order;
* changing the length of a care by Secretary order from a maximum of 2 years to a non-variable 2 years (unless child turns 18 in meantime) but providing a changed review procedure after 12m;
* allowing a family reunification order or a care by Secretary order to be converted into a family preservation order by administrative direction [in the same way as a supervised custody order can currently be converted into a supervision order];
* allowing the Secretary to apply *ex parte* for a variation of the conditions of a family reunification order in certain circumstances;
* making provision for applications for care by Secretary orders and long-term care orders;
* making substantial amendments to the provisions governing permanent care orders, in particular placing significant limits on conditions involving contact between the child and the child’s parent;
* requiring leave of the Court as a pre-requisite to a parent applying to vary or revoke a PCO;
* repealing provisions involving a “stability plan” and including a requirement of one of five types of “permanency objectives” in a case plan;

**CRIMINAL DIVISION**

* expanding 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 allowing the Court to make a YAO or YRC or YJC order notwithstanding that the child has participated in a group conference;
* restricting deferral of sentence to 2 months maximum if the child has been remanded in custody;
* abolishing the Youth Residential Board and transferring its functions to the Youth Parole Board;
* empowering the Court to discharge a child who has voluntarily participated in a therapeutic treatment program but is not subject to a therapeutic treatment order;
* requiring the Court to have regard to 4 specific matters in deciding whether to discharge a child who has participated – voluntarily or pursuant to a TTO – in a therapeutic treatment program.

A more detailed version of the above is contained in **Chapter 5** of these Research Materials.

Part 11 of the 2014 amending Act inserted new ss.175A & 175B. Section 175A allows the Secretary 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, a family reunification order or a therapeutic treatment (placement) order, the specification must not relate to “a major long-term issue”. Examples given of issues to which s.175A(1) applies (presumably these are regarded as minor long-term issues or short-term issues) are 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 empowers the carer of a child placed in out of home care under an IAO or a protection order that confers parental responsibility for the child on the Secretary to make a decision in relation to the child on an issue specified under s.175A without consulting the Secretary, if authorized by the Secretary or the person in charge of an out of home care service to make decisions on the issue. Part 11 came into operation on 10/09/2014.

## **1.1.4 COVID-19 amendments to relevant legislation [2020/21] and their aftermath**

In Victoria a State of Emergency was declared on 16/03/2020 as a consequence of the health risks associated with the COVID-19 pandemic. As a consequence of this pandemic the Victorian Parliament enacted the *COVID-19 Omnibus (Emergency Measures) Act 2020* which came into operation on 25/04/2020. This Act temporarily amended certain Acts, and temporarily empowered the making of regulations, to modify certain aspects of the law of Victoria to respond to the COVID-19 pandemic. The amendments which were relevant to the Children’s Court were originally to be repealed on 24/10/2020.

The *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* came into operation on 21/10/2020. This Act extended the repeal date of the original COVID-19 Act until 26/04/2021. It also introduced some relevant new amendments including s.600OA CYFA which adds up to 6 months to the period of a family reunification order [‘FRO’] or extension in some circumstances.

Experience gained in court operations and community public health during the COVID-19 pandemic led the Department of Justice & Community Safety, in consultation with all of the courts and tribunals, to seek to extend temporarily or make permanent – either in an unchanged or amended form – some of the temporary amendments which had been effected by the temporary COVID-19 legislation. This has been achieved by enactment of the huge 168-page *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (No.11/2021) [‘JLASA’] which was assented to on 23 March 2021 and largely commenced operation on 26/04/2021. It makes amendments to 27 Acts and further consequential amendments to 6 Acts. So far as the Children’s Court [‘ChCV’] is concerned, JLASA’s main purposes are:

1. to extend until 26/04/2022 four sets of temporary provisions introduced into the CYFA by the COVID‑19 legislation;
2. to extend until 26/04/2023 the temporary modifications in the CYFA to the period of a FRO;
3. to make permanent – mostly in an amended form – a large number of temporary COVID-19 provisions in the CYFA and other Acts and Regulations.

Any provisions of the COVID-19 legislation which were not expressly extended or made permanent by the JLASA ceased to be in operation (apart from some minor transitional exceptions) on 26/04/2021.

For the ChCV the most significant of the JLASA provisions are as follows:

* Conciliation conferences in ChCV Family Division may be conducted in person or by audio visual link AVL or audio link AL.
* Bail justice IAO hearings remained suspended until 26/04/2022.
* Extended duration provisions for making/extending a FRO remain applicable until 26/04/2023.
* The ChCV may sit at any time and place. The ChCV may order that a hearing be held at an appropriate place that is not the ‘proper venue’ if it is appropriate and in the interests of justice.
* Powers of registrars in the ChCV and the Magistrates’ Court [MCV] are expanded.
* Five additional methods of service of documents are included in the CYFA:
* on the person by (d) confirmed electronic service; or
* on the person’s legal representative by (e) registered post, (f) leaving at business premises, (g) personal service or (h) confirmed electronic service.
* A witness is not required to attend court on the date and time specified in a witness summons if a criminal proceeding is adjourned prior to the date and time specified in the summons.
* A number of provisions of the *Evidence (Miscellaneous Provisions) Act 1958* are amended to allow the use of AVL and several are amended in relation to the use of AL. These include:
* **A child who is not an accused** may not be directed to appear, give evidence or make a submission by AL unless exceptional circumstances exist [s.42F(7)].
* **A child accused** must appear physically unless the ChCV directs appearance by AVL which it may do if exceptional circumstances exist or an appearance by AVL is necessary for ChCV’s case management, is consistent with the interests of justice and is reasonably practicable [ss.42O, 42P].
* A hearing by audio visual link or audio link is not invalid merely because of a failure to comply with the complex technical requirements included in the EMPA [s.42Y].
* The *Bail Act 1977* is amended to allow certain documents to be signed electronically.
* The *Criminal Procedure Act 2009* is amended to allow a court to determine any issue (other than whether an accused is guilty or not guilty) in any criminal proceeding without an oral hearing and entirely by written submissions and without the appearance of parties if in the interests of justice.
* The *Magistrates’ Court Act 1989* is amended to allow the MCV [and ChCV by operation of s.528 CYFA] to determine any issue in any non-criminal proceeding without an oral hearing and entirely by written submissions and without the appearance of parties if it is in the interests of justice.
* Amendments are made to the *Electronic Transactions (Victoria) Act 2000* primarily in relation to witnessing by AVL and the use of electronic signatures.
* Amendments are made to the *Oaths and Affirmations Act 2018* primarily to allow affidavits and statutory declarations to be validly made by AVL subject to various provisos.
* The *Open Courts Act 2010* is amended to provide–
* permanently that handing down and delivering judgments by electronic communication; and
* temporarily until 26/10/2022 that a failure to hold a hearing in a court room open to the public–

do not contravene rules of law relating to open justice provided that certain stipulations are met.

A detailed summary of those provisions of the JLASA which have some relevance to the ChCV as well as several of its provisions which have relevance to other courts can be downloaded from this website.

## **1.1.5 CYFA amendments in the Aboriginal Self-determination etc Act 2023**

Assented to on 27/06/2023, the *Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Act 2023* makes amendments to multiple Acts. Commencement dates for various sections of this Act are set out in s.2. Insofar as it amends the *Children, Youth and Families Act 2005* [CYFA], its provisions whose headings are shaded **green** came into operation on 28/06/2023. Those shaded **yellow** came into operation on 01/07/2024.

Insofar as it amends the CYFA, s.1(a) of the amending Act notes that its main purpose is–

1. to include an Aboriginal Statement of Recognition and recognition principles relating to child protection decision-making for Aboriginal children;
2. to incorporate further Aboriginal child placement principles;
3. to make amendments relating to authorisation of principal officers of an Aboriginal agency [to perform specified functions and exercise specified powers in respect of an Aboriginal child and any non-Aboriginal sibling];
4. to provide for use and disclosure of information to and by principal officers authorised under ss.18 or 19 of the CYFA; and
5. to enable judicial registrars to exercise powers of magistrates to issue warrants for the purposes of having a child placed in emergency care and to enable judicial registrars to exercise powers of registrars.

In the Second Reading Speech on 22/02/2023 Minister Spence said:

“One of the main purposes of the [Act] is to advance the self-determination of Aboriginal people in relation to the protection of children, the provision of community services and in the health system.”

The amendments which are directly or indirectly relevant to the Children’s Court are summarised below.

|  |  |  |  |
| --- | --- | --- | --- |
| **CYFA** | | **AMENDMENT** | |
| **Part 1.1A** | **s.7AA** | | **Statement of acknowledgement** |
| **New s.7AA** provides:  s.7AA(1) The Parliament acknowledges that removing an Aboriginal child from the care of a parent may–   1. disrupt the child’s connection to their culture; and 2. cause harm to the child, including serious harm.   s.7AA(2) The Parliament does not intend by this section to affect in any way the interpretation of this Act or of any other laws in force in Victoria. | | | |
| **Part 1.1A** | **s.7A** | | **Statement of Recognition** |
| **New s.7A** details the Statement of Recognition which includes:  s.7A(6) The Parliament supports rights and initiatives that–   1. address the factors that drive the over-representation of Aboriginal children in the child protection system; and 2. will require Aboriginal children, families and communities to be treated fairly and equally.   s.7A(7) It is the intention of Parliament that the child protection system must recognise, respect and support the distinct cultural rights of Aboriginal people and their right to self-determination. | | | |
| **Part 1.1A** | **s.7B** | | **Acknowledgement of Victoria’s Treaty process** |
| **New s.7B(1)** provides that the Parliament acknowledges Victoria’s Treaty process and the aspiration of Aboriginal people to achieve increased autonomy, Aboriginal decision-making and control of planning, funding and administration of services for Aboriginal children and their families, including through self-determined Aboriginal representative bodies established through Treaty. | | | |
| **Part 1.1A** | **ss.7C, 7D** | | **Effect of Part 1.1A** |
| **New ss.7C & 7D** provide that Part 1.1A is not intended to create in any person any legal right or give rise to any civil cause of action or to alter or affect an existing entitlement to compensation or create an entitlement to compensation arising from any matter referred to in s.7A. | | | |
| **Part 1.1B** | **ss.7E, 7F, 7G, 7H** | | **Recognition principles, their role and their application by the Children’s Court** |
| **New s.7E** details ten recognition principles which include:   1. The right of Aboriginal children, families and communities in Victoria to self-determination must be recognised, respected and supported. 2. When considering the views of Aboriginal children, decision-makers must uphold their cultural rights and sustain their connections to family, community, culture and Country. 3. Understanding of, and respect and support for, Aboriginal culture, cultural diversity, customary lore, knowledge, perspectives and expertise is to be demonstrated in decision-making. 4. Strong connections with culture, family, Elders, communities and Country are to be recognised as the foundations needed for Aboriginal children to develop and thrive and to be protected from harm. 5. Historic and ongoing biases and structural and everyday racisms create barriers to the best interests of the Aboriginal child and are to be recognised and overcome. | | | |
| **New s.7F** requires the Children’s Court to have regard to and apply the above principles set out in ss.7E(1) to (5) (where relevant) in making any decision or taking any action in relation to an Aboriginal child. **New s.7G** imposes similar obligations on the Secretary DFFH and on a community service in relation to all 10 principles in s.7E. | | | |
| **New s.7H(1)** provides that the recognition principles are intended–   1. to give guidance in the administration of the CYFA; and 2. to ensure that the distinct cultural rights of Aboriginal children and Aboriginal families and the right of Aboriginal people to self-determination are recognised, respected and supported.   **New ss 7H(2)-(3)** provide that the recognition principles apply subject to the best interests provisions in s.10 CYFA and in addition to – and without limiting – the principles in ss.11-14 CYFA.  **New s.7H(4)** provides that nothing in Part 1.1B applies in relation to any decision or action under Chapter 5 (Children and the criminal law) or under Chapter 7 (The Children’s Court of Victoria) in relation to any matter under Chapter 5. | | | |
| **Part 1.2** | **s.13(4)** | | **Aboriginal Child Placement Principle** |
| **New s.13(4)** provides that for the avoidance of doubt, the Court or a bail justice (as the case may be) must have regard to the Aboriginal Child Placement Principle in making any decision or taking any action in respect of a child in need of protection under Chapter 4. | | | |
| **Part 1.2** | **s.14** | | **Further principles for placement of Aboriginal child** |
| **Amended s.14** contains 4 new principles, additional to the 4 principles already enacted in s.14, for the placement of an Aboriginal child:  *Prevention principle*  (1A) An Aboriginal child has a right to be brought up within the child’s family and community.  *Partnership principle*  (1B) The Aboriginal community to which the child belongs and other respected Aboriginal persons have a right to participate in the making of a significant decision in relation to an Aboriginal child under the CYFA.  (1C) Representatives of the Aboriginal community have a right to participate in the design and implementation of child protection and community services relating to Aboriginal children and their families under the CYFA.  *Participation principle*  (1D) The parents and members of the extended family of an Aboriginal child have a right to participate, and to be enabled to participate in an administrative or judicial decision-making process under the CYFA that relates to that child.  *Connection principle*  (1E) An Aboriginal child has a right to develop and maintain a connection with the child’s family, community, culture, Country and language.  In relation to ss.14(1B) & 14(1D) the Explanatory Memorandum states at page 9: “[N]ew section 14(1B) and (1D) is intended to support and guide decision making.” This was reinforced by Minister Spence in the Second Reading Speech in the Legislative Assembly on 22/02/2023 [see Hansard at page 482] [emphasis added]:  *“Embedding all five elements of the Aboriginal Child Placement Principle*  Currently, s.13 of the CYFA describes matters to be considered when placing an Aboriginal child in care. This has the effect of placement being incorrectly considered as the sole, or most important, principle.  This Bill amends the Act to expressly include all five elements underpinning the intent of the Aboriginal Child Placement Principle, namely: prevention; participation; partnership; placement; and connection. This addition gives prominence to the Principle and clarifies that it is to be applied to all decision-making regarding Aboriginal children, not just in relation to a placement decision.  **The five elements of these non-binding principles are intended to support decision makers to adopt an Aboriginal lens regarding the placement of an Aboriginal child in care. In this way, the principles are guiding in nature and do not purport to interfere with existing decision-making powers.**  **Importantly, the best interests of the child remain paramount as set out in the CYFA. The Aboriginal Child Placement Principle is therefore expressed to be subject to section 10 of the CYFA*.****”*  See also Minister Blandthorn’s Second Reading Speech in the Legislative Council on 09/03/2023 [Hansard at page 798]. | | | |
| **Chapter 2** | **s.17(3), 18** | | **Secretary may authorise principal officer of Aboriginal agency to act** |
| **New s.17(3)** expands the power of the Secretary DFFH to delegate the power to make an authorisation under s.18 by providing: “The Secretary may, by instrument, delegate to an executive within the meaning of the *Public Administration Act 2004* the power to make an authorisation under s.18.” | | | |
| **Previous s.18 is substituted by a new s.18** which reflects the self-determination provision of the Treaty process in new s.7B(1). The purpose of new **s.18** is described in the Explanatory Memorandum at p.9 as follows:  “New s.18 provides for seamless authorisation of the functions and powers of the Secretary from protective intervention through to protection orders and other relevant orders to provide for consistency of culturally appropriate service delivery to Aboriginal children and their families. This will also be an expansion of the Secretary's existing authorisation power as it enables an Aboriginal agency to be authorised to manage a child who is subject to relevant orders, in addition to protection orders. Further it enables an authorisation to be made with respect to classes of Aboriginal children and their siblings, in addition to a specific Aboriginal child and their sibling.” | | | |
| **New s.18(1)** empowers the Secretary DFFH to authorise the principal officer of an Aboriginal agency – who must be an Aboriginal person [see **s.18(5)**] – to perform specified functions and exercise specified powers referred to in **s.18(2)** in respect of any of the following–   1. an Aboriginal child; 2. any non-Aboriginal sibling of an Aboriginal child for whom an authorisation has been made; 3. a child or class of children whom the Secretary believes to be Aboriginal; 4. any non-Aboriginal sibling of an Aboriginal child or class of children for whom an authorisation has been made. | | | |
| **New s.18(2)** provides that the functions and powers that may be specified in an authorisation are those conferred by or under the CYFA on the Secretary DFFH–   1. as a protective intervener; and 2. to receive reports under s.185 and to investigate those reports; and 3. in relation to a protection order or a “relevant order”, the latter defined in what ultimately became new **s.18(8)** as a temporary assessment order, an interim accommodation order, a therapeutic treatment order, a therapeutic treatment (placement) order and a permanent care order. | | | |
| **New s.18(3)** provides that such authorisation may only be made with the agreement of the Aboriginal agency and the principal officer. **New s.18(4)** requires the Secretary DFFH, before giving an authorisation, to provide the Aboriginal agency and the principal officer with all the information that is known to the Secretary and that is reasonably necessary to assist the agency and the principal officer to make an informed decision as to whether or not to agree to the authorisation. | | | |
| **New s.18(6)** provides that before giving an authorisation under ss.18(1)(a) or 18(1)(c), the Secretary DFFH must have regard to any view expressed by the child and the parent of the child if those views can be reasonably obtained. | | | |
| **New s.18(7)** provides that on an authorisation being given, the CYFA applies in relation to the performance of the specified functions or the exercise of the specified powers referred to in the authorisation for the specified child(ren) as if the authorised principal officer were the Secretary. | | | |
| **Part 4.4** | **s.181(c)** | | **Who is a protective intervener?** |
| **Existing ss.181(a) & (b)** provide that for the purposes of the CYFA the following persons are protective interveners:   1. the Secretary DFFH; and 2. all police officers.   **New s.181(c)** complements new s.18 by adding to s.181:   1. the principal officer of an Aboriginal agency authorised under s.18 to perform functions and exercise powers of a protective intervener, to the extent that the principal officer performs those functions and exercises those powers in relation to a child who is the subject of the authorisation. | | | |
| **Chapter 2** | **s.18AAA** | | **Revocation of authorisation under s.18(1)** |
| **New s.18AAA** empowers the Secretary DFFH to revoke an authorisation under s.18(1) in writing at any time and requires the principal officer upon such revocation to provide the Secretary DFFH with all records created by or on behalf of or provided to the Aboriginal agency in respect of the child or children as a result of the authorisation. New **s.18AAA(4)** provides that despite the revocation of an authorisation in respect of an Aboriginal child or a child or class of children who the Secretary believes to be Aboriginal, an authorisation under ss.18(1)(c) or 18(1)(d) of a non-Aboriginal sibling of the Aboriginal child(ren) continues to have effect until revoked. | | | |
| **Chapter 2** | **s.18AAB** | | **If agency considers authorisation is no longer in best interests** |
| **New s.18AAB** requires the principal officer of an Aboriginal agency to notify the Secretary DFFH in writing as soon as practicable if he or she considers that an authorisation under s.18 is no longer in the best interests of a particular child or children who are the subject of the authorisation. On receiving a notification, the Secretary DFFH may revoke the authorisation in accordance with s.18AAA. However, nothing in this section affects the Secretary’s power under s.18AAA to otherwise revoke an authorisation. | | | |
| **Chapter 2**  **Part 4.5** | **ss.19A**  **192(4)** | | **Information use and disclosure for the purposes of authorised functions and powers** |
| **New ss.19A(1) & (2)** provide for information disclosure by the Secretary DFFH to the principal officer of an Aboriginal agency and vice versa.  **New s.19A(3)** empowers the principal officer to disclose any information obtained by the principal officer in the course of performing functions or exercising powers under the authorisation, if the principal officer reasonably believes that the information is necessary for performance of those functions or exercise of those powers.  **New s.19A(4)** empowers the Secretary DFFH to require the principal officer to give information to the Secretary if it is necessary to update records held by the Secretary.  **Existing s.192** specifies the circumstances when the Secretary DFFH or a protective intervener may request and disclose information. **New s.192(4)** provides that–   * a reference to the Secretary includes a reference to a principal officer performing functions or exercising powers of the Secretary under a section 18 or 19 authorisation; and * a reference to a protective intervener includes a reference to a principal officer performing functions or exercising powers of a protective intervener under an authorisation made under section 18. | | | |
| **Part 4.7** | **s.215B(1)** | | **Management of child protection proceedings** |
| **Section 215B(1)** deals with the powers of the Court to manage Family Division proceedings. It expressly provided that it does not limit the best interests and other decision-making principles in Part 1.2 of the CYFA and is now amended to add that it also does not limit the recognition principles in new Part 1.1B [ss.7E to 7H]. | | | |
| **Part 7.4** | **s.529(1)** | | **Recall and cancellation of warrants by judicial registrars** |
| **Amended s.529(1)(a) and new s.529(1)(ab)** give a judicial registrar power to recall and cancel warrants issued by judicial registrars. | | | |
| **Part 7.6A** | **s.542J(4)** | | **Performance of duties by judicial registrar** |
| **New s.542J(4)** provides: “A judicial registrar has any of the powers, duties and functions of a registrar under this Act and any other Act or the rules of Court.” | | | |
| **Part 7.11** | **s.588**  **(1AB)(ba)** | | **Power to make rules of court to enable judicial registrars to issue emergency care search warrants** |
| **New s.588(1AB)(ba)** empowers the President together with 2 or more magistrates to jointly make rules of court providing for a judicial registrar to exercise any power of a magistrate under the CYFA with respect to the issue of a search warrant for the purpose of having a child placed in emergency care.  There are 13 types of emergency care warrants referred to in the CYFA. Eight of these [under ss.237(2), 243(3), 247(1), 261(1), 268(5)(b), 269(3)(b), 270(5)(b) & 313(b)] can be issued by “the Court”, defined in s.504(2) as including the judicial registrars. Applications for the remaining five [under ss.241(1), 269(4)(b), 270(6)(b), 314(2) & 598(1)] are expressed as being made to a magistrate.  New s.588(1AB)(ba) enables the making of rules of court to empower judicial registrars to issue all types of emergency care search warrants. Pursuant to this section, the *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* [S.R. No.22/2021] were amended as and from 10/07/2023 by S.R. No.70/2023 to enable Children’s Court judicial registrars to issue all 13 types of emergency care warrants. For further details see sections 1.3 & 5.27. | | | |
| **Part 8.6** | **ss.633-4** | | **Transitional provisions & transitional regulation-making powers** |
| **New s.633** applies the new s.18 to previous s.18 authorisations of principal officers of Aboriginal agencies and continues the authorisation until–   * it is revoked by the Secretary under s.18AAA; or * the protection order in respect of the child to whom the authorisation relates ceases to be in force–   whichever is the earlier.  **New s.634** empowers the making of transitional regulations arising as a result of this amending Act. | | | |

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## **1.1.6 Relevant amendments made by the Justice Legislation Amendment Act 2023**

Assented to on 10/10/2023, the *Justice Legislation Amendment Act 2023* [JLA] makes amendments to multiple Justice portfolio Acts. The substantive amendments which are relevant to the Children’s Court – as described in s.1 JLA – are summarised in the following table. In the last column the relevant sections of the Research Materials are referenced.

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| --- | --- | --- |
| **JLA**  **2023** | **SUMMARY OF AMENDMENT** | **RESEARCH MATERIALS** |
| **s.1(a)(i)**  **Part 2** | To amend **s.8B *Open Courts Act 2013*** to make permanent certain temporary measures by clarifying that rules of law relating to open justice are not contravened if, in the interests of justice, public access to a proceeding is provided in specified ways other than a physically open court or tribunal. | **2.7.1** |
| Amended **s.8B OCA** provides in part:  A court or tribunal does not contravene any rule of law relating to open justice if, instead of holding a proceeding or hearing in a court room or hearing room that is physically open to the public, the court or tribunal does whichever of the following things the court or tribunal is satisfied it is in the interests of justice to do—   * arranging or providing a contemporaneous audio or audio visual broadcast of the proceeding or hearing; or * arranging or providing an audio or audio visual recording of the proceeding within a reasonable time after the conclusion of the proceeding or hearing—   to the public generally or to a member of the public on request.  A court or tribunal may determine what means of access or combination of means of access under subsection (1) is or are more appropriate in all the circumstances.  No fee is payable by a person to whom a broadcast or recording is provided. | | |
| **s.1(a)(ii)**  **Part 2** | To amend the ***Court Security Act 1980*** to ensure that courts and tribunals can permanently manage public health risks on court premises in relation to public health events and pandemics and to make other minor amendments. | **2.5.4** |
| The meaning of “the security, good order or management of the court premises” in **s.2(2) CSA** is expanded to include:  (d) in relation to a pandemic declaration, the health of all persons or any class of person who work at, attend or are in custody at the court premises;  (e) the following of any relevant pandemic order at the court premises;  (f) the following of any relevant directions made by an authorised officer under Part 8A or 10 of the *Public Health and Wellbeing Act 2008* at the court premises. | | |
| **Sections 3(4) & 3(6) CSA** are modified to permit an authorized officer to seize and retain any item the officer **believes on reasonable grounds** is a prohibited item. | | |
| **Section 4B(2A) CSA** is added: “A person may publish a record of a proceeding if the person does so on behalf of a court or tribunal for a purpose set out in s.8B OCA.” | | |
| **Section 7A CSA** which provided some other temporary measures in response to the COVID-19 pandemic is repealed. | | |
| **s.1(c)**  **Part 4** | * To amend **ss.3, 21, 22** (including **Table 1**), **23 & 24 *Spent Convictions Act 2021*** and to add **ss.22A-22E** to facilitate information sharing. * To amend **ss.3, 9(1) & 11(1) SCA** and to add **ss.5A & 5B** to clarify other aspects of the operation of the SCA. | **11.13.2** |
| **s.1(f)**  **Part 7** | To amend the ***Children, Youth and Families Act 2005*** [CYFA] to support the introduction of the electronic case management system [CMS] in the Family Division of the Children’s Court. | **1.6.3**  **3.7.2**  **Chapter 5** |
| To enable electronic filing of documents via CMS, the words “by the appropriate registrar” or similar words in **ss.214, 228, 243, 246, 253, 258, 259, 260, 262, 266, 320, 326, 409L, 409W, 527, 532, 550, 574, 579 & 588 CYFA** are either omitted or replaced by “in the Court” or similar words. For the same purpose a minor amendment is made to **s.587 CYFA**. | | |
| **Section 533A(2) CYFA** is added: “Without limiting subsections (1) and (2), the issuing or transmission of any order, process or document by electronic communication may include the use of an information system.” In **s.3(1) CYFA** “information system” is newly defined as having “the same meaning as in the *Electronic Transactions (Victoria) Act 2000*.” | | |
| **Section 533B CYFA** is added: “Any document to be filed in the Court may be filed by electronic communication, including by using an information system.” | | |
| **Section 538(3) CYFA** is replaced by:  “(3) Process issued by a registrar may be recalled and cancelled by— (a) the principal registrar; or (b) a judicial registrar; or (c) any other registrar; or (d) a magistrate.” | | |
| **s.1(g)**  **Part 8** | To amend **ss.47A & 54H(5)** ***Jury Directions Act 2015*** in relation to sexual offence cases. | **10.3.3.5C** |
| **s.1(j)**  **Part 11** | To amend **ss.464AAB & 464FA *Crimes Act 1958*** in relation to notification of the Victorian Aboriginal Legal Service. | **8.2.2** |
| **Sections 464AAB & 464FA CA** are amended to apply to Torres Strait Islanders as well as to Aboriginal persons. | | |
| **Section 464FA CA** is amended to require an investigating official to notify the Victorian Aboriginal Legal Service within one hour of a person being taken into custody or as soon as practicable thereafter if the person states that they are an Aboriginal person or a TSI or the official knows or is of the opinion that the person is an Aboriginal person or a TSI. | | |

The amendments detailed in s.1(j) JLA commenced operation on 01/01/2024. All of the other amendments detailed above commenced operation on 11/10/2023.

## **1.1.7 Youth Justice Act 2024**

One of the recommendations of the Armytage and Ogloff Youth Justice Review in July 2017 was the establishment of “a contemporary legislative framework for youth justice” and the creation of “a standalone Act, separate from the *Children, Youth and Families Act 2005*” [CYFA]. The ***Youth Justice Act 2024*** [**YJA**] is this new “standalone Act”. It received the Royal Assent on 10/09/2024.

**Section 1** of the **YJA** provides:

1 Purposes

(1) The main purposes of this Act are—

(a) to raise the minimum age of criminal responsibility from 10 years of age to 12 years of age; and

(b) to provide for police powers in relation to children under the minimum age of criminal responsibility who are 10 or 11 years of age; and

(c) to provide for the procedures and other matters relevant to the Criminal Division of the Children's Court as the specialist division dealing with criminal matters relating to children; and

(d) to ensure robust oversight and accountability of the youth justice system to—

(i) promote community safety; and

(ii) prevent and reduce offending by children and young persons; and

1. support the rehabilitation and positive development of children and young persons involved in the youth justice system; and
2. provide victims with appropriate opportunities to participate in the youth justice process; and
3. protect the rights of children and young persons involved in the youth justice system; and

(e) to establish a scheme that provides alternative processes to a court proceeding for dealing with children who are alleged to have committed offences, including the use of—

(i) youth warnings and youth cautions; and

(ii) early diversion group conferences; and

(iii) court ordered diversion from criminal proceedings; and

(f) to make provision in relation to—

(i) children who have been charged with offences; and

(ii) children and young persons who have been found guilty of offences.

(2) The other purposes of this Act are—

(a) to repeal certain provisions from the **Children, Youth and Families Act 2005** and reform and re-enact those provisions in this Act; and

(b) to amend the **Bail Act 1977**, including by providing for the trial of a scheme under which, in certain circumstances, certain courts may grant bail to a child subject to conditions that provide for electronic monitoring of the child; and

(c) to set out transitional provisions; and

(d) to make consequential amendments to other Acts.

The effect of the amendments referred to in **YJA ss.1(2)(a) & 1(2)(d)** is that most previous statutory provisions which are relevant to the operation of the Criminal Division of the Children’s Court [ChCV] (mainly those in theCYFA) are repealed and re‑enacted in the **YJA**, sometimes in an amended form.

**Section 2 of the YJA** provides for the **YJA** to have a staggered commencement. The following provisions of the **YJA** commence operation on the dates shown.

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| --- | --- |
| **11/09/2024** | **Section 2** and **ss.903D, 903E, 903G & 904** (minor amendments to the ***Bail Act 1977***, some of which are shaded in **orange** in this summary). |
| **16/10/2024** | **Section 1** and **Chapter 20 [ss.855-856** (insertion of ss.347B, 347C & 491A CYFA)]. |
| **02/12/2024** | **Part 22.1, Division 2**:Amendments to the ***Bail Act 1977*** contained in **YJA ss.903A-903C** which are shaded in **mauve** in this summary. |
| **22/04/2025** | **Part 22.1, Divisions 1 & 2**:Amendments to the ***Bail Act 1977*** contained in **YJA ss.899-903** involving electronic monitoring of children on bail in certain circumstances. |

The remaining sections come into operation on a day or days to be proclaimed or on the following dates if not proclaimed earlier.

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| --- | --- |
| **30/09/2025** | The remaining provisions of **Chapter 1 Parts 1+2**, **Chapter 3** [Police power to take into care and control and transport a child aged 10 or 11], **Chapter 19** [Provisions relating to minimum age of criminal responsibility], **Chapter 20** [Additional amendments to the CYFA] and **ss.766(1) & 766(3)** [Regulation-making powers]. |
| **30/09/2026** | The rest of the **YJA**. |

**The provisions which are directly relevant to the Children’s Court are summarised below. A reference to the CYFA shown in red indicates that the provision is repealed by the YJA.**

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| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **ACTS** | | | | **SUMMARY OF PROVISION** | | | | | | | | | | | | | | | | |
| **CHAPTER 1, PART 1.1 – ‘CHILD’, ‘YOUNG PERSON’ & RELEVANT IMPAIRMENT’** | | | | | | | | | | | | | | | | | | | | |
| **YJA s.4**  **CYFA s.3(1)** | | | | **‘*Child*’ is defined differently in the YJA although the upper limit of the jurisdiction of the Criminal Division remains unchanged by s.4.** | | | | | | | | | | | | | | | | |
| (1) In this Act, ***child*** means a person who is under 18 years of age.  (2) Additionally, child includes, in the case of a person who commits an offence or is alleged to have committed an offence, a person who—  (a) was under 18 years of age at the time of the offence; and  (b) is not excluded by subsection (3).  (3) A person is excluded if 19 years of age or over at the time of the commencement of the proceeding for the offence or alleged offence. | | | | | | | | | | | | | | | | | | | | |
| See also **YJA s.1175** (discussed at the end of this summary) for an expanded definition of ‘***child***’ and an explanation of why there is an expanded definition at all. | | | | | | | | | | | | | | | | | | | | |
| **YJA s.5**  **CYFA NONE** | | | | **‘Young person’ is defined as:** | | | | | | | | | | | | | | | | |
| A person 18 years of age or over (other than a person who is taken under **YJA s.4(2)** to be a child) who is—   1. sentenced to a term of detention in a youth justice custodial centre [YJCC] under the ***Sentencing Act 1991***; or 2. sentenced to a term of imprisonment under the ***Sentencing Act 1991*** and is the subject of a direction under **YJA Chapter 13** for transfer to a YJCC or being considered under **Chapter 13** for such transfer. | | | | | | | | | | | | | | | | | | | | |
| **YJA s.6**  **CYFA NONE** | | | | **For the purposes of the YJA a child has a ‘relevant impairment’ if:** | | | | | | | | | | | | | | | | |
| * the child has an intellectual disability, an acquired brain injury or a neurodevelopmental disorder; and * the impairment has resulted in the child having substantially reduced functional capacity in relation to communication, social interaction, learning, self-care or self-management. | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 1, PART 1.2 – CRIMINAL RESPONSIBILITY OF CHILDREN** | | | | | | | | | | | | | | | | | | | | |
| **YJA s.10**  **CYFA s.344** | | | | * **The age of criminal responsibility is raised from 10 years to 12 years:** “It is conclusively presumed that a child who is under 12 years of age cannot commit an offence”**.** * **Related transitional provisions and consequential amendments are in Chapter 19.** | | | | | | | | | | | | | | | | |
| **YJA s.11** | | | | **The presumption of *doli incapax* is incorporated into the YJA.**  (1) It is presumed that a child who is 12 or 13 years old cannot commit an offence.  (2) The presumption in **YJA s.11(1)** is rebutted only if the prosecution proves beyond reasonable doubt that the child knew at the time of the alleged commission of the offence that the child's conduct was seriously wrong.  (3) Whether a child knew that their conduct was seriously wrong—  (a) is a question of fact; and  (b) cannot be inferred merely from the fact that the child engaged in the conduct which constituted the offence; and  (c) refers to the child's knowledge that it was seriously wrong in a moral sense to engage in the conduct that constitutes the physical element or elements of the offence.  (4) To avoid doubt—  (a) any presumption arising by or under the common law in relation to the criminal responsibility of a child continues to apply; and  (b) in the event of inconsistency between this section and a presumption referred to in paragraph (a), this section prevails to the extent of the inconsistency. | | | | | | | | | | | | | | | | |
| **CYFA NONE**  **COMMON LAW** | | | |
| **YJA ss.12‑14** | | | | These new provisions impose an obligation on a police officer and a police prosecutor (but not the DPP) to be satisfied – before deciding to commence or to continue a proceeding for an offence allegedly committed by a child at 12 or 13 years of age – to have regard to whether it appears that there is admissible evidence to prove beyond reasonable doubt that the child knew at the time of the commission of the alleged offence that the child’s conduct was seriously wrong. See also **YJA ss.823-826** (relevant only to jury trials) and **YJA ss.811(1), 813-816 & 818-819** (re “record of reasons”) which are discussed in **Chapter 19, Part 19.7** below. | | | | | | | | | | | | | | | | |
| **CYFA NONE** | | | |
| **CHAPTER 3 – POLICE POWER TO TAKE INTO CARE AND CONTROL AND TRANSPORT A CHILD AGED 10 OR 11 YEARS OLD** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.66‑91** | | | | **These new provisions complement the removal of criminal responsibility for a child who is 10 or 11 years old.** In particular **s.68(1)** empowers a police officer to take a child aged 10 or 11 into care and control if the police officer believes on reasonable grounds that—  (a) there is a risk of serious harm to the child or another person that is likely to occur as a result of the behaviour of the child; and  (b) it is necessary for the child to be transported under **s.69** to minimise that risk of harm of serious harm. | | | | | | | | | | | | | | | | |
| **CYFA NONE** | | | |
| **CHAPTER 1, PART 1.3 – GUIDING YOUTH JUSTICE PRINCIPLES** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.15‑26** | | | | **s.15: The guiding youth justice principles apply subject to any express statutory requirements and unless the context otherwise requires.**  **s.16:** Their purposes are to promote community safety, minimise and reduce offending by children and young persons and support rehabilitation and positive development of children and young persons.  **s.17:** The DJCS Secretary, DFFH Secretary, Commissioner for Youth Justice, **any court,** the Youth Parole Board, Victoria Police or any other person or entity **should take into account each guiding youth justice principle to the fullest extent possible when exercising any power, performing any function, making any decision or taking any other action under the YJA in respect of a child or young person.**  **However, a court is not to take into account the guiding youth justice principles in sentencing a child or young person.**  **To ensure that s.24 is taken into account, a court and any other relevant person must make enquiries to determine whether a child or young person is an Aboriginal person before exercising any power, performing any function, making any decision or taking any other action under the YJA in respect of the child or young person.** | | | | | | | | | | | | | | | | |
| **CYFA NONE** | | | |
| **The guiding youth justice principles are:** | | | | | | | | | | | | | | | | | | | | |
| **YJA s.18: Treatment of children and young persons**  (1) Children and young persons are to be treated differently to adults, in a way that recognises that they—  (a) are developmentally distinct from adults; and  (b) are dependent on parents, family and persons of significance in their lives, and the wider community, to provide them opportunities to realise their full potential; and  (c) tend to be vulnerable when dealing with persons of authority; and  (d) have a unique capacity for rehabilitation and positive development when properly supported.  (2) Children and young persons are to be responded to as individuals and in a way that—  (a) addresses the underlying causes of the child's or young person's offending behaviour, having regard to the available evidence about what works to reduce offending; and  (b) promotes the child's or young person's human rights; and  (c) promotes the child's or young person's strengths, including acknowledging the child's or young person's developmental needs, characteristics, identity and capacity for positive change; and  (d) supports the child or young person to take responsibility for their actions, having regard to their capacity to do so, including by helping the child or young person recognise the impacts of their actions on victims and the community; and  (e) provides the child or young person with opportunities to participate in decision-making processes that affect them and ensures that those processes are accessible, comprehensible and culturally appropriate;  (f) minimises stigma to the child or young person; and  (g) promotes and sustains the engagement of the child's or young person's parents, family and persons of significance in their lives and the wider community in their rehabilitation; and  (h) recognises the unique vulnerabilities and systemic and structural issues that disproportionately impact upon cohorts to which the child or young person belongs, including but not limited to children or young persons—  (i) with a disability; or  (ii) with a mental illness; or  (iii) from a culturally or linguistically diverse background; or  (iv) with a history of involvement with the child protection system; and  (i) recognises that children or young persons may themselves be victims; and  (j) contributes to the most timely outcome for the child or young person that is appropriate in the circumstances.  **YJA s.19: Prevention, diversion and minimum intervention**  Responses to offending and alleged offending by children and young persons are to emphasise prevention, diversion and minimum intervention by—  (a) ensuring that the child or young person is subject to the minimum intervention that is necessary and appropriate in the circumstances with any deprivation of liberty being a last resort and for the minimum period appropriate; and  (b) giving priority to diverting the child or young person away from the criminal justice system and supporting efforts at early intervention to address the causes of offending behaviour; and  (c) ensuring that a criminal proceeding is not commenced against the child or young person if there are other appropriate means of dealing with the child's behaviour or the young person's behaviour, unless the public interest requires otherwise.  **YJA s.20: Rights of victims and the importance of restoration**  The rights of victims and the importance of restoration are to be recognised by—  (a) providing opportunities for restoration of harm and restorative processes that allow the harm done by a child or young person to their victims, their families and their community to be acknowledged; and  (b) providing opportunities for victims to participate in such processes and for the harm done to them to be acknowledged. | | | | | | | | | | | | | | | | | | | | |
| **YJA s.21: Importance of parents and family**  (1) Parents, family and persons of significance in a child's life or a young person's life are to be recognised as having a shared responsibility to help the child or young person to rehabilitate, positively develop and not offend.  (2) Parents, family and persons of significance in a child's life or a young person's life are to be engaged to fulfil the responsibilities—  (a) of caring for and supporting the child or young person; and  (b) of helping the child or young person to rehabilitate, positively develop and not offend.  **YJA s.22(1): Promotion of partnership and collaboration with agencies and other entities**  (1) Public service bodies, public entities, Victoria Police, non-government organisations and the community have a shared responsibility to—  (a) support children and young persons to rehabilitate, positively develop and not offend; and  (b) prevent children and young persons from having contact with the youth justice system; and  (c) divert children and young persons from the youth justice system, to the greatest extent possible.  **YJA s.24: Additional principles specific to Aboriginal children and young persons**  (1) In addition to the other guiding youth justice principles, the right of Aboriginal persons to self­determination must be respected and upheld by—  (a) positioning and empowering Aboriginal persons to design, develop and implement policies, initiatives and strategies that will lead to an Aboriginal-led youth justice system in relation to Aboriginal children and young persons; and  (b) having regard to the following principles—  (i) respect for Aboriginal peoples' human rights and cultural rights;  (ii) equitable partnerships between public service bodies, public entities, Victoria Police, non-government organisations and Aboriginal communities;  (iii) sustainable and flexible funding and resourcing for Aboriginal communities;  (iv) respect for cultural diversity and customary lore;  (v) transfer of decision-making powers to Aboriginal communities with their free, prior and informed consent;  (vi) overcoming barriers including structural racism, discrimination and bias;  (vii) shared commitment, accountability and responsibility;  (viii) valuing and centring of Aboriginal culture, knowledge and expertise;  (ix) embedding cultural safety in policies, programs and services.  (2) The right of Aboriginal children and young persons to self-determination must be supported by—  (a) providing them with the opportunity to express their views; and  (b) promoting their participation, and the participation of their family, kin and Elders, in decision-making processes that affect them.  (3) Aboriginal children and young persons must be supported by recognising that—  (a) Aboriginal concepts of family include extended kinship relationships and family structures; and  (b) strong connections with family, kin, community, culture, Country and Elders are the foundations needed for Aboriginal children and young persons to thrive; and  (c) Aboriginal children and young persons who have committed or are alleged to have committed offences should be dealt with in a way that upholds their cultural rights and sustains their ties to family, kin, community, culture, Country and Elders. | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 4 – DIVERTING CHILDREN FROM THE JUSTICE SYSTEM**  **CHAPTER 6, PART 6.1, DIVISION 3 – CHILDREN’S COURT REFERRAL TO EDGC** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.92‑146**  **+**  **ss.161-166** | | | | **The new provisions in Chapter 4 give a statutory basis to and substantially expand what was previously known as a ‘police caution’ given to a child for an alleged offence. There are 4 types of police diversion which form a hierarchy of options set out in s.92(1)(a)-(d):**   1. **take no action against the child;** 2. **give a youth warning to the child [ss.94-101];** 3. **give a youth caution to the child [ss.102-115];** 4. **refer the child to participate in an early diversion group conference [EDGC] [ss.116‑135 – see also s.138 for an Aboriginal child].**   **If all of these are clearly inappropriate in the circumstances, s.92(1)(e) provides that the police officer may then commence a criminal proceeding against the child for the alleged offence.**  **YJA s.92(2)** provides that in deciding whether an action in the hierarchy of options is clearly inappropriate, the police officer must have regard to each of the following matters—   1. the nature and seriousness of the alleged offending; 2. the number, frequency and nature of findings of guilt or convictions (if any) in respect of the child; 3. any previous conduct of the child relevant to the alleged offending, including but not limited to whether the child has acknowledged responsibility or shown remorse for their behaviour; 4. any harm caused to the victim (if any) of the alleged offending. | | | | | | | | | | | | | | | | |
| **CYFA NONE** | | | |
| **YJA ss.94-101: Youth warnings**   * A police officer may give a youth warning to a child for one or more alleged offences if satisfied there is sufficient evidence to charge the child with the alleged offence(s): **s.95**. The warning must be given as soon as reasonably practicable after the commission of the alleged offence and may be given after a criminal proceeding has been commenced against the child for that offence: **s.97**. The warning may be given at any place and may be verbal or in writing: **s.98**. The police officer who gives the youth warning must explain the nature and effect of the warning as plainly and simply as possible and in a way the child is likely to understand: **s.99**. * The following matters detailed in **s.96** do **not** affect a child’s eligibility to be given a youth warning for an alleged offence—   (a) whether the child has previously been given a youth warning or youth caution for any alleged offence and the number of youth warnings or youth cautions (if any) previously given to the child;  (b) whether the child has previously been charged with any alleged offence;  (c) whether the child has previously been found guilty of any offence;  (d) whether the child denies the alleged offending;  (e) whether the child has exercised any of the child's legal rights in relation to the alleged offence, including the right to silence;  (f) whether the child consents to receiving a youth warning.   * A police officer who gives a youth warning to a child may notify a parent of the child of the giving of the warning but must not do so if of the opinion that notifying the parent would pose an unacceptable risk to the safety or wellbeing of the child: **s.100**. A police officer must make a record of any youth warnings given: **s.101**.   **YJA ss.102-115: Youth cautions**   * A police caution is a significantly more formal process than a police warning. * A police officer may give a youth caution to a child for one or more alleged offences if satisfied there is sufficient evidence to charge the child with the alleged offence(s): **s.103**. The caution may be given by a cautioning police officer or a person requested by a cautioning police officer and consented to by the child [including an Elder of an Aboriginal child’s community or a respected member of a cultural or religious community with which the child identifies] to give a youth caution in accordance with **s.108**. The caution must be given as soon as reasonably practicable after the commission of the alleged offence and may be given after a criminal proceeding has been commenced against the child for that offence: **s.107**. The persons who must and may attend the giving of a caution are detailed in **s.109**. The caution may be given at any place that ensures the safety of all persons attending the giving of the caution: **s.112**. It must be in writing containing the matters set out in **s.113** and must be signed by the child in the presence of the persons referred to in **s.109** who attend the giving of the caution to the child. * **YJA s.104(2)** provides that the matters set out in paragraphs (a)-(e) of **s.96** which do not affect a child’s eligibility to be given a youth warning also apply to the giving of a youth caution. However, **s.104(1)** provides that a youth caution must not be given to a child unless the child consents after an explanation has been given to the child under **s.105**. The explanation must be given in the presence of a person chosen by the child (who may be a parent, a legal representative, an appropriate support person or an independent person) if it is reasonably practicable for that person to be present. A child may withdraw consent and request that the matter be dealt with by a court: **s.106**. * A cautioning police officer who gives or attends the giving of a youth caution to a child may notify a parent of the child of the giving of the caution but must not do so if of the opinion that notifying the parent would pose an unacceptable risk to the safety or wellbeing of the child: **s.114**.   **YJA ss.116-138 + 161-166: Early diversion group conferences**   * An early diversion group conference is a much more formal process than a police warning or a police caution. * A referral to an EDGC may be made by a police officer **ss.116-135** or by the Children’s Court **ss.161-166**. * A child may only be referred by a **police officer** to an EDGC if— * the police officer is satisfied that there is sufficient evidence to charge the child with one or more alleged offences and either taking no action or giving a police warning or a police caution are clearly inappropriate in the circumstances [**s.117(1)**]; and * at the time of the alleged offending the child was— * under 14 years of age; or * if 14 years of age or older, the alleged offending does not include the commission of an indictable offence and the child has not previously been charged with an offence allegedly occurring when the child was 14 years of age or over **[s.117(2)**; and * there is a suitable approved service provider to conduct the EDGC [**s.118(1)(a)**]; and * the child does not deny the alleged offending and consents to the referral [**ss.118(1)(b)-(c)**]; and * the alleged offence is not one specified in **s.118(2)** [**s.118(1)(d)**]. * A child may only be referred by the **Children’s Court** to an EDGC if— * before hearing and determining a charge against the child for an alleged offence the Court determines it is in the interests of justice to make the referral and the child consents [**s.161(1)**]; and * the Court has considered any submissions made in respect of the proposed referral by the prosecution and if reasonably practicable the views of any victim [**s.161(2)**]; and * the alleged offence is not one specified in **s.118(2)** [**s.161(4)**]; and * there is a suitable approved service provider to conduct the EDGC [**s.161(5)**]. * The form of referral by the Children’s Court is set out in **s.163**. * Procedure at an EDGC and EDGC outcomes are detailed at **ss.124-135, 164 + 166**. In particular—   **s.126** provides that an EDGC for a child must not proceed unless the child has legal representation;  **ss.130-131** govern any agreement made by a child in an ED outcome plan and the finalisation of such plan;  **s.132** governs deferral or discontinuation of an EDGC;  **ss.134-135** provide for confidentiality of EDGC proceedings and an ED outcome plan.   * The Children’s Court may take any action in respect of a child for an alleged offence that the Court considers to be appropriate if a convenor of an EDGC notifies the Court under **Part 4.4** that an EDGC is not appropriate or has been discontinued: **s.165**.   **YJA ss.136-138: Aboriginal-led early diversion group conference model**  **YJA s.136** imposes an obligation on the DJCS Secretary to develop an Aboriginal-led EDGC model with the requirements detailed in **s.137** and to approve a person or body to conduct such conferences in accordance with **s.138**.  **YJA ss.139-146: Effect of youth warnings, youth cautions and early diversion group conferences**   * **s.139**: A youth warning, a youth caution and an ED outcome plan must not be recorded on a child’s criminal record or form part of the child’s criminal history or be treated as a finding of guilt. * **s.140**: If a youth warning, youth caution or EDGC is finalised, any charge against the child for the alleged offence(s) must be withdrawn. Subject to **s.141** any proceeding commenced against the child for the alleged offence(s) must be discontinued. Despite s.177(7) of the *Criminal Procedure Act 2009*, no proceeding may be commenced against the child for that offence or for any other offence arising out of substantially the same circumstances. * **s.141**: If a proceeding has been commenced against a child for an alleged offence, leave of the court hearing the proceeding is required to give a youth warning or a youth caution or refer the child to an EDGC for that alleged offence. * **s.142**: Evidence of a youth warning or youth caution or the alleged underlying offending or any related statement or information given by the child is inadmissible as evidence in any criminal or civil proceeding against the child other than with the child’s consent. * **s.143-145**: Subject to certain exceptions, evidence of the listed matters are inadmissible as evidence in any criminal or civil proceeding against a child who has been referred to an EDGC. * **s.146**: Evidence referred to in **ss.142, 143 or 144** is inadmissible in a proceeding against a child to determine whether the presumption that a child who is under 14 years of age cannot commit an offence is rebutted. * **s.166**: The Children’s Court must discharge a child without any finding of guilt for an alleged offence if notified that an ED outcome plan has been finalised for the child and the child has completed the plan to the satisfaction of the Court. If the Court is not satisfied of the extent to which a child has completed the plan **s.166(3)** gives the Court 3 broad options: (1) allow the child additional time; (2) hear and determine the matter as if it had not been referred to an EDGC; (3) take any other action that the Court considers appropriate. | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 5 – COMMENCING A PROCEEDING AGAINST A CHILD**  **CHAPTER 11 – CHILDREN IN POLICE GAOLS OR CUSTODY OF TRANSFER OFFICER** | | | | | | | | | | | | | | | | | | | | |
| **YJA s147** | | | | **Only very minor changes have been made to the procedure formerly in CYFA s.345 for commencing a proceeding against a child.** | | | | | | | | | | | | | | | | |
| **CYFA**  **s.345** | | | | * **Sections 147(1) + 147(2)** provide that there is **a presumption in favour of proceeding by summons** if an accused is a child unless it would be clearly inappropriate to do so. * **Section 147(3)** lists 5 factors to which a charging police officer must have regard in deciding whether it would be clearly inappropriate to proceed by summons. * **Section 147(4)** prohibits a registrar from issuing a warrant to arrest in the first instance on the filing of a charge-sheet against a child unless satisfied by sworn or affirmed evidence that the circumstances are exceptional. | | | | | | | | | | | | | | | | |
| **YJA**  **ss.148-153** | | | | There have been no substantive changes to—   * time limits for commencing a proceeding against a child for a summary offence [**ss.148‑149**]; * provisions relating to an application by an informant for extension of time to commence a proceeding against a child for a summary offence [**ss.150‑151**]; and * provisions in relation to a rehearing of an extension of time application which has been heard and determined in the absence of the child [**ss.152-153**]. | | | | | | | | | | | | | | | | |
| **CYFA ss. 344A-344D** | | | |
| **YJA**  **ss.154-155**  **ss.567-591** | | | | **No substantive changes have been made to the procedure formerly in CYFA s.346 in relation to bringing a child in custody before the Children’s Court or a bail justice.**  **YJA s.154** provides—   1. Subject to this section, Subdivision (30A) of Division 1 of Part III of the ***Crimes Act 1958*** [**ss.464-464ZS**] applies to the custody and investigation of a child. 2. Within a reasonable time of being taken into custody, but not later than 24 hours, a child must be— 3. released unconditionally; or 4. released on bail in accordance with the ***Bail Act 1977***; or 5. brought before the Children’s Court; or 6. if the Children’s Court is not sitting at any convenient venue, brought before a bail justice. | | | | | | | | | | | | | | | | |
| **CYFA**  **ss.346-347A** | | | |
|  | | | | 1. Subsection (2) does not apply if bail may only be granted to a child by a court, in which case the child must be brought before the Children’s Court as soon as practicable and— 2. no later than the next working day after being taken into custody; or 3. if the proper venue of the Children’s Court is in a prescribed region of the State, within 2 working days after being taken into custody. 4. The ***Bail Act 1977*** applies to an application for bail by a child to the extent that it is not inconsistent with this section.   **The procedure formerly in CYFA ss.347(1), 347(1A) + 347A(1) relating to placement of a child in custody has been significantly amended.**   * **YJA ss.155(1) + (2)** provide that a child who is remanded in custody by a court or bail justice must be placed in a youth justice custodial centre [YJCC] unless— * the period of remand is not more than 2 working days and the proper venue of the court is in a prescribed region of the State; or * the child is temporarily held or detained in a police gaol for no more than 2 working days for the purposes of facilitating the transportation of the child to or from a court or a YJCC. * **YJA s.155(3)** makes a similar provision in relation to a child to whom bail may be granted only by a court and who is detained in custody pending being brought before the ChCV. | | | | | | | | | | | | | | | | |
| **The stipulations formerly in CYFA ss.347(2) + 347A(2) relating to the rights of children in police gaols or custody of transfer officer have been hugely expanded in Chapter 11.** | | | | | | | | | | | | | | | | |
| * **Part 11.1 – Rights of children in police gaols** * **Section 567**: **Rights of children in police gaols** * **Section 568**: **Chief Commissioner to ensure rights are complied with** * **Section 569**: **Right in police gaol – separate accommodation** * **Section 570**: **Right in police gaol – communication** * **Section 571**: **Right in police gaol – individual needs and environment** * **Section 572**: **Right in police gaol – making complaints** * **Section 573**: **Right in police gaol – being informed** * **Part 11.2 – Children detained in police gaols or in custody of transfer officer** * **Division 1, ss.574-576**: **Application of this Part** * **Division 2, s.577**: **Prohibited actions** * **Division 3, ss.578-580**: **Use of force** * **Division 4, ss.581-587**: **Unclothed searches** * **Division 5, ss.588-591**: **General requirements of use of force** | | | | | | | | | | | | | | | | |
| **CHAPTER 6, PART 6.1, DIVISIONS 1 + 2 – CONDUCT OF PROCEEDINGS GENERALLY** | | | | | | | | | | | | | | | | | | | | |
| **YJA**  **ss.156-159** | | | | **A substantial simplification has been made to the procedure formerly in CYFA s.356 for indictable offences. In particular the stipulations involving Category A & Category B serious youth offences have been removed.** | | | | | | | | | | | | | | | | |
| **CYFA s.356** | | | |
| **YJA ss.156-157: How Children’s Court must deal with indictable offences**   * The Children’s Court must hear and determine a charge for an indictable offence summarily unless—   (a) the charge is for one of the 7 death offences: murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death or culpable driving causing death; or  (b) before the hearing of evidence, the child (or the child’s parent if the child is under 15 and is not legally represented) objects to the charge being heard and determined summarily; or   1. at any stage the Court determines that the charge is unsuitable by reason of exceptional circumstances to be heard and determined summarily; or   (d) the child is committed for trial for a related offence and the Court determines that there is no substantial and compelling reason to hear and determine the charge summarily.   * The Children’s Court must conduct a committal proceeding into a charge for an indictable offence if the charge will not be heard and determined summarily. * The Children’s Court must hear and determine a charge for an indictable offence summarily if the charge has been transferred to the Court under **s.168** of the ***Criminal Procedure Act 2009***.   **YJA s.158: Indictable offences to be uplifted if exceptional circumstances exist**   * **YJA ss.158(1) + (2)**: The Children’s Court must not hear and determine summarily a charge against a child for an indictable offence if the Court determines at any stage that the charge is unsuitable by reason of **exceptional circumstances** to be heard and determined summarily. Without limiting this, exceptional circumstances exist if the Children’s Court considers that the sentencing options under the **YJA** are inadequate to respond to the child’s alleged offending. * **YJA s.158(3)**: In determining whether the sentencing options under the **YJA** are adequate, the Court must have regard to— * the nature of the offence and the seriousness of the conduct; including the impact on any victims and the role of the accused; * the age, maturity and stage of development of the child, and any disability or mental illness of the child at the time of the alleged offending and the time of sentencing; | | | | | | | | | | | | | | | | | | | | |
| * the seriousness, nature and number of any prior offences committed by the child; * whether the alleged offence was committed while the child was in youth justice custody, on parole or in contravention of an order made under the **YJA**; * any other matter the Court considers relevant. * **YJA s.158(4)**: **The Children’s Court must give reasons for a determination that a charge is unsuitable by reason of exceptional circumstances to be determined summarily.**   **YJA s.159: Transfer of indictable offences that is related to uplifted indictable offence**  Unless there is a substantial and compelling reason, the ChCV must not hear and determine summarily a charge against a child for an indictable offence if the child is committed for trial in respect of a related indictable offence. A related offence is one that is founded on the same facts or is an offence of the same or similar character. | | | | | | | | | | | | | | | | | | | | |
| **YJA**  **s.160** | | | | **Transfer of proceeding from Magistrates’ Court to Children’s Court**  **Section 160** provides that the Magistrates’ Court must discontinue a criminal proceeding and order that it be transferred to the Children’s Court if at any stage in the proceeding the Magistrates’ Court is satisfied that the accused is a child or was a child when the proceeding was commenced. The accused bears the burden of proof and the standard of proof is the balance of probabilities. Until the proceeding is heard by the ChCV, the Magistrates’ Court may permit the accused to go at large, grant the accused bail or remand the accused in a YJCC. | | | | | | | | | | | | | | | | |
| **CYFA**  **s.585** | | | |
| **YJA**  **NONE** | | | | **Transfer of proceeding from Children’s Court to Magistrates’ Court**   * **CYFA s.516(4)** provides an unchanged mechanism (in similar but reverse terms to **YJA s.160**) requiring the Children’s Court to transfer a proceeding to the Magistrates’ Court if before or during the hearing it appears to the ChCV that the accused did not fit within the definition of ‘child’ in the **YJA**. * **CYFA ss.516(5) + 516(6)** continue to provide an unchanged discretion for the Children’s Court to either hear or in exceptional circumstances to transfer to the Magistrates’ Court a proceeding in which the accused was a child when the proceeding for the offence was commenced but is now aged 19 or above. * It is not entirely clear why **CYFA ss.516 & 516A** were not moved to the **YJA**. | | | | | | | | | | | | | | | | |
| **CYFA**  **s.516(4)-(6)** | | | |
| **CHAPTER 6, PART 6.1, DIVISIONS 4 + 5 – CONDUCT OF A PROCEEDING** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.167‑180** | | | | **YJA ss.167-177 re-enact with minor modifications provisions in the CYFA which remain (unless shown in red) in the CYFA in a slightly modified form for Family Division proceedings. YJA ss.178-180 are new provisions.** | | | | | | | | | | | | | | | | |
| **s.167**  **s.168**  **s.169**  **s.170**  **s.171**  **s.172**  **s.173**  **s.174**  **s.175**  **s.176**  **s.177** | | | | **Procedural guidelines to be followed by the Children’s Court** | | | **CYFA s.522(1)** | | | | | | | | | | | | | |
| **Children’s Court to be constituted by the same judicial officer where practicable** | | | **CYFA ss.522A, 366(3)-(4), 371(3)-(4), 384(3),392(3), 408(7), 409L(7) + 409Q(5)** | | | | | | | | | | | | | |
| **Children’s Court proceedings to be heard in open court** | | | **CYFA s.523** | | | | | | | | | | | | | |
| **Legal representation of child in proceeding** | | | **CYFA ss.524(1)-(3) +(10)** | | | | | | | | | | | | | |
| **Children’s Court criminal proceedings in which child is required to be legally represented** | | | **CYFA ss.524(2) + (3) and 525(2)** | | | | | | | | | | | | | |
| **Legal practitioner may represent multiple children with leave** | | | **CYFA ss.524(5)-(7)** | | | | | | | | | | | | | |
| **Interpreter in proceeding** | | | **CYFA s.526** | | | | | | | | | | | | | |
| **Explanation for order** | | | **CYFA ss.527(1)-(2) + (10)-(11)** | | | | | | | | | | | | | |
| **Order and reasons for order to be provided to specified persons** | | | **CYFA ss.527(3)-(4) + (10)** | | | | | | | | | | | | | |
| **Translation of documents** | | | **CYFA ss.527(7)-(9)** | | | | | | | | | | | | | |
| **Order not invalidated by failure to comply with YJA ss.174-176** | | | **CYFA s.527(12)** | | | | | | | | | | | | | |
| **s.178** | | | | **Application under the YJA by a child under 15 years of age may be made by parent** | | | | | | | | | | | | | | | | |
| **s.179** | | | | **Service of notice of application or hearing on child under 15 effected by service on parent** | | | | | | | | | | | | | | | | |
| **s.180** | | | | **Provisions relating to warrants to arrest issued by a court under the YJA** | | | | | | | | | | | | | | | | |
| **CHAPTER 6, PART 6.2 – REFERRAL FOR INVESTIGATION BY DFFH UNDER CYFA** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.181‑190** | | | | **These provisions re-enact with minor modifications and replace provisions in the CYFA**—   * empowering the Children’s Court to make a referral to the DFFH Secretary for investigation if the Court considers there is prima evidence that grounds exist for the making of a protection application or an application for a therapeutic treatment order in respect of a child who appears as an accused in a criminal proceeding in the Court; * requiring the DFFH Secretary to report on the outcome of the investigation; * requiring the Court to **adjourn** a related criminal proceeding if a TTO is made or if the child participates voluntarily in a therapeutic treatment program; and * requiring the Court to discharge the child without further hearing of the criminal proceeding if satisfied that the child has attended and participated in the therapeutic treatment program. | | | | | | | | | | | | | | | | |
| **CYFA**  **ss.349-355** | | | |
| **CHAPTER 6, PART 6.3 – DIVERSION** | | | | | | | | | | | | | | | | | | | | |
| **YJA**  **ss.191-200** | | | | **These provisions re-enact with several modifications and replace provisions in CYFA ss.356B-356K but except as noted below they do not significantly alter the content.**  The modifications are—   * In **s.193** the period of adjournment for participation in and completion of a diversion program is described as a period of from less than one day to a period not exceeding 4 months.   **The above stipulation removes any doubt about whether a diversion program completed on the initial court day is valid.**   * The Court may adjourn the proceeding on its own motion but must not adjourn the proceeding for the purpose of the child completing a diversion program unless both the prosecutor and the child consent: see **ss.193(5), 194 + 195**. * In **s.194** the pre-condition in **s.356E CYFA** that “the child acknowledges to the Court responsibility for the offence” has been changed to “**does not deny responsibility for the alleged offence**”. * The contents of **CYFA** **s.407(3)** have been included in the statutory text of **s.199**. | | | | | | | | | | | | | | | | |
| **CYFA ss. 356B-356K**  **+ 407(3)** | | | |
| **CHAPTER 6, PART 6.4 – STANDARD OF PROOF** | | | | | | | | | | | | | | | | | | | | |
| **YJA**  **s.201** | | | | **This provision is unchanged apart from an added note referring to Evidence Act s.141.**   1. On the summary hearing of a charge for an offence, whether indictable or summary, the Children’s Court must be satisfied of a child’s guilt on proof beyond reasonable doubt by relevant and admissible evidence. 2. If the Court is not satisfied in accordance with subsection (1), it must dismiss the charge. | | | | | | | | | | | | | | | | |
| **CYFA s.357** | | | |
| **CHAPTER 7 – SENTENCING** | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.1 – SENTENCING PRINCIPLES** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.202‑210** | | | | **These are largely new provisions which set out the sentencing principles to which a court must have regard when sentencing a child for an offence. The Explanatory Memorandum states: “These principles do not displace the need for the Court still to undertake its instinctive synthesis when determining which sentence to impose, being the fundamental common law approach to sentencing.”** | | | | | | | | | | | | | | | | |
| **CYFA s.362(1)** | | | |
| **YJA s.202: Court must have regard to sentencing principles and general common law principles or rules in sentencing a child**   1. In sentencing a child for an offence, a court, as far as is reasonably practicable and appropriate in the circumstances, must have regard to—   (a) the sentencing principles, to the extent that each principle is relevant; and  (b) subject to subsections (2) and (3), the general common law principles or rules applicable to the sentencing of children.  **Note**: **A court is not to take into account the guiding youth justice principles in sentencing a child – see YJA s.17(2).**   1. In the event of inconsistency between any of the sentencing principles and the general common law principles or rules applicable to the sentencing of children, the sentencing principles take precedence to the extent of the inconsistency. 2. The common law principle of general deterrence does not apply to the sentencing of a child under the **YJA**.   **The sentencing principles are:**  **YJA s.203: Sentencing principle – rehabilitation and positive development**  A sentence imposed on a child should give the highest priority to the rehabilitation and positive development of the child, including by—  (a) preserving and strengthening the child's relationship with the child's parents, family and persons of significance in the child's life; and  (b) supporting the child to live at home, or in safe, stable and secure living arrangements in the community; and  (c) promoting the social and emotional wellbeing of the child through responses that—  (i) develop the child's strengths; and  (ii) address any underlying issues that may contribute to the child's offending behaviour; and  (d) promoting the child's access to and participation in education, training or work, and allowing education, training or work to continue with minimal interruption or disturbance; and   1. promoting the participation of the child in other activities that will support the child's positive development, including community, recreation and sport, music, and artistic activities; and   (f) minimising any stigma resulting from the sentence; and  (g) recognising that children often have limited control over their environment and having regard to the important role that public service bodies, public entities, Victoria Police, non-government organisations and the community can fulfil to collaboratively support the child's successful completion of the sentence.  **YJA s.204: Sentencing principle – protection of the community from reoffending**  A sentence imposed on a child should protect the community from any further offending by the child, noting that efforts to support rehabilitation and positive development are the most effective ways to reduce reoffending. | | | | | | | | | | | | | | | | | | | | |
| **YJA s.205: Sentencing principle – individual characteristics and vulnerabilities**  A sentence imposed on a child should—  (a) be tailored to the individual characteristics of the child, such as the following—  (i) age, maturity and stage of development;  (ii) gender or gender identity;  (iii) sexual orientation;  (iv) Aboriginal identity;  (v) cultural, racial or other identity and sense of belonging;  (vi) religion;  (vii) disability and associated support needs;  (viii) mental health and other health needs;  (ix) any other relevant characteristics; and  (b) recognise the vulnerabilities and strengths of the child, having regard to—  (i) the individual characteristics of the child, including any interrelationship of those characteristics; and  (ii) any relevant experiences including abuse, trauma, neglect, loss, family violence or child protection involvement, including removal from family or placement in out of home care.  **YJA s.206: Sentencing principle – responsibility for action**  A sentence imposed on a child should ensure that the child is aware that they must bear a responsibility for any action they take which is against the law.  **YJA s.207: Sentencing principle – impact on victims**  A sentence imposed on a child should—  (a) recognise the impact of the child’s offending on any victim of that offending; and  (b) provide opportunities for the child to restore any harm caused by their offending; and  (c) take into account any steps the child has taken to restore such harm, to the extent that the child has the capacity to do so.  **YJA s.208: Sentencing principle – minimum intervention**  A sentence imposed on a child should be the minimum intervention required in the circumstances, with a custodial sentence imposed as a last resort and for the minimum period appropriate and necessary.  **YJA s.209: Sentencing principle – deterrence from committing offences in YJCC**  A sentence imposed on a child should deter the child from committing offences while held in custody in a youth justice custodial centre, if relevant.  **YJA s.210: Additional sentencing principles for Aboriginal children**  In addition to the other sentencing principles, a sentence imposed on an Aboriginal child should—  (a) support the social and emotional wellbeing of the child; and  (b) promote the healing of the child; and  (c) strengthen the child’s connection to family, kin, community, culture, Country and Elders; and  (d) support the right of Aboriginal persons to self-determination by—  (i) providing the child with an opportunity to express their views; and  (ii) promoting the participation of the child and family, kin and Elders in the sentencing process; and  (e) pay particular attention to the history, culture and circumstances of the child; and  (f) recognise that discriminatory systemic institutional and historical factors have resulted in Aboriginal children being over-represented in the criminal justice system, particularly in custody; and  (g) reflect the need to reduce inequality and resultant over-representation of Aboriginal children in the criminal justice system.  **Note**: **Section 325(3)(e)** requires the Children’s Court to provide reasons outlining how it has had regard to the sentencing principles in this section if the Court imposes a custodial sentence on an Aboriginal child. | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.2 – REPORTS AND OTHER MATTERS TO BE TAKEN INTO ACCOUNT IN CONSIDERING SENTENCE** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.211‑221** | | | | **These provisions mostly re-enact with modifications repealed provisions in the CYFA (which are shown in red) or non-repealed provisions in the *Sentencing Act 1991* [SA].** | | | | | | | | | | | | | | | | |
| **s.211** | | | | **Children’s Ct may only consider certain reports (as to which see also YJA Chapter 9, Part 9.2) and other matters** | | | **CYFA s.358** | | | | | | | | | | | | | |
| In determining what sentence to impose on a child for an offence, the Children’s Court may take into account only the following—   1. any pre-sentence report [PSR] and any supplementary PSR in respect of the child and the evidence, if any, of its author; 2. any pre-sentence group conference report in respect of the child and the evidence, if any, of the group conference convenor; 3. any youth justice planning meeting report in respect of the child; 4. any report, submission or evidence given, made or tendered by or on behalf of the child; 5. any offences of which the child has been found guilty before the commission of the offence under consideration; 6. any submission on sentencing made by the informant, prosecutor or person appearing on behalf of the Crown; 7. any victim impact statement including a report attached to it under **YJA s.212**; | | | | | | | | | | | | | | | | | | | | |
| 1. any submission under **YJA s.221** on the unique systemic and background factors affecting the child; 2. any specialist assessment report in respect of the child; 3. any progress report in respect of the child under **YJA Part 9.2, Division 9**; 4. any information provided to the Court by the DFFH Secretary or an Aboriginal agency under **YJA Part 9.1**. | | | | | | | | | | | | | | | | | | | | |
| **s.212** | | | | **Victim impact statements** | | | **CYFA ss.359(1)-(4A)** | | | | | | | | | | | | | |
| **s.213** | | | | **Medical report may be attached to victim impact statement** | | | **SA s.8M** | | | | | | | | | | | | | |
| **s.214** | | | | **Use by the Court of a victim impact statement** | | | **SA ss.8L(3)-(6)** | | | | | | | | | | | | | |
| **s.215** | | | | **Distribution of victim impact statement** | | | **SA s.8N** | | | | | | | | | | | | | |
| **s.216** | | | | **Examination of victim or medical report** | | | **CYFA ss.359(7)+(8)** | | | | | | | | | | | | | |
| **s.217** | | | | **Victim may call a witness to give evidence** | | | **CYFA ss.359(9)+(10)** | | | | | | | | | | | | | |
| **ss.218-219** | | | | **Reading aloud of victim impact statement** | | | **CYFA 359(12), (12A), (12B) + (13), 359A** | | | | | | | | | | | | | |
| **s.220** | | | | **Alternative arrangements for examination under YJA ss.216-217** | | | **CYFA s.359B** | | | | | | | | | | | | | |
| **s.221** | | | | **Submission in respect of unique and systemic background factors affecting child** | | | **CYFA NONE** | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.3 – DEFERRAL OF SENTENCING** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.222‑227** | | | | **These provisions mostly re-enact with some modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | | | |
| **s.222** | | | | **Children’s Court may defer sentencing** | | **CYFA ss.414(1) + 415(1)** | | | | | | | | | | | | | | |
| (1) The Children’s Court may defer sentencing a child found guilty of an offence if—  (a) the Court is of the opinion that in the interests of the child sentencing should be deferred; and  (b) the deferral is for one or more of the reasons set out in subsection (2); and  (c) the child consents to the deferral of sentencing.  (2) Sentencing may be deferred for one or more of the following reasons—  (a) to allow the child to demonstrate positive development or rehabilitation;  (b) to allow the child to participate in activities or programs that support the child’s positive development or rehabilitation, including through supervision by the Secretary;  (c) to allow the child to participate in a youth justice planning meeting [YJPM] if the Children’s Court is considering making a youth supervision and support order [YSO] or a youth control order [YCO];  (d) to allow the child to participate in a pre-sentence group conference [PSGC] if the Children’s Court is considering making a community service order, probation order, YSO, YCO or youth justice custodial order [YJC] and—  (i) the Court is of the opinion, after consultation with the DJCS Secretary, that the child is suitable to participate in the conference; and  (ii) the child consents to participate in the conference.  (3) If the Children’s Court defers sentencing, it must advise the child that when the Court later sentences the child, the Court must have regard to—  (a) the child’s behaviour during the period of adjournment; and  (b) any applicable matters set out in **YJA ss.227(4)(b), (c), (d) or (e)** and advise the child of those matters.  (4) The Children’s Court must not defer sentencing for the sole purpose of obtaining a pre-sentence report or any other report.  (5) However, if the Children’s Court has deferred sentencing, nothing in this section prevents the Court ordering a pre-sentence report in accordance with **YJA Part 9.2, Division 3**. | | | | | | | | | | | | | | | | | | | | |
| **s.223** | | | | **Pre-sentence group conference or youth justice planning meeting is to be held if sentencing is deferred for either of these reasons** | | | **CYFA NONE** | | | | | | | | | | | | | |
| **s.224** | | | | **Adjourned deferred sentence and period of deferral** | | | **CYFA ss.414(2)-(5)** | | | | | | | | | | | | | |
| (1) Subject to subsection (2), if the Children’s Court defers sentencing a child under **section 222**, the Court must adjourn the case to a fixed date for sentence and release the child—  (a) unconditionally; or  (b) on bail in accordance with the ***Bail Act 1977***.  (2) If the Children’s Court is considering making a YJC order and the deferral of sentence is to allow the child to participate in a PSGC, the Court must adjourn the case to a fixed date for sentence and—  (a) release the child unconditionally; or  (b) release the child on bail in accordance with the ***Bail Act 1977***; or  (c) remand the child in custody for a period not exceeding 21 clear days.  (3) The period for which sentencing may be deferred is—  (a) if the child is remanded in custody under subsection (2)(c), a period not exceeding 2 months; or  (b) otherwise, a period not exceeding 4 months.  (4) If a child is brought before the Children’s Court on the expiry of a period of remand ordered under subsection (2)(c), the Court must not remand the child in custody for a further period exceeding 21 clear days.  (5) Bail must not be refused to a child on the sole ground that a child does not have any, or any adequate, accommodation. | | | | | | | | | | | | | | | | | | | | |
| **s.225** | | | | **Application by child for hearing of adjourned case at short notice** | | | | | | | **CYFA ss.416(1)-(2)** | | | | | | | | | |
| **s.226** | | | | **Court may re-list adjourned case at short notice on own motion** | | | | | | | **CYFA s.416(4)** | | | | | | | | | |
| **s.227** | | | | **Hearing of adjourned case** | | | | | | | **CYFA s.416(3)+(5)** | | | | | | | | | |
| (1) On hearing an adjourned case on the date fixed for sentence under **YJA s.224**, the Children’s Court must sentence the child.  (2) On hearing an adjourned case under **YJA ss.225 or 226**, the Children’s Court may—  (a) sentence the child; or  (b) further adjourn the case to a date fixed for sentence and exercise any of the powers under **ss.224(1) or 224(2)** (as the case requires).  (3) If the Children’s Court further defers sentencing the child under subsection (2), the total period of all deferrals of the sentencing must not exceed 2 months.  (4) In determining what sentence to impose on the child, the Children’s Court must have regard to—  (a) the child’s behaviour during the period of deferral; and  (b) any pre-sentence report ordered under **YJA Part 9.2, Division 3**; and  (c) if the child participated in a PSGC, the fact of that participation and the PSGC report; and  (d) if the child participated in a YJPM, the fact of that participation and the YJPM report; and  (e) any other matter the Court considers relevant.  (5) If the child does not appear before the Children’s Court on the date fixed for sentence or for the hearing of the adjourned case, a magistrate constituting the Court may issue a warrant to arrest the child. | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.4 – PRE-SENTENCE GROUP CONFERENCES** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.228‑234** | | | | **These provisions mostly re-enact with some modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | | | |
| **s.228** | | | | **Objects of a PSGC** | | | **CYFA s.415(4)** | | | | | | | | | | | | | |
| **s.229** | | | | **Date and time of PSGC** | | | **CYFA s.415(3)** | | | | | | | | | | | | | |
| **s.230** | | | | **Persons who must or may attend a PSGC** | | | **CYFA ss.415(6)-(7)** | | | | | | | | | | | | | |
| **s.231** | | | | **Pre-sentence outcome plan** | | | **CYFA s.415(5)** | | | | | | | | | | | | | |
| **s.232** | | | | **Report of PSGC** | | | **CYFA s.415(8)** | | | | | | | | | | | | | |
| **s.233** | | | | **Confidentiality of information given or statement made at PSGC** | | | **CYFA ss.415(9)-(11)** | | | | | | | | | | | | | |
| **s.234** | | | | **Confidentiality of pre-sentence outcome plan** | | | **CYFA NONE** | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.5 – SENTENCE DISCOUNT AND TOTAL SENTENCES** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.235‑239** | | | | | **These provisions mostly re-enact with some modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | | |
| **s.235** | | | | **Sentence discount for undertaking to assist law enforcement authorities** | | | **CYFA ss.362(5)-(6)** | | | | | | | | | | | | | |
| **s.236** | | | | **Sentence discount for assistance given or being given to law enforcement authorities** | | | **CYFA NONE** | | | | | | | | | | | | | |
| **The Explanatory Memorandum says of this new s.236: “The purpose of including this clause in addition to s.235 is to avoid a child’s current and past cooperation being conflated with any undertaking to assist in the future.”** | | | | | | | | | | | | | | | | | | | | |
| **s.237** | | | | **Sentence discount for guilty plea** | | | **CYFA s.362A** | | | | | | | | | | | | | |
| **The Explanatory Memorandum says of s.237: “This clause removes the requirement of the Court to state the discount in respect of each offence and instead requires the Court to state the overall sentence it would have imposed but for the plea of guilty, which then may apply to aggregate sentences.”** | | | | | | | | | | | | | | | | | | | | |
| **s.238** | | | | **Sentence discount for attending pre-sentence group conference** | | | | | | | **CYFA ss.362(3)-(4)** | | | | | | | | | |
| **s.239** | | | | **Failure to attend youth justice planning meeting [YJPM]** | | | | | | | **CYFA NONE** | | | | | | | | | |
| **The Explanatory Memorandum says of ss.238 + 239 that they prohibit the Court from imposing a more severe sentence on a child who has failed to attend a PSGC or a YJPM where sentencing was deferred under s.222 for the purpose of the child’s participation in the PSGC or YJPM.** | | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.6 – SENTENCING GENERALLY** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.240‑241** | | | | **These provisions mostly re-enact with some modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | | | |
| **s.240** | | | | **Hierarchy of options for sentencing** | | | **CYFA ss.360-361** | | | | | | | | | | | | | |
| 1. In sentencing a child for an indictable offence or a summary offence, the Children's Court may—   (a) **dismiss the charge without a formal warning** under **s.243**; or  (b) if satisfied that paragraph (a) is inappropriate, **dismiss the charge with a formal warning [DIW]** under **s.244**; or  (c) if satisfied that paragraph (b) is inappropriate, impose a **fine [FIN]** or make a **good behaviour order [GBO]**; or  (d) if satisfied that paragraph (c) is inappropriate, make a **community service order [CSO]**; or  (e) if satisfied that paragraph (d) is inappropriate, make a **probation order [PRO]**; or   1. if satisfied that paragraph (e) is inappropriate, make a **youth supervision and support order [YSO]**; | | | | | | | | | | | | | | | | | | | | |
| 1. if satisfied that paragraph (f) is inappropriate, make a **youth control order [YCO]**; or   (h) if satisfied that paragraph (g) is inappropriate, make a **youth justice custodial order [YJC]**.  **Note**   1. If the Children's Court is of the opinion that sentencing should be deferred, the Court may defer sentencing under **s.222**. 2. **Section 324** prevents the Children's Court from imposing a sentence of detention on a child who was under 14 years of age at the time of the offending unless the offence is a Category A serious youth offence, a Category B serious youth offence or any other offence the Court considers to be a serious and violent offence and the Court is reasonably satisfied that the child presents a serious risk to community safety. 3. The sentences of a **fine** and a **good behaviour order** are at the same level and either of those sentences may be imposed on a child without the Children’s Court considering whether the other is inappropriate.   (3) In addition to any sentence referred to in subsection (1), the Children’s Court may order a child—  (a) to make restitution or pay compensation in accordance with **s.329**; or  (b) to pay costs.  (4) The Children’s Court must not make an order referred to in subsection (3) a special condition of another sentence.  (5) If under any Act other than this Act a court is authorised on conviction for an offence—  (a) to make an order with respect to any property or thing the subject of or in any way connected with the offence; or  (b) to impose any disqualification or like penalty on the person convicted—  the Children’s Court, if it finds a child guilty of that offence, may make any such order or impose any such disqualification or penalty despite the child not being convicted of the offence.  (6) The Children’s Court must not pass a sentence that imposes any condition or requirement on a person or body that is not a party to a proceeding, unless the Court is satisfied that the person or body consents to the condition or requirement. | | | | | | | | | | | | | | | | | | | | |
| **The Explanatory Memorandum says: “The purpose of this sentencing hierarchy is to prevent the Court from imposing a more severe sentence on a child when a lower sentence in the hierarchy is appropriate, and also to ensure that detention of a child is only used as a last resort.” The EM also notes that the following sentence options which were available under the CYFA are no longer available under the YJA:**   * **Dismissal with a non-accountable undertaking [CYFA ss.363-364];** * **Accountable undertaking [CYFA ss.365-366];** * **Youth attendance order [CYFA ss.396-409]; and** * **Youth residential centre order [CYFA ss.410-411].**   **However, transitional provisions in Chapter 21 keep some CYFA sentencing orders alive until they expire.** | | | | | | | | | | | | | | | | | | | | |
| **s.241** | | | | **Supreme or County Cts may exercise sentencing powers of ChCV** | | | | | | | | **CYFA s.586** | | | | | | | |
| **CHAPTER 7, PT 7.7 – UNSUPERVISED COMMUNITY-BASED SENTENCING ORDERS** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.242‑261** | | | | **These provisions mostly re-enact with some modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | | | |
| **s.242**  **s.243**  **s.244**  **ss.245-246**  **s.247**  **s.248**  **s.249(1)** | | | | **A conviction is not to be recorded when making an unsupervised order, namely dismissal without a formal warning, dismissal with a formal warning, a good behaviour order or a fine.** | | | | | | | | **COMPONENTS OF**  **CYFA ss.360(1)(a), 367(1) + 373** | | | | | | | |
| **Dismissal without formal warning in appropriate circumstances** | | | | | | | | **CYFA s.360(1)(a)** | | | | | | | |
| **Dismissal with formal warning about the potential consequences of further offending** | | | | | | | | **CYFA NONE** | | | | | | | |
| **Good behaviour order [GBO]** | | | | | | | | **CYFA ss.367-370** | | | | | | | |
| * If the Children’s Court finds a child guilty of one or more offences, whether indictable or summary, the Court may order that the child be of good behaviour by not re-offending for a certain period. * The Court must not make a GBO unless the child consents. * The core condition of a GBO is that the child must not reoffend during the period of the order. * The Court may attach one or more developmental conditions [see **s.296 YJA**] to a GBO. * The maximum period of a GBO must not extend beyond a child’s 21st birthday and must not exceed–  1. if the child is under 15 years of age on the day of sentencing, 6 months or 12 months in exceptional circumstances; or 2. if the child is 15 years or age or over on the day of sentencing, 12 months or 18 months in exceptional circumstances. | | | | | | | | | | | | | | | | |
| **Fine [FIN]** | | | **CYFA ss.373-379** | | | | | | | | | | | | | |
| * If the Children’s Court finds a child guilty of one or more offences, whether indictable or summary, the Court may make an order imposing a fine on the child.   **YJA s.249(1)** **uses the term “guilty of one or more offences” in contradistinction to CYFA s.373 which used the term “guilty of an offence”. While s.373 – though ambiguous – has generally been read as preventing a single fine being imposed on multiple offences, it is clear that YJA s.249(1) will allow a single fine to be imposed on multiple offences.** | | | | | | | | | | | | | | | | |
| **s.249(2)**  **s.251**  **s.252**  **s.253**  **s.254**  **ss.255-256**  **ss.257-261** | | | | * The Children’s Court must not impose a fine on a child unless the child is 15 years of age or over on the day of sentencing and the Court is satisfied that the child has the means and capacity to pay a fine. * In determining the amount of a fine and the method of payment the Court must take into account the financial circumstances of the child and the nature of the burden that its payment will impose. * A fine must not exceed–  1. if it is imposed in respect of a single offence, 5 penalty units or the maximum fine which may be imposed on an adult for the same offence, whichever is the lower amount; or 2. if it is imposed in respect of more than one offence, a total of 10 penalty units.  * If the Children’s Court imposes a fine, it must make an instalment order if the child requests it and in any other case may make an instalment order if it considers it appropriate to do so. * If the Court does not make an instalment order, the Court may make a time to pay order at the time of imposing the fine. * These provisions govern the making by a child of an application for a time to pay order, an instalment order or variation of an instalment order and ChCV’s power to make such orders. * These provisions govern a default by a child in payment of a fine or instalment order. They add to the 5 options which were previously in **CYFA s.378(1)(a)-(e)** a 6th option in **s.257(2)(f)**: “Make a community service order in accordance with **YJA Part 7.8, Division 2** for a number of hours determined in accordance with **s.258**.” | | | | | | | | | | | | | | | | |
| **CHAPTER 7, PART 7.8 – SUPERVISED COMMUNITY-BASED SENTENCING ORDERS** | | | | | | | | | | | | | | | | | | | | |
| **YJA ss.262‑295** | | | | **These provisions mostly re-enact with modifications repealed provisions in the CYFA. The youth supervision and support order was formerly called a youth supervision order.** | | | | | | | | | | | | | | | | |
| **s.262** | | | | This section applies to the 4 orders specified in **s.262(4)**, namely a **community service order**, a **probation order**, a **youth supervision and support order** or a **youth control order**. | | | **CYFA ss.360(1), 380(1), 387(1) + 409B(1)** | | | | | | | | | | | | | |
| * An order specified in **s.262(4)** must be made without conviction if the child is under 15 years of age on the day of sentencing: **s.262(2)**. * An order specified in **s.262(4)** may be made with or without conviction if the child is 15 years of age or over on the day of sentencing: **s.262(1)**. * In determining whether to record a conviction the Children’s Court must have regard to all the circumstances of the case (including **subparagraphs (i)-(v)**) and ensure, as far as practicable, that the matter of the child’s rehabilitation is given more weight than any other individual matter that is being considered: **s.262(3)**. | | | | | | | | | | | | | | | | | | | | |
|  | | | | **Division 2 – Community service order [CSO]** | | | | | | | **CYFA NONE** | | | | | | | | | | |
| **ss.263-264**  **s.265(1)**  **ss.266-267**  **s.268** | | | * If the Children’s Court finds a child guilty of one of more offences, whether indictable or summary, the Court may order the child to perform a specified number of hours of unpaid community service activities in a 6-month period commencing on the day of sentencing. * The Court must not make a CSO unless the child is 15 years of age or over on the day of sentencing and consents to the CSO being made and the Court is satisfied that there are one or more appropriate community service programs available for the child. * A CSO must not extend beyond the child’s 21st birthday. * The core condition of a CSO is that the child performs community service activities for the number of hours specified in the order at the place and at the dates or times directed by the Secretary. * The maximum number of hours of community service activities ordered under a CSO must not exceed–  1. 25 hours for a single offence; or 2. a total of 50 hours if the child is found guilty on the same day, or in the same proceeding, of more than one offence.  * In determining the number of hours, the Children’s Court must consider the likely impact of the order on the child’s engagement in education, training, employment and rehabilitation activities. * A child does not contravene a CSO if the child does not perform the number of hours ordered under a CSO for the sole or primary reason that there were no appropriate community service activities for the child to perform. | | | | | | | | | | | | | | | | | | |
|  | | | **Division 3 – Probation order [PRO]** | | | | | | | **CYFA ss.380-386** | | | | | | | | | | | |
| **ss.269-270**  **s.271(1)** | | | * If the Children’s Court finds a child guilty of one of more offences, whether indictable or summary, the Court may make an order placing the child on probation. * The Court must not make a PRO unless the child consents. * The 6 core conditions of a PRO are–  1. the child must not commit an offence punishable by imprisonment, whether in or outside Victoria, during the period of the order; 2. the child must report to the Secretary within 2 working days after the order is made; 3. the child must comply with all reasonable and lawful instructions of the Secretary; 4. the child must report to the Secretary, as and when required by the Secretary, during the period that the order is in force; | | | | | | | | | | | | | | | | |
| **s.271(2)**  **s.272** | | | | | 1. the child must not leave Victoria without the written permission of the Secretary; 2. the child must notify the Secretary of any change in the child’s residence, school or employment within 2 working days after the change has occurred.  * The Children’s Court may attach to a PRO–  1. one or more developmental conditions [**s.296**]; and 2. the restrictive conditions set out in **s.297(a) and (b)**.  * The period of a PRO must not extend beyond the child’s 21st birthday and not exceed–  1. if the child is under 15 years of age on the day of sentencing, 6 months or 12 months in exceptional circumstances; or 2. if the child is 15 years or age or over on the day of sentencing, 12 months or 18 months in exceptional circumstances. | | | | | | | | | | | |
| **ss.273-275**  **s.278**  **s.276**  **s.277**  **s.279** | | | | | **DIVISION 4 – Youth supervision and support order [YSO]** | | | **CYFA ss.387-391** | | | | | | | | |
| * If the Children’s Court finds a child guilty of one of more offences, whether indictable or summary, the Court may make an order for the supervision and support of the child. * The Court must not make a YSO unless the child consents. * The period of a YSO must not extend beyond the child’s 21st birthday and not exceed–  1. if the child is under 15 years of age on the day of sentencing, 6 months or 12 months in exceptional circumstances; or 2. if the child is 15 years or age or over on the day of sentencing, 12 months or 18 months in exceptional circumstances.  * The Court may order that an approved service provider hold a youth justice planning meeting for a child [see **ss.290-293**]. * The 6 core conditions of a YSO are the same as the 6 core conditions of a PRO. * The Children’s Court may attach to a YSO–  1. one or more developmental conditions [**s.296**]; and 2. one or more restrictive conditions (other than a condition under **s.297(g)**).  * The Children’s Court may order that a child placed on a YSO be subject to judicial monitoring in accordance with **Division 7**. * If a court other than the Children’s Court makes a YSO and orders that the child be subject to judicial monitoring, that court – unless it considers that it would not be appropriate to do so – must remit to the Children’s Court the matters in respect of the order in–  1. **s.294** (reporting and monitoring); and 2. **ss.303 + 304** (variation or revocation); and 3. **ss.307 + 309** (contravention of order), subject to **s.314**. | | | | | | | | | | | |
| **ss.280-281**  **s.284**  **s.282**  **s.283**  **ss.285-286** | | | | | **DIVISION 5 – Youth control order [YCO]** | | | **CYFA ss.409A-409H** | | | | | | | | |
| * The ChCV may make an order for the supervision and control of a child if the Court–  1. finds the child guilty of one or more offences, whether indictable or summary; and 2. considers that the child would otherwise be sentenced to detention in a youth justice custodial centre as a result of the gravity or habitual nature of the child’s unlawful behaviour.  * The Children’s Court must not make a YSO unless–  1. the offence or one of the offences committed by the child is punishable by imprisonment; and 2. the Court has made enquiries of the Secretary and is satisfied that the child is suitable for a YCO; and 3. the child consents; and 4. a youth justice plan has been developed for the child.  * In determining whether to make a YCO, the Children’s Court must have regard to the 9 matters set out in **s.280(3)**. * The period of a YCO must not exceed 12 months and must not extend beyond the child’s 21st birthday. * The Children’s Court must order that an approved service provider hold a youth justice planning meeting for a child [see **ss.290-293**] if the Court is considering making a YCO for the child. The Court may also make such an order if a YCO is in force for the child and the Court considers that such a meeting is necessary. * Six of the 8 core conditions of a YCO are the same as the 6 core conditions of a PRO or a YSO. The 2 additional core conditions of a YCO are–  1. the child must attend the Children’s Court as directed by the Court under **s.294**; 2. the child must participate in education, training or work (whether paid or unpaid) for some or all of the period that the order is in force.  * The Children’s Court may attach to a YCO–  1. one or more developmental conditions [**s.296**]; and 2. one or more restrictive conditions [**s.297**]; and 3. the restorative condition, namely that the child attend and participate in a group conference [**s.298**].  * If the ChCV makes a YCO, the Court may order that the child’s parent (other than DFFH Secretary) give a non-accountable undertaking, with or without conditions, to support the child to comply with the YCO for a period not exceeding the period of the YCO. | | | | | | | | | | | |
| **s.294(2)**  **s.287** | | | | * The ChCV must direct that a child placed on a YCO attend the Court at least monthly for the first half of the period of the order; see also the associated stipulations in **ss.294(3)‑(7)**. * If a court other than the Children’s Court makes a YCO, that court – unless it considers that it would not be appropriate to do so – must remit to the Children’s Court the matters in respect of the order in–  1. **s.294** (reporting and monitoring); and 2. **ss.303 + 304** (variation or revocation); and 3. **ss.307 + 309** (revocation of CSO), subject to **s.314**. | | | | | | | | | | | | | | |
| **DIVISION 6– Youth justice plans & Youth justice planning meetings** | | | | | | | | | | | | | | | | | | |
| **s.288**  **s.289**  **s.290**  **s.291**  **s.292**  **s.293** | | | | **What is a youth justice plan?** | | | | | | | | | | | **CYFA s.409U** | | | |
| **What is a youth justice planning meeting?** | | | | | | | | | | | **CYFA s.409S** | | | |
| **Requirements of a youth justice planning meeting** | | | | | | | | | | | **CYFA s.409T** | | | |
| **Requirements for a report of a youth justice planning meeting** | | | | | | | | | | | **CYFA s.409V** | | | |
| **Confidentiality of meeting** | | | | | | | | | | | **CYFA s.409Y** | | | |
| **Court may revoke order for youth justice planning meeting** | | | | | | | | | | | **CYFA NONE** | | | |
| **DIVISION 7– Judicial monitoring of YSO & YCO** | | | | | | | | | | | | | | |
| **s.294**  **s.295** | | | | **Reporting and monitoring of YSO and YCO** | | | | | | | | | | | **CYFA s.409U** | | | |
| 1. The Children’s Court must direct that a child placed on a YCO attend the Court at least monthly for the first half of the period of the order. 2. A child must attend Court– (a) as directed under **s.294(2**) and (b) from time to time as directed by the Court for the Court to consider the child’s compliance and the ongoing suitability of the conditions of the order. 3. The Children’s Court may require any of the following to attend court to provide information, either verbally or in writing, for the purposes of the child’s attendance under subsection (3): (a) the Secretary; (b) the prosecuting person or body; (c) any other person the Court considers appropriate. 4. When the child attends the Children’s Court under this section, the Court must consider whether the order should be varied under **s.304(4)**. 5. When the child attends the ChCV under this section, the Court is to be constitituted by the same judicial officer who sentenced the child unless a matter specified in **s.294(6)** applies. 6. If the child fails to attend as directed under **ss.294(2) or (3)(b)**, a warrant to arrest may be issued. | | | | | | | | | | | | | | |
| **Warning of possible variation or revocation of YSO or YCO when child attends the Children’s Court under s.294.** | | | | | | | | | | | **CYFA s.409O** | | | |
| **CHAPTER 7, PART 7.9 – SPECIAL CONDITIONS ON SENTENCING ORDERS** | | | | | | | | | | | | | | | | | |
| **YJA ss.296‑302** | | | **These provisions set out the various special conditions that may be attached to a good behaviour order, a probation order, a** **youth supervision and support order or a** **youth control order**. **They mostly replace with significant modifications repealed provisions in CYFA.** | | | | | | | | | | | **CYFA ss.367(3)(d), 381(4), 389(3) + 409F(2)** | | | |
| **s.296** | | | | **Developmental conditions**  Each of the following conditions is a **developmental condition:**   1. the child must undergo health related counselling or a treatment service of any kind, including–   (i) psychological, neuropsychological or psychiatric mental health assessment and treatment; or  (ii) assessment and treatment for drug or alcohol abuse or dependence;   1. the child must participate in disability services; 2. the child must attend education or training programs, activities or support services; 3. the child must attend and participate in mentoring, personal development or cultural programs, activities or support services; 4. the child must attend and participate in sporting or recreational programs, activities or support services; 5. the child must participate in one or more community service activities if the child’s participation in the activity would support the child’s rehabilitation and positive development; 6. any other condition that has a developmental, rehabilitative or therapeutic purpose and requires the child to engage in kinds of actions aimed at addressing the underlying causes of the child’s offending behaviour. | | | | | | | | | | | | | | |
| **s.297** | | | | **Restrictive conditions**  Each of the following conditions is a **restrictive condition:**   1. the child must reside at a specified address; 2. the child must reside with one or more specified persons; 3. the child must not leave the child’s place of residence–   (i) between specified hours; or  (ii) on specified days; or   1. between specified hours on specified days; | | | | | | | | | | | | | | |
|  | | | | 1. the child must not associated with specified persons; 2. the child must not contact specified persons; 3. the child must not visit particular places or areas, or only visit the places or areas for a specific purpose at specified times or in the company of one or more specified persons; 4. any other condition that the Children’s Court considers would–   (i) assist in the child’s compliance with the order to which the condition is attached; and   1. address offending behaviour and support rehabilitation. | | | | | | | | | | | | | | |
| **s.298** | | | **Restorative condition**  The child must attend and participate in a group conference. | | | | | | | | | | | | | | |
| **s.299** | | | **Directing manner of compliance with special conditions by the Court or the DJCS Secretary** | | | | | | | | | | | **CYFA NONE** | | | |
| **s.301** | | | **Attaching special conditions to certain community-based orders** | | | | | | | | | | | **CYFA s.409F** | | | |
| 1. If the Children’s Court is determining whether to attach a special condition to a **GBO, PRO, YSO or YCO**, the Court must– 2. have regard to– 3. the sentencing principles [**ss.202-210**]; and 4. the objects of the order; and 5. the need to address the underlying causes of the child’s offending; and 6. any pre-sentence report [PSR] or supplementary PSR; and 7. any youth justice planning meeting report or youth justice plan in respect of the child for the offence for which the order is to be made or varied; and 8. the safety of any victim of the child’s offending; and 9. be satisfied that the special condition is relevant to one or more of the offences in respect of which the order is to be made or varied; and 10. be satisfied that the child is capable of complying with the special condition, taking into account the core conditions, any other special conditions, the availability of support services and the child’s personal circumstances. 11. Before the Children’s Court attaches a special condition to the order, the Court must seek the child’s view on the child’s ability to comply with the special condition taking into consideration the core conditions and any special conditions already attached to the order. 12. A special condition may be attached to the order for the whole or any part of the period of the order. | | | | | | | | | | | | | | |
| **s.300**  **s.302** | | | **Reasons for attaching special conditions to be given** | | | | | | | | | | | **CYFA ss.381(3) + 389(3)** | | | |
| If the Children’s Court attaches one or more special conditions to a **GBO, PRO, YSO or YCO**, the Court must include in its statement of reasons for the sentence, its reasons (which are not required to be provided in writing) for attaching each special condition. | | | | | | | | | | |
| **Pre-conditions to varying existing special conditions or attaching special conditions to an existing order** | | | | | | | | | | | **CYFA NONE** | | | |
| **CHAPTER 7, PART 7.10 – VARYING OR REVOKING COMMUNITY-BASED ORDERS** | | | | | | | | | | | | | | | | | |
| **YJA ss.303‑306** | | | **These provisions re-enact with some modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | |
| **s.303** | | | **Application by DJCS Secretary or child to vary or revoke a GBO, CSO, PRO, YSO or YCO.** | | | | | **CYFA ss.409N(2),, 409Q(2), 421(1)** | | | | | | | | | |
| **s.304** | | | **Power of Children’s Court determining an application to vary or revoke a GBO, CSO, PRO, YSO or YCO.** | | | | | **CYFA ss.409Q, 421(5)** | | | | | | | | | |
| **s.305** | | | **Warrant to arrest for failure to appear on an application to vary or revoke made by the Secretary under s.303(1)** | | | | | **CYFA ss.421(6)** | | | | | | | | | |
| **s.306** | | | **YSO or YCO may be varied or revoked under s.304 without the consent of the child and without a warning under s.295.** | | | | | **CYFA s.409P** | | | | | | | | | |
| **CHAPTER 7, PART 7.11 – CONTRAVENTION OF COMMUNITY-BASED ORDERS** | | | | | | | | | | | | | | | | | |
| **YJA ss.307‑314** | | | **These provisions re-enact with significant modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | |
| **s.307** | | | **Application by DJCS Secretary or a police officer for variation or revocation of a GBO, CSO, PRO or YSO for contravention** | | | | | **CYFA s.421(1)** | | | | | | | | | |
| **s.308** | | | **Court may issue on own motion notice to appear before court in relation to contravention of a GBO, CSO, PRO, YSO or YCO** | | | | | **CYFA ss.409Q, 421(5)** | | | | | | | | | |
| **s.309** | | | **Power of Children’s Court determining an application to vary or revoke a GBO, CSO, PRO, YSO or YCO for contravention** | | | | | **CYFA ss.371, 409R, 421(6)** | | | | | | | | | |
| 1. If the ChCV is satisfied that a child has contravened a **GBO, CSO, PRO, YSO or YCO** the Court may– 2. dismiss the application; or 3. subject to subsection (2), vary the contravened order by doing one or more of the following– 4. vary a special condition, including by suspending or revoking the condition; 5. attach a special condition; 6. if the order is a **YSO**, order that the child be subject to judicial monitoring; or | | | | | | | | | | | | | | | | | |
| 1. subject to subsection (4), revoke the contravened order and make any order in respect of the offence(s) which the Court could have made if it had not make the contravened order; or 2. subject to subsection (4), if the contravened order has since expired– 3. make any order in respect of the offence(s) which the Court could have made if it had not made the contravened order; or 4. dismiss the application. | | | | | | | | | | | | | | | | | |
| 1. The ChCV must not extend the period of the contravened order unless the child has contravened a core condition of a **CSO** in which case the Court– 2. may extend the period within which the community service activities are required to be performed by a period of up to 3 months; but 3. must not increase the number of hours of community service activities the child is required to perform. 4. In determining what action to take under subsection (1), the ChCV may take into account– 5. a contravention report in respect of the child; and 6. the extent to and the manner in which the child has complied with the contravened order; and 7. the fact that the contravened order was considered appropriate at the time of sentencing; and 8. the period for which the order has been in force. 9. The ChCV may **not** impose a sentence that is higher in the sentencing hierarchy in **YJA s.240(1)** unless– 10. during the term of the contravened order, the child commits an offence punishable on first conviction with imprisonment for a term of 5 years or more; or 11. the core conditions or special conditions of the contravened order, or the support and assistance offered to the child during the remaining term of the contravened order, cannot be varied in a way that would make the order suitable for the child. | | | | | | | | | | | | | | | | | |
| **s.310**  **s.311**  **s.312**  **s.313**  **s.314** | | | **YSO or YCO may be varied or revoked under s.304 without the consent of the child and without a warning under s.295** | | | | | **CYFA s.409P** | | | | | | | | | |
| **Time limit for making application for alleged contravention of order** | | | | | **CYFA ss.372, 386 + 395** | | | | | | | | | |
| **Warrant to arrest for failure to appear on an application to vary or revoke or if service of notice to appear cannot be served** | | | | | **CYFA s.419** | | | | | | | | | |
| **Provisions in relation to bail if child arrested under a warrant issued under s.312** | | | | | **CYFA s.420** | | | | | | | | | |
| **Proceeding for contravention of sentence** | | | | | **CYFA s.423** | | | | | | | | | |
| 1. An application in respect of an order contravention proceeding must be made in the Children’s Court– 2. whether the sentence to which the proceeding relates was imposed by the Children’s Court, the County Court or the Supreme Court, on appeal or otherwise; and 3. whether the child in respect of whom the application is made is 19 years of age or over. | | | | | | | | | | | | | | | | | |
| 1. If the order contravention proceeding is in respect of a child who is under 19 years of age when the proceeding commences, the ChCV must hear and determine the proceeding unless– 2. the sentence was imposed by the Supreme Court or the County Court and the child does not consent to the ChCV hearing the proceeding; or 3. the ChCV considers that in all the circumstances of the case it is appropriate to transfer the proceeding to the court that imposed the sentence. 4. If the order contravention proceeding is in respect of a child who is 19 years of age or over when the proceeding commences, the ChCV must transfer the proceeding to the Magistrates’ Court or to the court that imposed the sentence unless the ChCV considers that in all the circumstances of the case it is appropriate for the ChCV to hear and determine the proceeding, having regard to the matters referred to in subsection (4). 5. The ChCV must have regard to the following matters for the purposes of subsection (3)– 6. the age, maturity and stage of development of the child; 7. the nature and circumstances of the alleged contravention; 8. the stage of the proceeding; 9. whether the child is the subject of another proceeding in any other court; 10. the availability of appropriate sentences in the other court if the contravention were proved; 11. whether the child prefers to be dealt with in the ChCV or any other court; 12. any other matter that the ChCV considers relevant. 13. An order contravention proceeding must not be transferred on the sole ground that the sentence was imposed by another court. 14. For the purposes of subsections (2) and (3), an order contravention proceeding is taken to commence on the day on which an application is made under **s.307** or a direction is given under **s.308**. 15. If the child does not consent to the ChCV hearing and determining an order contravention proceeding or the ChCV considers that the proceeding should be transferred, the ChCV must discontinue the proceeding and order that it be transferred to the Magistrates’ Court or to the court that imposed the sentence and in the meantime may permit the child to go at large, grant the child bail or remand the child in custody. 16. If an order contravention proceeding is transferred to the Magistrates’ Court under this section– 17. the Magistrates’ Court may sentence the child as if the Magistrates’ Court had been satisfied of the child’s guilt of the offence for which the sentence was imposed; and 18. for the purpose of paragraph (a), the Magistrates’ Court has jurisdiction, whether or not the Magistrates’ Court would otherwise have had jurisdiction to deal with the offence. | | | | | | | | | | | | | | | | | |
| **CHAPTER 7, PT 7.12 – GENERAL PROVISIONS FOR COMMUNITY-BASED ORDERS** | | | | | | | | | | | | | | | | | |
| **YJA ss.315‑323** | | | **Some of these provisions are new. The rest mostly re-enact with significant modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | |
| **s.315** | | | **Persons to whom a copy of the order must be given if the ChCV Court makes or varies a GBO, FIN, CSO, PRO, YSO or YCO** | | | | | **CYFA s.409J** | | | | | | | | | |
| **ss.316-317** | | | **Maximum total periods of community-based orders** | | | | | **CYFA ss.382, 388 + 409I** | | | | | | | | | |
| **s.316** | | | **Same type of certain community-based orders** | | | | | | | | | | | | | | |
| If a child is found guilty of more than one offence on the same day or in the same proceeding the total period of 2 of more sentencing orders of the same type made in respect of the offences must not extend beyond the child’s 21st birthday or exceed–   1. in the case of a **GBO or PRO**– 2. 12 months if the child is under 15 years of age on the day of sentencing; or 3. 18 months if the child is 15 years of age or over on the day of sentencing; and 4. in the case of a **YSO**– 5. 12 months if the child is under 15 years of age on the day of sentencing; or 6. 24 months if the child is 15 years of age or over on the day of sentencing; and 7. in the case of a **YCO**– 12 months. | | | | | | | | | | | | | | | | | |
| **s.317** | | | **Certain community-based orders and youth justice custodial orders [YJC]** | | | | | | | | | | | | | | |
| 1. If a child is found guilty of more than one offence on the same day or in the same proceeding and the ChCV makes a **GBO, CSO, PRO or YSO** for one or more of the offences and makes a **YJC** for one or more of the other offences, the total period of the orders in respect of all the offences must not exceed– 2. 2 years if the child is under 15 years of age on the day of sentencing; or 3. 3 years if the child is 15 years of age or over on the day of sentencing. 4. If a child is found guilty of more than one offence on the same day or in the same proceeding and the Children’s Court makes a **YCO** for one or more of the offences and makes a **YJC** for one or more of the other offences, the total period of the orders in respect of all the offences must not exceed– 5. 2 years if the child is under 15 years of age on the day of sentencing; or 6. 4 years if the child is 15 years of age or over on the day of sentencing. | | | | | | | | | | | | | | | | | |
| **s.318** | | | | **Community-based orders to be served concurrently unless otherwise ordered in exceptional circumstances** | | | | | **CYFA ss.382, 388 + 409I** | | | | | | | | | |
| **s.319** | | | | **DJCS Secretary may suspend operation of GBO, CSO, PRO, YSO or YCO or operation of condition(s) of order if the child is ill or there are other exceptional circumstances** | | | | | **CYFA s.362A** | | | | | | | | | |
| **s.321** | | | | **Secretary may suspend operation of GBO, CSO, PRO, YSO or YCO if child is in custody at time order made or subsequently** | | | | | **CYFA 390 + 409M** | | | | | | | | | |
| **s.320** | | | | **Child in custody while subject to order imposing fine or instalment order may apply for an order discharging the fine or varying the fine or instalment order** | | | | | **CYFA NONE** | | | | | | | | | |
| **s.322** | | | | **DJCS Secretary to notify ChCV when child who is on a YSO subject to judicial monitoring or a YCO is in custody or has order suspended** | | | | | **CYFA NONE** | | | | | | | | | |
| **s.323** | | | | **Sets out a framework to follow in the event of any inconsistencies between two or more orders [GBO, CSO, PRO, YSO and/or YCO] which are in force in respect of a child at the one time.** | | | | | **CYFA NONE** | | | | | | | | | |
| **CHAPTER 7, PART 7.13 – SENTENCES OF DETENTION** | | | | | | | | | | | | | | | | | |
| **YJA ss.324‑328** | | | **YJA ss.324 & 326 are new. YJA ss.325 & 327-328 re-enact with some significant modifications repealed provisions in the CYFA.** | | | | | | | | | | | | | | |
| **s.324** | | | **Presumption against sentence of detention on child under 14** | | | | | **CYFA NONE** | | | | | | | | | |
| The Children’s Court must not impose a sentence of detention on a child who it finds guilty of an offence committed when the child was under 14 years of age unless–   1. the offence is a Category A or Category B serious youth offence or any other offence against a person that the Court considers to be serious and violent; and 2. the Court is reasonably satisfied that the child presents a serious risk to community safety. | | | | | | | | | | | | | | | | | |
| **s.325** | | | **Making a youth justice custodial order [YJC]** | | | | | **CYFA ss.410-413** | | | | | | | | | |
| 1. Subject to **s.324** and subsection (2**)**, if the Children’s Court finds a child guilty of one or more offences, whether indictable or summary, the Court may order that the child be detained in a youth justice custodial centre. 2. The ChCV must not make a **YJC** order unless– 3. on the day of sentencing the child is under 21 years of age; and 4. the child is present before the Court; and 5. the Court is satisfied that the circumstances and nature of the offence are sufficiently serious to warrant the making of a **YJC** order and that no other sentence is appropriate; and | | | | | | | | | | | | | | | | | |
| 1. the offence is one punishable by imprisonment (other than for default in payment of a fine); and 2. the Court has taken into account the following– 3. any pre-sentence report [PSR] ordered in accordance with **Division 3 of Part 9.2**; 4. any previous PSR and a supplementary PSR, if applicable; 5. any pre-sentence group conference report; 6. any previous contravention report. 7. If the ChCV makes a **YJC** order it must– 8. record a conviction for the offence or offences in respect of which the order is made; and 9. state in writing the reasons for the order; and 10. cause a statement of reasons to be entered in the court register; and 11. unless the Court otherwise orders, cause a copy of the written statement of reasons to be given or sent by post, or by electronic communication if so requested, within 21 days after the making of the order to– 12. the child; and 13. the child’s parents; and 14. any other parties to the proceeding; and 15. if the child is an Aboriginal child, the Court must provide reasons outlining how it has had regard to the sentencing principles in **YJA s.210**. 16. The failure of the ChCV to comply with **YJA s.325(3)** does not invalidate the **YJC** order. | | | | | | | | | | | | | | | | | |
| **s.326** | | | **Objects of a YJC order** | | | | | **CYFA NONE** | | | | | | | | | |
| **s.328** | | | **Total sentence of detention** | | | | | **CYFA s.362B** | | | | | | | | | |
| 1. If the ChCV convicts a child of 2 or more offences, the Court may impose a total sentence of detention in respect of those offences instead of a separate sentence of detention in respect of all or any 2 or more of them. 2. The term of the total sentence of detention must not exceed the total effective period of detention that could have been imposed in respect of the offences if the ChCV had imposed a separate sentence of detention on each of them. 3. If the ChCV imposes a total sentence of detention in respect of 2 or more offences, the Court– 4. is not required to identify separate events giving rise to specific charges; and 5. is not required to announce the sentences that would have been imposed for each offence had separate sentences been imposed or whether those sentences would have been concurrent or cumulative. | | | | | | | | | | | | | | | | | |
| **YJA s.328 replaces CYFA s.362B which formerly allowed the Court to impose an aggregate sentence of detention for 2 or more offences if they were founded on the same facts or form, or are part of, a series of offences of the same or a similar character. YJA s.328 will thus allow a single YJC order to be made on multiple offences whether they are related or not. This is also consistent with YJA s.325(1) which uses the phrase “guilty of one or more offences” in contrast with “guilty of an offence” in CYFA s.412.** | | | | | | | | | | | | | | | | | |
| **s.327** | | | **Maximum period of a YJC order** | | | | | **CYFA ss.411 + 413** | | | | | | | | | |
| 1. Subject to this section, **s.34** [**Commencement of sentences**] & **s.35** [**Time held in custody before trial etc to be deducted from sentence**] of the ***Sentencing Act 1991*** apply to an order made by the Children’s Court detaining a child in a youth justice custodial centre [YJCC] as if a reference to the Magistrates’ Court included the Children’s Court. | | | | | | | | | | | | | | | | | |
| **Maximum period of detention** | | | | | | | | | | | | | | | | | |
| 1. The period of detention under a **YJC** order made in respect of a child– 2. in the case of a child who is under 15 years of age on the day of sentencing–must not exceed the maximum term of imprisonment for the offence if committed by an adult and in any event must not exceed 1 year; and 3. in the case of a child who is 15 years of age or over but under 21 years of age on the day of sentencing–must not exceed the maximum term of imprisonment for the offence if committed by an adult and in any event must not exceed 3 years. | | | | | | | | | | | | | | | | | |
| **Rebuttable presumption of concurrency for child sentenced to detention for multiple offences on the same day or in the same proceeding except for a YJC offence for which there is a rebuttable presumption of cumulation of any sentence of detention.** | | | | | | | | | | | | | | | | | |
| 1. If a child is found guilty on the same day, or in the same proceeding, of more than one offence– 2. subject to subsection (4), any period of detention in a YJCC is to be concurrent with any period of detention in respect of any of the other offences, unless the Children’s Court, at the time of sentencing, states that the sentences are cumulative, or part cumulative, and gives reasons for its decision; and 3. the total period of detention in a YJCC in respect of all the offences must not exceed– 4. in the case of a child who is under 15 years of age on the day of sentencing–2 years; and 5. in the case of a child who is 15 years of age or over but under 21 years on the day of sentencing–4 years; and 6. if the Children’s Court makes a **YJC** order and the child has not completed another sentence of detention in a YJCC, the Court may direct that the **YJC** order being imposed be served– 7. concurrently with the other sentence; or 8. wholly or partly cumulative on the other sentence. 9. If one or more of the offences referred to in subsection (3) is– 10. an offence involving an assault on a youth justice custodial worker on duty; or 11. an offence against **YJA s.533** [**Escape from YJCC**]; or 12. an offence involving property damage to a YJCC– | | | | | | | | | | | | | | | | | |
| any period of detention imposed on the child for that offence or those offences must be served wholly or partly cumulatively with any period of detention in respect of any of the other offences, unless the Children’s Court, at the time of sentencing, states that the sentences are concurrent and gives reasons for its decision.  **Rebuttable presumption of concurrency for child serving an uncompleted sentence of detention unless the child is 15 years of age or over on the day of being sentenced to detention for a YJC offence for which there is a rebuttable presumption of cumulation.**   1. Subject to subsection (6), every period of detention in a YJCC under a **YJC** order must, unless otherwise directed by the Children’s Court at the time of pronouncing the sentence, be, as from the date of its commencement, served concurrently with any uncompleted sentence(s) of detention in a YJCC, **whether before or at the same time the YJC order is made**. 2. If– 3. one or more of the offences for which the **YJC** order referred to in subsection (5) is made is– 4. an offence involving an assault on a youth justice custodial worker on duty; or 5. an offence against **YJA s.533** [**Escape from YJCC**]; or 6. an offence involving property damage to a YJCC; and 7. the child in respect of whom the order is made is 15 years of age or over on the day of sentencing–   any period of detention imposed on the child for that offence or those offences must be served cumulatively with any uncompleted sentence(s) of detention in a YJCC, unless the Children’s Court, at the time of sentencing, states that the sentences are concurrent and gives reasons for its decision.  **ChCV may make written recommendations re custody of detainee**   1. The Children’s Court may make recommendations in writing as to the management or treatment of, or any other matter concerning, a child in respect of whom a **YJC** order is made. | | | | | | | | | | | | | | | | | | |
| CHAPTER 7, PART 7.14 –ORDERS IN ADDITION TO SENTENCE | | | | | | | | | | | | | | | | | | | |
| **YJA ss.329‑330** | | | **These provisions re-enact without significant modification repealed provisions in the CYFA.** | | | | | | | | | | | | | | | | |
| **s.329** | | | **Orders in addition to sentence** | | | | | | | **CYFA s.417** | | | | | | | | | |
| * Part 4 of the ***Sentencing Act 1991*** [**Restitution; Compensation;** **Recovery of assistance paid under the *Victims of Crime Assistance Act 1996*; Recovery of costs incurred by emergency service agencies; Suspension & cancellation of driver licences and learner permits and driver disqualification; Alcohol Exclusion Orders**] applies to a proceeding in the Criminal Division of the Children’s Court with any necessary modification, including requiring the Children’s Court to take into account the child’s financial circumstances. * The maximum amount that the Children’s Court may order a child to pay under Part 4 of the ***Sentencing Act 1991*** is $1,000. | | | | | | | | | | | | | | | | | | | |
| **s.330** | | | **Enforcement of orders in addition to sentence** | | | | | | | **CYFA s.418** | | | | | | | | | |
| **CHAPTER 9, PART 9.1 – ASSISTING THE CHILDREN’S COURT** | | | | | | | | | | | | | | | | | | | |
| **YJA ss.400‑403** | | | **These are new provisions.** | | | | | | | | | | | | | | | | |
| **s.400** | | | **Children’s Court may require DJCS Secretary to give assistance** | | | | | | | | | | | | | | | | |
| **s.401** | | | **Children’s Court may require DFFH Secretary or principal officer of Aboriginal agency to attend or give information or assistance** | | | | | | | | | | | | | | | | |
| **The Explanatory Memorandum to YJA s.401 states: “The ability of the Court to order the attendance of and assistance from the DFFH Secretary and, if relevant, the principal officer acknowledges the link between youth offending and disadvantage, and is underpinned by the observation in the Sentencing Advisory Council *Crossover Kids: Vulnerable Children in the Youth Justice System* report that trauma can be a particularly relevant factor in understanding offending and should inform sentencing. This clause aims to ensure that where the DFFH Secretary has the specified level of involvement with a child, the Court will be able to obtain all the information that the Court considers is necessary to help it gain an accurate picture of the child's circumstances and inform the Court's decision making in criminal proceedings. In making such orders, it is intended that the Court will exercise its judgement on a case-by-case basis and utilise the ability to order written information or documents in the first instance where appropriate, rather than ordering attendance at court as a default or where the circumstances or information sought does not require this. It is expected that attendance would be ordered where this serves a clear purpose that cannot be met via an order for provision of information or a report. If attendance at Court by the DFFH Secretary is ordered, the DFFH Secretary will be able to delegate these requirements as the Secretary considers appropriate.”** | | | | | | | | | | | | | | | | | | | |
| **s.402** | | | **Duty of DJCS Secretary to assist Children’s Court** | | | | | | | | | | | | | | | | |
| **s.403** | | | **DJCS Secretary may apply to Children’s Court to be heard** | | | | | | | | | | | | | | | | |
| **CHAPTER 9, PART 9.2 – REPORTS TO THE COURT** | | | | | | | | | | | | | | | | | | | |
| **YJA ss.404‑436** | | | **The majority of these provisions are new. The rest re-enact with minor modifications repealed provisions in CYFA Part 7.8. See also YJA s.211.** | | | | | | | | | | | | | | | | |
| **ss.404-409**  **ss.410-412**  **ss.413-421**  **ss.422-424**  **ss.425-427**  **ss.428-429**  **ss.430-431**  **s.432**  **ss.433-436** | | | * **Division 1 – General provisions for reports to the Children’s Court** * **Division 2 – Specialist assessment reports** * **Division 3 – Pre-sentence reports** * **Division 4 – Pre-sentence group conference reports** * **Division 5 – Variation reports** * **Division 6 – Contravention reports** * **Division 7 – Youth justice planning meeting reports** * **Division 8 – Judicial monitoring reports** * **Division 9 – Progress reports** | | | | | | | | | | | | | | | | |
| **CHAPTER 17 – CHILDREN AND YOUNG PERSONS INFRINGEMENT NOTICE SYSTEM (CAYPINS)** | | | | | | | | | | | | | | | | | | | |
| **YJA ss.722‑744** | | | **YJA s.724 is new and YJA s.722 involves a substantial modification to repealed CYFA s.581. The other provisions re-enact with generally minor modifications repealed provisions in CYFA s.582 & Schedule 3.** | | | | | | | | | | | | | | | | |
| **s.722** | | | **Application of CAYPINS procedure** | | | | | | | **CYFA s.581** | | | | | | | | | |
| 1. An enforcement agency **must** use the **CAYPINS** procedure instead of commencing a proceeding against a child for an offence for which an infringement notice could be issued unless–  * the enforcement agency considers that it is in the interests of the child or the interests of justice to have the matter heard and determined in the Children’s Court; or * the child has elected to have the matter heard and determined by the Children’s Court.  1. If a child may be prosecuted for an offence for which an infringement notice may be issued, a reference in any Act to enforcement under the ***Fines Reform Act 2014*** includes a reference to enforcement under this **Chapter**. 2. The **CAYPINS** procedure applies without prejudice to the application of so much of any other procedure as is consistent with the **CAYPINS** procedure. 3. The procedure set out in **YJA Part 17.2** may be used in relation to any infringement notice, regardless of when it was issued. | | | | | | | | | | | | | | | | | | | |
| **The Explanatory Memorandum says of YJA s.722: “This new general requirement to use CAYPINS is intended to encourage increased use of the child-specific procedure, while the exceptions are intended to allow proceedings to be commenced in appropriate cases—for example, if the infringement offence is alleged to have been committed along with several other more serious offences, it may be more efficient for the child and the Children's Court to have them all heard and dealt with in one proceeding.”** | | | | | | | | | | | | | | | | | | | |
| **s.723** | | | **Certain agencies may give information for enforcement purposes** | | | | | | | **CYFA s.582** | | | | | | | | | |
| **YJA s.723(2)** provides that on the written request of a registrar of the Children’s Court, the sheriff or any contractor or sub-contractor supporting the functions of the sheriff, a specialised agency may give the person or persons making the request access to any information held by the agency that may be of use in the enforcement of court orders and fines. | | | | | | | | | | | | | | | | | | | |
| **s.724** | | | **Court may order infringement penalty be dealt with through CAYPINS procedure** | | | | | | | **CYFA NONE** | | | | | | | | | |
| 1. Subject to subsection (2), any time after a charge-sheet and summons has been filed with the Children’s Court under s.17(3) of the *Infringements Act 2006* the Court may– 2. order that enforcement of an infringement notice served on the child be dealt with under **YJA Part 17.2**; and 3. make any other ancillary order that the Court considers appropriate. 4. The Children’s Court must not make an order under subsection (1) if–  * it is in the interests of the child or the interests of justice to have the matter heard and determined in the Children’s Court; or * the child has elected to have the matter heard and determined by the Children’s Court.  1. If the Children’s Court makes an order under subsection (1)– 2. the enforcement agency must give a registrar of the Children’s Court the registration document and the registration certificate by the date specified in the order; and 3. the registrar of the Children’s Court must register the infringement penalty under **s.726**. 4. If the Children’s Court makes an order under subsection (1), the requirements referred to in **YJA s.725(2)(h) & (i)** do not apply to the registration certificate. | | | | | | | | | | | | | | | | | | | |
| **The Explanatory Memorandum says of new YJA s.724: “This new power is intended to ensure that infringement notices are dealt with through CAYPINS wherever appropriate. The exceptions to this power of the Children's Court to order use of the CAYPINS procedure are consistent with the exceptions to the requirement for an enforcement agency to use the CAYPINS procedure in YJA s.722.”** | | | | | | | | | | | | | | | | | | | |
| **ss.725-741** | | | * **Part 17.2 – Enforcement of infringement notices** | | | | | | | | | | | | | | | | |
| **ss.742-743** | | | * **Part 17.3 – Cancellation of infringement notice** | | | | | | | | | | | | | | | | |
| **s.744** | | | * **Part 17.4 – Decision to go to Court** | | | | | | | | | | | | | | | | |
| Subsection (1) lists the 12 ways and circumstances in which a proceeding in respect of a summary offence for which an infringement notice was issued may be commenced.  Subsection (2) provides that subsection (1) has effect despite **YJA s.148** or any other provision of any Act or other instrument providing for the period during which a proceeding may be commenced for an offence alleged to have been committed. | | | | | | | | | | | | | | | | | | | |
| **CHAPTER 22, PART 22.1, DIVISION 1 – AMENDMENT OF BAIL ACT 1977 – TRIAL OF ELECTRONIC MONITORING OF CHILDREN ON BAIL IN CERTAIN CIRCUMSTANCES** | | | | | | | | | | | | | | | | | | | |
| **YJA ss.899‑903**  **BA ss.17C‑17P** | | | **These provisions add Part 2A to the *Bail Act 1977* [BA] and make consequential amendments. This provides a legislative framework for the trial of electronic monitoring of accused children and young people on bail in certain tightly defined circumstances. The headings of BA Part 2A are listed below with the key provisions summarised.** | | | | | | | | | | | | | | | | |
| **BA s.17C**  **BA s.17D**  **BA s.17E**  **BA s.17F**  **BA s.17G**  **BA s.17H**  **BA s.17I**  **BA s.17J**  **BA s.17K**  **BA s.17L**  **BA s.17M**  **BA s.17N**  **BA s.17O**  **BA s.17P** | | | **Definitions** | | | | | | | | | | | | | | | | |
| **Meaning of *applicable decision*** | | | | | | | | | | | | | | | | |
| A decision whether or not to grant bail to an accused or to vary the conditions of bail is an applicable decision if any prescribed criteria are met and–   * at the time of making the decision the accused is either aged 14-17 or is aged 18 but was under 18 at the time of the alleged offending; and * the bail decision maker is either the Children’s Court sitting at a venue that is in a prescribed region of the State or the Supreme Court. | | | | | | | | | | | | | | | | |
| **What are *electronic monitoring conditions*?** | | | | | | | | | | | | | | | | |
| The electronic monitoring conditions are conditions that the accused–   1. must for 24 hours of each day wear an electronic monitoring device fitted at the direction of the Secretary; and 2. must not, without reasonable excuse, tamper with, damage, disable or remove any electronic monitoring device or equipment used for the electronic monitoring; and 3. must comply with any necessary direction given by the Secretary to ensure that the accused is electronically monitored. | | | | | | | | | | | | | | | | |
| **What is a *suitability report*?** | | | | | | | | | | | | | | | | |
| **When bail decision maker may impose electronic monitoring conditions** | | | | | | | | | | | | | | | | |
| A bail decision maker who is making an ***applicable decision*** may impose the electronic monitoring conditions if–   1. the bail decision maker is to impose, as conduct conditions, either a curfew or a geographical exclusion zone or both; and 2. the bail decision maker is of the opinion that it is appropriate to impose the electronic monitoring conditions in order to monitor compliance with the proposed conduct conditions referred to in paragraph (a); and 3. the bail decision maker is to impose a conduct condition requiring that the accused is to reside at an address that is in a prescribed region of the State; and 4. the bail decision maker has received a suitability report in respect of the accused and is of the opinion that the accused is suitable to be electronically monitored on bail and adequate resources and equipment are available for this purpose. | | | | | | | | | | | | | | | | |
| **Bail decision maker may adjourn for preparation of suitability report** | | | | | | | | | | | | | | | | |
| **Extension of bail where EM conditions imposed** | | | | | | | | | | | | | | | | |
| If an accused is subject to EM conditions, the presence of those conditions does not prevent that bail from being extended by a bail decision maker who did not impose those conditions. Nothing in this section authorises a bail decision maker to impose EM conditions (for the first time) when extending bail. | | | | | | | | | | | | | | | | |
| **Revoking related conduct conditions also revokes the EM conditions** | | | | | | | | | | | | | | | | |
| **Accused ceasing to be of eligible age does not affect EM conditions** | | | | | | | | | | | | | | | | |
| **EM devices and equipment to be removed by authorised officer if EM conditions cease** | | | | | | | | | | | | | | | | |
| **Temporary removal of EM device if person arrested** | | | | | | | | | | | | | | | | |
| **Confidentiality of personal information** | | | | | | | | | | | | | | | | |
| **Delegation by DJCS Secretary** | | | | | | | | | | | | | | | | |
| **Regulations for Part 2A** | | | | | | | | | | | | | | | | |
| **YJA s.904** | | | **Transitional provisions** | | | | | | | | | | | | | | | | |
| **CHAPTER 22, PART 22.1, DIVISIONS 2 + 3 – AMENDMENT OF *BAIL ACT 1977* – Div 2: SCHEDULED OFFENCES, UNACCEPTABLE RISK & CONDUCT CONDITIONS Div 3: EXAMPLES, REVOCATION & REVIEW** | | | | | | | | | | | | | | | | | | | |
| **YJA ss.903A-G**  **& 904-907** | | | **These provisions amend BA ss.4E(1) & 5AAA(1) and add BA ss.18AE(1A) & 30A. They also include some transitional provisions and technical amendments. The amendments shaded orange came into operation on 11/09/2024. Those shaded mauve come into operation on 02/12/2024 or earlier if so proclaimed.** | | | | | | | | | | | | | | | | |
| **BA s.4E(1)** | | | Amended **BA s.4E(1)** provides: “A bail decision maker must refuse bail for a person accused of any offence if the bail decision maker is satisfied that–   1. there is a risk that the accused would if released on bail–   **(iaa) commit a Schedule 1 or a Schedule 2 offence; or**   1. **otherwise** endanger the safety or welfare of any other person, whether by committing an offence that has that effect or by any other means; … or 2. interfere with a witness or otherwise obstruct the course of justice in any matter; or | | | | | | | | | | | | | | | | |
| 1. fail to surrender into custody in accordance with the **~~conditions of bail~~ bail undertaking**; and 2. the risk is an unacceptable risk.   **Example**  An unacceptable risk that the accused, if released on bail, would—  (a) drive dangerously; or  (b) commit a family violence offence; or  (c) commit an aggravated burglary; or  (d) commit an armed robbery; or  (e) commit a carjacking; or  (f) commit a home invasion.” | | | | | | | | | | | | | | | | |
| **BA s.5AAA(1)** | | | Amended **BA s.5AAA(1)** provides: “A bail decision maker considering the release of an accused on bail must impose any condition that, in the opinion of the bail decision maker, will reduce the likelihood that the accused may—  (aa) **commit a Schedule 1 offence or a Schedule 2 offence; or**   1. otherwise endanger the safety or welfare of any other person, whether by committing an offence that has that effect or by any other means; or 2. … 3. interfere with a witness or otherwise obstruct the course of justice in any matter; or 4. fail to surrender into custody in accordance with the bail undertaking.   **Example**  A bail decision maker may impose a condition in order to reduce the likelihood that the accused may—  (a) drive dangerously; or  (b) commit a family violence offence; or  (c) commit an aggravated burglary; or  (d) commit an armed robbery; or  (e) commit a carjacking; or  (f) commit a home invasion.” | | | | | | | | | | | | | | | | |
| **BA ss.18AE(1) & 18AE(1A)** | | | **BA ss.18AE(1) & 18AE(1A)** provide:   1. The informant or the Director of Public Prosecutions may apply for revocation of bail granted to a person.   (1A) Without limiting subsection (1), an application under that subsection may be made because the applicant believes on reasonable grounds that the person–   1. has committed an offence since bail was granted; or 2. is likely to commit an offence whilst on bail; or 3. has breached a condition of bail; or 4. is likely to breach a condition of bail or the bail undertaking. | | | | | | | | | | | | | | | | |
| **BA s.30A** | | | **BA s.30A** provides:  “**An accused on bail must not commit a Schedule 1 offence or Schedule 2 offence while on bail. Penalty: 30 penalty units or 3 months imprisonment.”** | | | | | | | | | | | | | | | | |
| **CHAPTER 18 – GENERAL PROVISIONS** | | | | | | | | | | | | | | | | | | | |
| **YJA ss.745‑767** | | | **Many of these provisions are new. The others re-enact – sometimes with significant modifications – repealed provisions in the CYFA.** | | | | | | | | | | | | | | | | |
| **ss.745-747**  **s.745** | | | **Part 18.1 – Additional safeguards** | | | | | | | | | | | | | | | | |
| **Statements, confessions, admissions or information given by a child or young person participating in treatment or rehabilitation program not admissible in proceedings unless the person consents** | | | | | | | | | | | | | **CYFA s.251**  **See also new CYFA s.347B** | | | |
| **s.746** | | | **Risk rating derived from assessment of child’s risk of reoffending not admissible in a hearing under the *Bail Act 1977* or any criminal proceeding before child is sentenced** | | | | | | | | | | | | | **See also new CYFA s.347C** | | | |
| **s.747** | | | **Statement by child participating in a restorative justice program not admissible in subsequent proceedings unless the child consents** | | | | | | | | | | | | | **CYFA NONE** | | | |
| **s.748** | | | **Part 18.2 – Powers of DJCS Secretary in relation to medical services**  **Powers of Secretary in relation to assessment, medical treatment and admission to hospital of child in Secretary’s legal custody** | | | | | | | | | | | | | **CYFA s.597** | | | |
| **ss.749-754** | | | **Part 18.3 – Powers of DJCS Secretary in relation to cultural support plans for Aboriginal children** | | | | | | | | | | | | | **CYFA NONE** | | | |
| **s.749** | | | **Objects of cultural support plan – see also YJA s.24** | | | | | | | | | | | | | | | | |
| **s.750** | | | **Development of cultural support plan for Aboriginal child or young person** | | | | | | | | | | | | | | | | |
| 1. The DJCS Secretary must offer an Aboriginal child or young person an opportunity to develop a cultural support plan as soon as practicable after–  * a **PRO**, **YSO**, **YCO** or **YJC** order is made in respect of the child; or * the child is sentenced to a term of detention in a YJCC under the ***Sentencing Act*** ***1991***; or * the child or young person is transferred from prison to a YJCC under **YJA s.674**. | | | | | | | | | | | | | | | | | | | |
| 1. The Secretary may offer an Aboriginal child remanded in custody or released on bail an opportunity to develop a cultural support plan if it would be practicable to do so. 2. An Aboriginal child may develop a cultural support plan or request the Secretary to assistance to do so. 3. A cultural support plan for an Aboriginal child or young person must comply with any prescribed requirement. | | | | | | | | | | | | | | | | | | | |
| **s.751**  **s.752**  **s.753**  **s.754**  **ss.755-757**  **ss.758-762**  **s.758**  **s.759**  **s.760**  **s.761**  **s.762**  **ss.763-764**  **s.763**  **s.764**  **s.765**  **ss.766-767** | | | **Secretary to assist Aboriginal child or young person to develop cultural support plan in accordance with request** | | | | | | | | | | | | | | | | |
| **Secretary must keep a copy of a cultural support plan developed by an Aboriginal child or young person** | | | | | | | | | | | | | | | | |
| **Use of cultural support plan** | | | | | | | | | | | | | | | | |
| **Report to Commission for Children and Young People** | | | | | | | | | | | | | | | | |
| **Part 18.4 – Establishment, approval and abolition of youth justice services** | | | | | | | | | | | | | | **CYFA NONE** | | |
| **Part 18.5 – Matters relating to group conferences** | | | | | | | | | | | | | | **CYFA s.415** | | |
| **Person engaged to convene group conferences** | | | | | | | | | | | | | | | | |
| **Functions of a group conference convenor** | | | | | | | | | | | | | | | | |
| **Remote conduct of or participation in group conference** | | | | | | | | | | | | | | | | |
| **Obligation of convenor to keep records in accordance with prescribed requirements** | | | | | | | | | | | | | | | | |
| **Victim’s participation in group conference does not affect the person’s eligibility for compensation or financial assistance** | | | | | | | | | | | | | | | | |
| **Part 18.6 – Enforcement and other matters** | | | | | | | | | | | | | | **CYFA NONE** | | |
| **Offence to obstruct DJCS Secretary, Commissioner for Youth Justice or DJCS employee** | | | | | | | | | | | | | | | | |
| **Requirements under the YJA relating to reporting** | | | | | | | | | | | | | | | | |
| **Part 18.7 – Limitation of the Supreme Court’s jurisdiction** | | | | | | | | | | | | | | **CYFA s.599** | | |
| **Part 18.8 – Regulations** | | | | | | | | | | | | | | **CYFA s.600** | | |

**Provisions which have some indirect relevance to the Children’s Court are listed below. A reference to the CYFA shown in red indicates that the provision is repealed by the YJA.**

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| **CHAPTER 8 – APPEALS** | | |
| **YJA ss.331‑399** | **These provisions mostly re-enact with minor modifications repealed provisions in CYFA Part 5.4.** | |
| **ss.331-333**  **ss.334-340**  **ss.341-348**  **ss.349-370**  **ss.371-374**  **ss.375-380**  **ss.381-388**  **ss.389-392**  **ss.393-398**  **s.399** | * **Part 8.1 – Appeal by offender to County Court or Trial Division of Supreme Court** * **Part 8.2 – Appeals by DPP** * **Part 8.3 – Procedure on appeals from Children’s Court** * **Part 8.4 – Reports in an appeal under Part 8.1 or 8.2** * **Part 8.5 – Appeal to Supreme Court on a question of law** * **Part 8.6 – Appeal to Court of Appeal** * **Part 8.7 – Case stated for Court of Appeal** * **Part 8.8 – Status of sentence and orders during appeal period** * **Part 8.9 – Miscellaneous** * **Part 8.10 – Costs on appeal or new hearing** | |
| **CHAPTER 10 – YOUTH JUSTICE CUSTODY** | | |
| **YJA ss.437‑566** | **Some of these provisions are new. Others (such as the ‘temporary leave’ from YJCC provision of YJA s.470) re-enact – sometimes with significant modifications – repealed provisions in CYFA Part 5.8.** | |
| **ss.437-444**  **ss.445-459**  **ss.460-473**  **ss.474-527**  **ss.528-549**  **ss.550-561**  **ss.562-566** | * **Part 10.1 – Guiding custodial principles** * **Part 10.2 – Rights and responsibilities of children and young persons in YJCCs** * **Part 10.3 – Legal custody and management and operation of YJCCs** * **Part 10.4 – Prohibited actions and restricted practices**   **(Use of force; Isolation, Search of child or other person in YJCC, Seizure of items)**   * **Part 10.5 – Offences relating to YJCCs and YJ community service centres** * **Part 10.6 – Change of name applications and acknowledgement of sex applications** * **Part 10.7 – Other provisions relating to YJCCs** | |
| **CHAPTER 12 – YOUTH PAROLE** | | |
| **YJA ss.592‑664** | **Some of these provisions are new. The others re-enact – sometimes with significant modifications – repealed provisions in CYFA Part 5.5. However, it remains the case that a court sentencing a child to a YJC order under the YJA – as with the CYFA – has no power to fix a non-parole period for the child. The power whether – and if so when – to release a person on youth parole is vested solely in the Youth Parole Board.** | |
| **ss.592-620**  **ss.621-644**  **ss.645-653**  **ss.654-664** | * **Part 12.1 – The Youth Parole Board** * **Part 12.2 – Release on parole from YJCC** * **Part 12.3 – Parole stage group conference** * **Part 12.4 – Youth Justice Victims Register** | |
| **CHAPTER 13 – TRANSFERS FROM YJCC TO PRISON OR VICE VERSA** | | |
| **YJA ss.665‑684** | **Some of these provisions are new. The others re-enact – sometimes with significant modifications – repealed provisions in CYFA Part 5.6.** | |
| **ss.665-681** | * **Part 13.1 – Transfer directions** | |
| **ss.667-673** | * **Division 2 – Transfer from YJCC to prison** | |
| **ss.674-677** | * **Division 3 – Transfer from prison to YJCC** | |
| **ss.682-684** | * **Part 13.2 – Service of sentences of detention and sentences of imprisonment** | |
| **s.682** | * **Child or young person in YJCC sentenced to IMP – presumption of concurrency** | |
| **s.683** | * **Child or young person in prison sentenced to YJC – presumption of concurrency** | |
| **s.684** | * **Serving sentence of detention in YJCC and held in custody elsewhere** | |
| **SCHEDULE 1 – INTERSTATE TRANSFERS OF YOUNG OFFENDERS** | |
| **YJA s.565**  **Schedule 1** | **YJA s.565 & Schedule 1 are provisions relating to the interstate transfer of young offenders. They replicate with a few minor modifications repealed provisions in CYFA s.582 & Schedule 2.** | |

**Chapters which have limited relevance to the general operation of the ChCV are listed below.**

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| **CHAPTER 2 – ENTITIES WITH FUNCTIONS AND POWERS UNDER THE YJA** | | |
| **ss.27-34**  **ss.35-39**  **ss.40-65** | * **Part 2.1 – Functions and powers of the DJCS Secretary** * **Part 2.2 – Commissioner for youth justice** * **Part 2.3 – Aboriginal youth justice agencies** | |
| **CHAPTER 14 – MULTI-AGENCY PANELS AND HIGH RISK PANEL** | | |
| **ss.685-692**  **ss.693-699** | * **Part 14.1 – Multi-agency panels** * **Part 14.2 – High-risk panel** | |
| **CHAPTER 15, PART 15.1 – SHARING OF CONFIDENTIAL INFORMATION** | | |
| **YJA ss.700‑714** | **The Explanatory Memorandum says: “This Part establishes a purposive information sharing regime for confidential information relating to children and young persons involved in the youth justice system, notwithstanding a range of restrictions in other Acts which might otherwise limit such information sharing. The intention is to allow a group of trusted individuals working within or alongside the youth justice system to share, on request or proactively, confidential information if it is necessary to perform an ‘official duty’ or other specific functions.”** | |
| **CHAPTER 15, PART 15.2 – SHARING OF TERRORISM RISK INFORMATION** | | |
| **YJA ss.715‑717** | **These provisions re-enact – with modifications – repealed provisions in CYFA Part 5.10.** | |
| **s.715** | **What is the permitted purpose for disclosing information under this Part?** | **CYFA s.492C** |
| **s.716** | **Secretary or Department may disclose terrorism risk information** | **CYFA s.492D** |
| **s.717** | **Youth Parole Board may disclose terrorism risk information** | **CYFA s.492E** |
| **CHAPTER 16 – PLANNING, PERFORMANCE, COLLABORATION AND ACCOUNTABILITY OF THE YOUTH JUSTICE SYSTEM** | | |
| **s.718** | **Responsibility of Secretary to prepare a strategic plan** | |
| **s.719** | **Publication of prescribed information – operation of youth justice system** | |
| **s.720** | **Obligations in delivery of services in youth justice system** | |
| 1. In the course of delivering services to a child or young person in the youth justice system, a youth justice service entity [YJSE] must– 2. support the child or young person as far as reasonably practicable to– 3. rehabilitate; and 4. develop positively; and 5. not commit an offence or commit further offences; and 6. if applicable, transition effectively from custody into the community; and 7. provide reasonable assistance and support to any other YJSE in meeting any obligations under paragraph (a) in respect of the child or young person; and 8. identify and resolve any issues, including systemic issues, in the delivery of services to the child or young person. 9. The DJCS Secretary may request a YJSE to provide reasonable assistance and support to the Secretary in the delivery of services to a child or young person in the youth justice system. | | |
| 1. A request under subsection (2) may include a request to identify or resolve issues, including systemic issues, in the delivery of services to a child or young person in the youth justice system. 2. In this section youth justice service entity means any of the following– 3. a public service body; 4. a public entity; 5. Victoria Police; 6. a non-government organisation that is responsible for the provision of youth justice services; 7. a prescribed person or body. | | |
| **s.721** | **Publication of prescribed information – accountability measures to improve outcomes for Aboriginal children** | |

**The following sections contain a large number of repeals & amendments to the CYFA and various other Acts as well as a number of transitional provisions**

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| **CHAPTER 19 – TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS RELATING TO THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY** | | | |
| **YJA ss.768‑854** | **These sections contain–**   * **transitional provisions; and** * **provisions which repeal or make other consequential amendments to sections in the CYFA and 16 other Acts including *Bail Act 1977*, *Crimes Act 1958,* *Criminal Procedure Act 2009, Infringements Act 2006, Personal Safety Intervention Orders Act 2010* and *Spent Convictions Act 2021–***   **consequent on the minimum age of criminal responsibility being increased from 10 to 12. The sections referred to below mostly have some relevance to the operation of the ChCV. The other sections have no significant relevance to the operation of the ChCV.** | | |
| **ss.768-778** | **Part 19.1 – Transitional provisions** | | |
| **s.769** | **Person cannot be held criminally responsible for conduct at 10 or 11 years of age** | | |
| **s.770** | **Person must be released from custody for offence committed at 10 or 11 years of age** | | |
| **s.771** | **Criminal proceeding on foot for offence committed at 10 or 11 years of age – child must be taken to be not guilty of the alleged offence and child must be unconditionally released** | | |
| **s.772** | **Where criminal proceeding adjourned for therapeutic treatment order or protection order** | | |
| **s.773** | **Conviction or finding of guilt in relation to an offence committed at 10 or 11 years of age to be set aside** | | |
| **s.774** | **Presumption that a person cannot be held criminally responsible for alleged conduct at 12 or 13 years of age whether conduct is alleged to have occurred before, on or after the commencement day for Chapter 19.** | | |
| **s.775** | **A court has broad power to resolve a difficulty in a proceeding that arises because of the operation of Part 19.1.** | | |
| **s.777** | **The fact that a person is taken under s.771 to be not guilty of an alleged offence does not entitle the person to be awarded costs in a criminal proceeding for the alleged offence.** | | |
| **s.778**  **ss.779-780**  **s.780** | **Subsection (1) provides that the application of Part 19.1 to a person does not entitle the person to compensation arising from or in relation to any act or omission occurring before the commencement day for Chapter 19.** | | |
| **Part 19.2 – Amendment of *Bail Act 1977*** | | |
| ***Bail Act* s.3B(1)(c) is amended to read: " the presumption ~~at common law~~ that a child who is ~~10 years of age or over but under 14~~ 12 or 13 years of age cannot commit an offence;”.** | | |
| **ss.781-788** | **Part 19.3 – Amendment of the CYFA** | | |
| **s.781** | **The definition of *child* in CYFA s.3(1) is amended.** | | |
| **s.782** | **CYFA Part 5.1 (Criminal responsibility of children) is repealed.** | | |
| **s.786** | **CYFA s.410(1)(b) is amended to enable YRC order to be made only for child aged 12-14.** | | |
| **ss.796-810** | **Part 19.6 – Amendment of *Crimes Act 1958*** | | |
| **s.797** | **New s.321AA (Agreement with child who may not be criminally responsible) is inserted.** | | |
| **s.798** | **New s.321GA (Incitement of child who may not be criminally responsible) is inserted.** | | |
| **s.803** | **New s.324AB (Complicity with child who may not be criminally responsible) is inserted.** | | |
| **ss.805-806** | ***Crimes Act* ss.464L & 464M re fingerprinting of children aged 14 or under are amended to apply only to children aged 12 or over at the time of the child’s alleged act or omission.** | | |
| **ss.807-809** | ***Crimes Act* ss.464U, 464ZF & 464ZFAAA in relation to forensic procedures for children are amended to apply only to children aged 12 or over at the relevant time.** | | |
| **s.810** | **New ss.464ZGFC & 464ZGFD are inserted requiring the Chief Commissioner of Police to destroy or cause to be destroyed fingerprints and records, copies or photographs thereof and any samples and related material and information taken from a person in respect of the commission or alleged commission of an offence committed by a person under 12.** | | |
| **ss.811-826** | **Part 19.7 – Amendment of *Criminal Procedure Act 2009* [CPA]** | | |
| **s.811(1)** | **Insertion of definition of “record of reasons” in CPA s.3** | | |
| **s.813** | * ***Record of reasons*** means a record of reasons prepared for the purposes of **YJA s.12(3)** which provides: “If a police officer decides to commence a proceeding for [an offence allegedly committed by a child at 12 or 13 years of age], the police officer must record–  1. the reasons why it appears that there is admissible evidence to prove beyond reasonable doubt that the child knew at the time of the alleged commission of the offence that the child’s conduct was seriously wrong having regard to **YJA s.11(3)**; and 2. any information, evidence or other matter referred to in **YJA s.12(2)** that was considered by the police officer; and 3. any other prescribed information.”  * **YJA s.12(4)** provides: “A record of reasons under **YJAs.12(3)** must be in the prescribed form and must be filed in the court with the charge-sheet at the commencement of the proceeding.” | | |
| **Insertion of CPA s.13(ab) re ‘record of reasons’ and associated amendments** | | |
| In the case for a charge for an offence against a child who was 12 or 13 years of age at the time of the alleged commission of the offence, a summons to answer the charge or a warrant to arrest must be accompanied – on service or execution on the accused – by a copy of the **record of reasons** for the charge. | | |
| **ss.814-816 + 818-819** | If applicable, a copy of the **record of reasons** must also be:   * included in a preliminary brief [CPA s.37(1)(ab)]; * included in a full brief [CPA s.41(ba)]; * in the possession of the informant for provision to the accused or the accused’s legal representative [CPA s.53A(2)(c)(ia)]; * included in a hand-up brief [CPA s.110(ba)]; * included in a plea brief [CPA s.117(1)(ab)]. | | |
| **s.820** | **Powers of court at directions hearing (set out in CPA s.181) are expanded to include references to new powers of the Supreme & County Cts in new CPA Part 5.5 Division 5** | | |
| **ss.823-826** | **Insertion of new CPA Part 5.5 Division 5 [CPA ss.206A to 206G], plus an associated amendment to CPA s.300(2) and insertion of CPA ss.300A & 327(3)** | | |
| **This new Division 5 sets out a procedure for determination in a pre-trial hearing “by a judge alone, without a jury” of the issue of whether the presumption against criminal responsibility of an accused for an offence allegedly committed at 12 or 13 years of age has been rebutted. The use of the phrase “determined by a judge alone, without a jury” in CPA s.206A(1)(a) and the stipulation in CPA s.206(1)(b) that “the charge for the offence will not be heard and determined summarily” means – as the Explanatory Memorandum explains – that this pre-trial procedure “only applies to charges for indictable offences being heard and determined in the County Court or the Supreme Court”.** | | |
| **ss.833-834** | **Part 19.11 – Amendment of *InfringementsAct 2009* [IFA]** | | |
| **s.834** | * **A child cannot be held criminally responsible for an infringement offence at 10 or 11 years of age [IFA s.219].** * **A child is to be released from an obligation to pay infringement penalty for conduct alleged to have occurred when the child was 10 or 11 years of age [IFA s.220].** | | |
| **ss.837-839**  **ss.841-845** | **Part 19.14 – Amendment of *Personal Safety Intervention Order Act 2010* [PSIA]** | | |
| * This Part amends **PSIA s.18** to provide that if a person makes an application for a personal safety intervention order [PSIO] against a child aged under 12 years at the date of the application for the order–  1. if the Court knows the child was aged under 12, the court must not make a PSIO against the child; 2. if the court makes a PSIO, the order has no effect.  * On the commencement of **YJA s.839**– * any existing PSIO made against a child who was 10 or 11 years of age on the date the application for the order was made is taken to be set aside; and * any underdetermined application to make, vary, revoke or extend a PSIO against a child who was 10 or 11 years of age on the date the application for the order was made must be dismissed. | | |
| **Part 19.16 – Amendment of *Spent Convictions Act 2021* [SCA]** | | |
| **s.841**  **s.842**  **s.843** | **Insertion of various definitions into SCA s.3, including–**   * a definition of ***Victorian Court*** as “any of the following – the Supreme Court, the County Court, the Magistrates’ Court, the Children’s Court and the Coroners Court”; * a definition of ***Victorian law enforcement agency*** which makes it clear that the Children’s Court is not a law enforcement agency. | | |
| Makes a minor technical amendment to **SCA s.21(cc)(v)** to clarify that the Secretary of a Department is the relevant person or body to which spent convictions are disclosed. | | |
| **Collection, use and disclosure of criminal record information by Court Services Victoria** | | |
| **s.844** | **Insertion of a new SCA Part 4A headed “Spent childhood convictions”** | | |
| **The Explanatory Memorandum says of this: “Part 4A establishes a new framework that applies to the use of spent childhood convictions and related information. The overarching policy rationale for new Part 4A is to prevent children who were convicted of an offence when aged 10 or 11 from being subject to adverse consequences as a result of that conviction. This recognises that children under 12 years of age should not have been convicted of an offence because they lack the capacity to form criminal intent. New Part 4A inserts new sections 24A, 24B, 24C, 24D and 24E into the *Spent Convictions Act 2021* to give effect to this policy intent.”** | | |
| **s.845** | **Expansion of the regulation-making power in SCA s.26(1).** | | |
| **CHAPTER 20 – ADDITIONAL AMENDMENTS TO THE CYFA** | | | |
| **s.855** | **New CYFA ss.347B & 347C inserted** | | **Not previously in the CYFA** |
| **347B** | **Statements by child participating in treatment or rehabilitation program not admissible in proceedings** |
| **347C** | **Risk rating devised from assessment of child’s risk of re-offending not admissible before child is sentenced** |
| **s.856** | **New CYFA s.491A inserted** | | **Not previously in the CYFA** |
| **491A** | **Power of police to arrest person in remand centre** |
| **CHAPTER 21 – OTHER TRANSITIONAL PROVISIONS** | | | |
| **YJA ss.858‑898** | **Of the transitional provisions listed below, those in YJA Parts 21.1, 21.3, 21.4 & 21.6 are probably of most relevance to the ChCV.** | | |
| **ss.858-861**  **s.859(2)**  **s.862** | * **Part 21.1 – General transitional provisions** | | |
| On or after the commencement day for **YJA Chapter 21**, if a superseded provision of an Act continues to apply by force of this Chapter, the following provisions also continue to apply: (a) any other provisions of that Act necessary to give effect to that continued provision; and (b) any regulations or rules made under that Act for the purposes of that continued provision. | | |
| * **Part 21.2 – Early diversion group conferences** | | |
| **s.863** | * **Part 21.3 – Criminal proceedings and imposition of sentence** | | |
|  | * **YJA Chapters 5 [Commencing a proceeding against a child] & 6 [Conduct of a proceeding]** apply to a criminal proceeding commenced on or after the commencement of that Chapter, irrespective of when the offence is alleged to have been committed. * Subject to this Chapter, **CYFA Chapter 5, Parts 5.1A [Commencement of proceedings] & 5.2 [Procedures and standard of proof]** as in force immediately before the commencement day, continue to apply to a criminal proceeding commenced in the ChCV before the commencement day as if those Parts had not been repealed. * Any sentence imposed on or after the commencement of **YJA Chapter 7 [Sentencing]** must be imposed in accordance with the **YJA** irrespective of when the offence was committed. | | |
| **ss.864-865** | * **Part 21.4 – Sentencing** | | |
|  | * **Deferral**: If sentencing of a child has been deferred under **CYFA s.414** before the commencement day but the adjourned case has not been heard, the matter remains adjourned in accordance with the relevant provisions of the CYFA as if **YJA Chapter 7** **[Sentencing]** had not commenced but when the ChCV ultimately sentences the child it must be in accordance with the **YJA**. * **Group conference**: Subject to this Chapter, **CYFA s.415** continues to apply to a group conference to which a child is referred before the commencement of **YJA Chapter 7** and to an outcome plan from that group conference as if **CYFA s.415** had not been repealed. * **Maximum period of a YJCC order – offences relating to remand centres, youth justice centres**: see **YJA s.865** for relevant transitional provisions. | | |
| **ss.866-870** | * **Part 21.5 – Youth Justice Services** | | |
| **ss.871-884** | * **Part 21.6– Sentences imposed under the CYFA** | | |
| **s.872**  **s.873** | * CYFA sentencing orders in force on the commencement day of **YJA s.921** continue in accordance with **CYFA Part 5.3 [Sentences]** as if that Part had not been repealed. * **Despite the above, if a person subject to a CYFA sentencing order (other than YRC, YCO or YJC) comes before the ChCV on–**  1. **an application to vary or revoke the CYFA order; or** 2. **a breach of that order–**   **and the ChCV determines to revoke the CYFA sentencing order and make a new order in respect of the offence(s), subject to the stipulations in the sections listed below the ChCV must make an order under the YJA that it could have made had it found the person guilty of the offence(s) under the YJA. The ChCV must consider making an order at a similar level of the sentencing hierarchy in YJA s.240(1) unless to do so is inappropriate in the circumstances.** | | |
| **s.875** | * Proceeding under the **YJA** for breach of a **CYFA accountable undertaking**. | | |
| **s.876** | * Proceeding under the **YJA** for breach of a **CYFA good behaviour bond.** | | |
| **ss.877-879** | * Proceeding under the **YJA** for breach of a **CYFA probation order**. | | |
| **ss.880-882** | * Proceeding under the **YJA** for breach of a **CYFA youth supervision order**. | | |
| **s.883** | * Proceeding under the **YJA** for breach or variation of a **CYFA youth attendance order**. | | |
| **ss.884-885** | * Proceeding under the **YJA** for variation or revocation of a **CYFA youth control order**. | | |
| **s.886** | Subject to **YJA s.872**, on and after the commencement date, a **CYFA youth residential centre order** or a **CYFA youth justice centre order** is to be treated as a **YJC order** for the purposes of the **YJA**. | | |
| **ss.887-892** | * **Part 21.7 – Transitional provisions – Youth parole** | | |
| **ss.893-894** | * **Part 21.8 – Transfers under Chapter 13** | | |
| **ss.895-898** | * **Part 21.9 – Other transitional provisions** | | |
| **s.895**  **s.896**  **s.898** | * Any infringement penalty registered under **CYFA Schedule 3** immediately before the commencement of **YJA Chapter 17** is to be dealt with on and from the commencement date under the **YJA** **CAYPINS** procedure. * An undetermined application for change of name or acknowledgement of sex made under **CYFA Part 5.8** must be determined in accordance with the **YJA** on and from the commencement date. * Any undetermined appeal commenced and on foot under **CYFA Part 5.4** must be dealt with in accordance with **YJA Chapter 8** on and from the commencement date. | | |
| **CHAPTER 23, PART 23.5 – AMENDMENT OF THE CYFA** | | | |
| **YJA ss.917‑987 & 1087** | **These provisions repeal or make consequential or substantive amendments to the CYFA. Only a few of the 56 amending sections are significant for the operation of the Children’s Court and these are detailed below.** | | |
| **ss.917-931** | **Repeal of various provisions in the CYFA** | | |
| * **Various definitions in s.3(1) including accountable undertaking, youth attendance order, youth supervision order, youth residential centre order and remand centre as well as the definitions in ss.3A & 3B.** * **Delegation provisions in ss. 17(1)(f), 17(1)(fa) & 17(1)(fb).** * **Part 5.1A, Parts 5.2-5.8, Part 5.10 in Chapter 10 [Children and the Criminal Law].** * **Part 6.2 [Offences relating to detained persons].** * **Sections 522A, 543-544, 547(f)-(j), 585-586, 599(2).** * **Part 7.8 Divisions 6+7, Part 7.9.** * **Most paragraphs of the regulation making power in s.600(1).** * **Schedules 2+3.** | | |
| **ss.932-987** | **Consequential or other amendments to the CYFA significant for the operation of ChCV** | | |
| **s.944** | **Joint committal proceedings** | | |
| **s.1087** | The jurisdiction granted by **CYFA s.516A(1)** to conduct joint committal proceedings involving child and adult accused is significantly expanded. It is no longer restricted to a child who is of or over the age of 15 years at the time the criminal proceeding against the child for the offence is commenced. Nor is it restricted to the offences of murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death or culpable driving causing death. The amended subsection provides:   1. The jurisdiction given by **CYFA s.516(1)(c)** may be exercised concurrently with the jurisdiction of the Magistrates' Court to conduct a committal proceeding if— 2. the charges against each accused could properly be joined in the same indictment; and 3. the accused who is a child is charged with an indictable offence that is not to be heard and determined summarily for a reason specified in **YJA s.156(1)**; and   the Court makes an order under subsection (2) in relation to the accused who is a child and the Magistrates' Court makes an order under section 25(4) of the **Magistrates' Court Act 1989** in relation to the other accused.  A parallel amendment has been made by **YJA s.1087** to s.25(3) of the **Magistrates' Court Act 1989**. | | |
| **ss.945-949** | **Minor amendments to CYFA ss.517-520 primarily to add references to the YJA to sections relating to the Koori Court (Criminal Division).** | | |
| **ss.955-960** | **Consequential amendments to CYFA ss.522-527 primarily to remove references to the Criminal Division as a consequence of YJA ss.167-177.** | | |
| **s.964** | **Minor amendment to CYFA s.534 re restriction on publication of proceedings.** | | |
| **s.975** | **Expansion of CYFA s.551 to permit a parent of a child in the Criminal Division to dispute a matter in a report to which CYFA Part 7.8 applies.** | | |
| **CHAPTER 23, PARTS 23.1-23.4 & 23.6-23.45 – AMENDMENT OF OTHER ACTS** | | | |
| **YJA ss.909‑916 + 988-1174** | **These provisions make consequential amendments to a large number of other Acts. Headings to the various amending sections are listed on pages xxxviii to xlviii of the YJA.** | | |

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| **CHAPTER 23, PART 23.46 – AMENDMENT OF THE YJA** | |
| **YJA s.1175** | **This section amends the definition of *child* in YJA s.4. It provides:** |
| For **YJA s.4(3)** substitute–   1. A person is excluded if the person is 19 years of age or over– 2. at the time of the commencement of the proceeding for the offence or alleged offence; or | |
| 1. if the offence is an infringement offence– 2. at the time of the commencement of the proceeding for the offence; or 3. at the time the enforcement agency gives the registration document and registration certificate to a registrar under **s.725**–   whichever is earlier.   1. To avoid doubt, in the **YJA** ***child*** includes— 2. a person who is 18 years of age or older and subject to an order or sentence under **Chapter 7**; and 3. a person who is 18 years of age or older at any time during an appeal under **Chapter 8**; and 4. a person who is held in custody in a youth justice custodial centre under the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; and 5. a person who is under 18 years of age and detained in a youth justice custodial centre under Part 2AA or Part 2A of the **Terrorism (Community Protection) Act 2003** or under a corresponding preventative detention law within the meaning of that Act. 6. Despite subsection (2), in **YJA Chapter 11**, ***child*** does not include a person who– 7. is held in a police gaol for one or more offences; and 8. was 18 years of age or over at the time of the commission of at least one of those offences. | |
| **While it may seem strange that there is a provision included in the YJA to amend the central definition of ‘*child*’ contained in YJA s.4, the explanation is that various provisions of the YJA will commence at various times. The Explanatory Memorandum explains that s.1175 substitutes new subsections for s.4(3) to amend the definition of ‘child’ for the purposes of the Act when provisions commence in accordance with s.2(3).** | |

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## **1.2 Regulations**

This Part contains a summary of various sets of Regulations that have some relevance to the operation of the Children’s Court.

### **1.2.1 Children, Youth and Families Regulations 2017**

Section 600 of the CYFA empowers the Governor in Council to make regulations for or with respect to 30 listed matters relating to various aspects of the Act.

The Regulations originally made under the CYFA were the *Children, Youth and Families Regulations 2007* [S.R. No.21/2007]. They were made on 17/04/2007 and came into operation on 23/04/2007. They were amended as from 01/01/2010 by S.R. No.159/2009. The major effect of this amendment was to revoke the forms used for or with respect to proceedings in the Criminal Division of the Court, these being placed initially in the *Children’s Court Criminal Procedure Rules 2009* [S.R. No.189/2009] and now in S.R. No.161/2019.

The 2007 Regulations were revoked and replaced by the *Children, Youth and Families Regulations 2017* [S.R. No.19/2017]. They were made on 17/04/2017 and came into operation on the same day. Minor amendments have since been made in 2018 [S.R. No.5/2018, 8/2018, 53/2018 & 147/2018] & 2019 [S.R. No.75/2019].

The 2017 Regulations also revoke and replace the *Children, Youth and Families (Bail) Regulations 2016* [S.R. No.27/2016].

The 2017 Regulations prescribe various matters required to be prescribed or permitted under the CYFA. The majority of the regulations have no relevance to the operation of the Children’s Court. Those which have at least some relevance are detailed below.

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| **REG.** | **SUBJECT MATTER** |
| 15 | Information required under ss.242(1) & 247A(1) of the CYFA to be given by a protective intervener to parent(s) and child of or above the age of 12 years when a child is placed in emergency care. |
| 16 | Criteria to which the Secretary must have regard in preparing a report pursuant to s.263(6) of the CYFA on the suitability of a person for the purpose of placing a child with that person on an interim accommodation order. |
| 17+Sch.2 [Form 6] | Prescribed form of notice of direction by the Secretary under s.282(2) of the CYFA in relation to compliance with a family preservation order. |
| 18 | Matters to be considered by a Court for the purposes of s.319(1)(c)(i) of the CYFA in determining whether to make a permanent care order in respect of a child. |
| 23 + Sch.3 | Prescribed regions for the placement in a police gaol of a child remanded in custody pursuant to ss.346(3)(b), 347(1) & 347(1A) of the CYFA. |
| 24 | The whole of the State is a prescribed region pursuant to s.387(2)(a) of the CYFA for the making of youth supervision orders. |
| 25+Sch.4  [Form 1] | Prescribed form for notice of suspension of youth supervision order pursuant to s.390(1) of the CYFA. |
| 26+Sch.4  [Form 2] | Prescribed form for notice of required attendance at a youth justice unit pursuant to s.402(2) of the CYFA. |
| 27+Sch.4  [Form 3] | Prescribed form for notice of suspension of youth attendance order pursuant to s.403(1) of the CYFA. |
| 30 | Terms and conditions of a youth parole order for the purposes of s.458(4) of CYFA. |
| 37 | Remission of sentences of detention in youth residential centre or youth justice centre where a detainee is not eligible for parole |
| 38 | Prescribed particulars for the issue of warrants in electronic form pursuant to s.528B of the CYFA. |
| 43 | Infringement notice |
| 44 | Minimum registrable amount |
| 45+Sch.6 | CAYPINS forms |

### **1.2.2 Intervention Orders Regulations**

The following Regulations are ancillary to the legislation in respect of intervention orders and hence have some relevance to the Children’s Court:

* *Personal Safety Intervention Orders Regulations 2011* [S.R. No.89 of 2011] which sunset on 30/08/2021;
* *Family Violence Protection Regulations 2018* [S.R. No.161 of 2018].

These Regulations came into operation on 05/09/2011 and 01/12/2018 respectively and prescribe various matters required or necessary to be proclaimed under the respective Acts.

### **1.2.3 COVID-19 temporary Regulations**

Four sets of regulations were made in 2020 to modify temporarily certain aspects of the law of Victoria to respond to the COVID-19 pandemic. Those relevant to the Children’s Court were S.R. No.34, 38, 45 & 120/2020. All of these regulations expired on 26/04/2021. As and from that date many of their contents have been enacted permanently – mostly in an amended form – by related provisions in the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*. For details see **section 1.1.4** above.

### **1.2.4 Criminal Procedure Regulations 2020**

The Regulations originally made under the *Criminal Procedure Act 2009* [‘the CPA’] were the *Criminal Procedure Regulations 2009* [S.R. No.169/2009] which were amended by S.R. No.1/2011 and S.R. No.46/2018. They were revoked and replaced by the *Criminal Procedure Regulations 2020* [S.R. No.134/2020] which were made on 08/12/2020 and came into operation on 13/12/2020.

The objectives of the 2020 Regulations are–

1. to provide for the making, use, possession, copying, storage, access to and destruction of audio and audiovisual recordings referred to in Division 5 and Division 6 of Part 8.2 of the CPA; and
2. to specify the allowances and expenses that are to be paid to prosecution witnesses; and
3. to provide for the use of various audio or audiovisual recordings made in certain proceedings for the purpose of assisting intermediaries or the training or evaluation of intermediaries; and
4. other matters required or necessary to be prescribed by the CPA.

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| **REG.** | **SUBJECT MATTER** |
| **Part 2**  **Regs.6-13** | **Division 5 recordings** |
| Division 5 (ss.366-368A) of the CPA deals with the use of recorded evidence-in-chief of children and cognitively impaired witnesses in a sexual offence, assault or family violence criminal proceeding (other than a committal). A Division 5 recording is an audio or audiovisual recording of a kind referred to in ss.367-368A of the CPA. |
| **Reg. 6: For the purposes of s.367 of the CPA who may ask questions**  **Reg. 7: Information to be included in a Division 5 recording**  **Regs. 8-9: Copies and transcript of a Division 5 recording**  **Reg.10: Right of accused to listen to or view Division 5 recording**  **Reg.11: Record of persons listening to or viewing Division 5 recordings**  **Reg.12: Use of Division 5 recordings, copies or transcripts**  **Reg.13: Retention and destruction of recordings and copies** |
| **Part 3**  **Regs.14-17** | **Division 6 recordings** |
| Division 6 (ss.369-376) of the CPA deals with procedure and rules for children and cognitively impaired complainants in trials that relate (wholly or partly) to a charge for a sexual offence. A Division 6 recording is an audio or audiovisual recording of a kind referred to in ss.370-376 of the CPA. |
| **Reg.14: Right of accused to listen to or view Division 6 recording**  **Reg.15: Record of persons listening to or viewing Division 6 recordings**  **Reg.16: Use of Division 6 recordings, copies or transcripts**  **Reg.17: Retention and destruction of recordings and copies** |
| **Part 4**  **Regs.18-24** | **Prosecution witnesses allowances and expenses**  **Reg.18: Attendance allowance for expert witness**  **Reg.19: Allowances and expenses of other witnesses**  **Regs.20-22: Meal, accommodation and travelling allowances for witnesses**  **Reg.23: No payment to prisoners**  **Reg.24: Evidence of expenses etc. to be produced** |
| **Part 5**  **Regs.25-26**  **Sch.1** | **Intermediaries** |
| The function and use of intermediaries are governed by Division 2 of Part 8.2A of the CPA. Their function – set out in s.389I – is to communicate or explain:   1. to a witness for whom an intermediary is appointed, questions put to the witness to the extent necessary to enable them to be understood by the witness; and 2. to a person asking questions of a witness for whom an intermediary is appointed, the answers given by the witness in reply to the extent necessary to enable them to be understood by the person. |
| **Reg.25+Schedule 1: Intermediaries’ oath or affirmation**  **Reg.26: Use of recordings and transcripts** |

### **Bail Regulations 2022**

The *Bail Regulations 2022* [S.R. No.116/2022] were made under s.33 of the *Bail Act 1977* on 18/10/2022 and come into operation on 10/12/2022. They revoke and replace the *Bail Regulations 2012* and subsequent amendments in 2013, 2016, 2017 & 2018. They were amended as and from 25/03/2024 by the *Bail Amendment Regulations 2024* [S.R. No.8/2024] and as and from 22/04/2025 by the *Bail Amendment (Electronic Monitoring) Regulations 2025*[S.R. No.16/2025]. The objectives of the current Regulations (as amended) are–

* to prescribe regions of the State for the purposes of the trial of electronic monitoring of children on bail: for further information see section **section 9.5.2** **in Chapter 9** of these Research Materials;
* to prescribe forms to be used for the purposes of the *Bail Act 1977*: there are 21 prescribed forms which are listed and described in detail in **section 9.2.9** **in Chapter 9**; in relation to prescribed forms it is noted that s.53 of the *Interpretation of Legislation Act 1984* – under the heading “**Strict compliance with prescribed forms not necessary**” – provides as follows:

“Where a form is prescribed by an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law.”

## **1.3 Rules**

Sections 588(1), 588(1A), 588(1AC) & 588(1B) of the CYFA empower the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* the prescription of forms for the purposes of the Family Division of the Court;
* judicial resolution conferences, including but not limited to the practice and procedure of the Court in relation to judicial resolution conferences;
* any matter relating to the jurisdiction of the Family Division of the Court given by s.515(4);
* generally any matter relating to the practice and procedure of the Family Division of the Court;
* prescribing forms for the purposes of the Criminal Division of the Court.
* generally any matter relating to the practice and procedure of the Criminal Division of the Court;
* any matter or thing required or permitted by or under the *Vexatious Proceedings Act 2014* to be dealt with by rules of court or otherwise necessary or required for the purposes of that Act;
* prescribing forms for the purposes of the CAYPINS procedure or generally any matter relating to the CAYPINS procedure.

Section 588(1AAB) of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* the form in which process may be issued out of the Court and the manner in which it may be authenticated, stored, transmitted or otherwise dealt with;
* the manner in which orders may be authenticated;
* electronic communication and electronic processes, including, but not limited to–
* applications by electronic means, electronic filing and electronic service of documents in any proceeding; and
* the transmission and issuing of orders, processes and other documents by electronic communication; and
* use of electronic signatures and seals;
* the storage, disposal or destruction of documents–
* filed or lodged in proceedings in the Court; or
* issued out of the Court in proceedings in the Court and kept by the principal registrar.

Section 588(1AB) of the CYFA empowers the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* the prescription of the proceedings or class of proceedings which may be dealt with by the Court constituted by a judicial registrar;
* delegating to the judicial registrars all or any of the powers of the Court specified by the rules of court in relation to proceedings so prescribed, including, but not limited to, the exercise by judicial registrars of the jurisdiction of the Court other than the power—
* to impose a sentence of detention in a youth justice centre or youth residential centre; or
* to make a youth attendance order;
* providing for a judicial registrar to exercise any power of a magistrate under this Act with respect to the issue of a search warrant for the purpose of having a child placed in emergency care;
* the transfer or referral of proceedings between the Court constituted by a judicial registrar and the Court constituted by a magistrate of the Court;
* reviews of, and appeals from, the Court constituted by a judicial registrar;

As part of the COVID-19 pandemic recovery process, the CCV was granted funds to establish judicial registrar positions in its jurisdiction. The *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* [S.R.No.22/2021] came into operation on 25/03/2021, were amended by S.R.No.90/2021 from 23/07/2021 and were further amended by S.R.No.70/2021 from 10/07/2023.

Section 588(2) provides that a rule made under s.588 must not be inconsistent with a provision made by or under this or any other Act, whether the provision was made before or after the making of the rule.

In addition ss.589-590 & 590A of the CYFA empower the President, together with 2 or more magistrates for the Court, jointly to make rules of court for or with respect to–

* requirements for the purposes of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958* for or with respect to 6 specific matters relating to audio visual or audio links;
* applications to the Court under Division 2 or 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*;
* any matter relating to the practice and procedure of the Court under Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*;
* the return to the Court of warrants issued under this Act or issued by the Court under s.57 of the *Magistrates’ Court Act 1989* as applied by this Act;
* any other matter or thing required or permitted by or under Part 4A of the *Sex Offenders Registration Act 2004*to be dealt with by rules of court or otherwise necessary or required for the purposes of Part 4A of that Act;
* any matter relating to the practice and procedure of the Koori Court (Criminal Division) and the Neighbourhood Justice Division of the Court and to the transfer of proceedings to and from those courts.

Section 591 of the CYFA provides that the power of the President together with 2 or more magistrates for the Court jointly to make rules of court is subject to the rules being disallowed by a House of Parliament in accordance with s.23 of the *Subordinate Legislation Act 1994*.

Section 210(1) of the *Family Violence Protection Act 2008* (‘the FVPA’) empowers the President of the Children’s Court, together with 2 or more magistrates of the court, jointly to make rules for and with respect to proceedings in the court in relation to applications and orders made under the FVPA, including the non-exhaustive list of matters set out in s.210(2).

Section 184(1) of the *Personal Safety Intervention Orders Act 2010* (‘the PSIA’) empowers the President of the Children’s Court, together with 2 or more magistrates of the court, jointly to make rules for and with respect to proceedings in the court in relation to applications and orders made under the PSIA, including the non-exhaustive list of matters set out in s.184(2).

In *Victorian Legal Services Board v Kuksal (Costs and Amendment Application)* [2024] VSC 48 Gorton J – in rejecting the defendants’ submission that rule 4.05(b) does not authorise the commencement of the proceeding by way of originating motion – said at [19]: “More fundamentally, **the Rules are the servants, not the masters, of judicial process**. The defendants did not identify any prejudice that they have or will suffer by reason of their facing a proceeding commenced by originating motion rather than by writ.” [emphasis added]

The following 8 sets of rules – listed in the “Acts and Regulations” section under the tab “Legal Professionals” on the Children’s Court website [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au) – are current.

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| **RULES** | | | **OBJECT OF RULES** |
| S.R.No.20/2017 | *Children, Youth and Families (Children’s Court Family Division) Rules 2017* [as amended by S.R.No.185/2018, 3/2019 & 100/2022] | * To prescribe certain matters and 42 forms for the purposes of the ChCV Family Division. * The amendments on 01/02/2019 include addition of rules 9, 9AA & 9A-9H (Witness summons) and rule 10 (Application to the Court – publication of proceedings). * The amendments on 01/10/2022 update the forms of an affidavit/declaration of service in the Family Division and the Criminal Division and include other minor and consequential changes. | |
| IN OPERATION 18/04/2017 |
| **AMENDED 01/02/2019**  **& 01/10/2022** |
| S.R.No.169/2018 | *Children's Court (Family Violence Protection) Rules 2018* [as amended by S.R.No.10/2020] | To make rules of procedure for proceedings in the Children’s Court of Victoria under the FVPA. To revoke Children’s Court (Family Violence Protection) Rules 2008 & Children’s Court (Family Violence Protection) (Amendment No.1) Rules 2011. | |
| IN OPERATION 03/12/2018 |
| **AMENDED 01/03/2020** |
| S.R. No.15/2018 | *Children's Court (Evidence – Audio Visual and Audio Linking) Rules 2018* | To facilitate applications to the Court under Part IIA of the Evidence (Miscellaneous Provisions) Act 1958, namely applications under ss.42E, 42L, 42M, 42N & 42P relating to the giving of evidence and/or the appearance of a person at court by means of an audio visual link or audio link. | |
| IN OPERATION 26/02/2018 |
| **REVOKES S.R. No.11/2008** |
| S.R.No.161/2019 | *Children's Court Criminal Procedure Rules 2019* | To provide for the practice and procedure of the Criminal Division of the Children’s Court, including various forms prescribed for the purposes of the Criminal Division. | |
| IN OPERATION 22/12/2019 |
| **REPLACES S.R. No.189/2009** |
| S.R.No.126/2020 | *Children's Court Authentication and Electronic Transmission Rules 2020* [as amended by S.R.No.104/2023] | To provide for the following in the Children’s Court:   1. the authentication of orders; 2. the issue and authentication of process; 3. the authentication of warrants; 4. the filing of documents by electronic communication or by CMS. | |
| IN OPERATION 17/11/2020 |
| **AMENDED**  **09/10/2023** |
| S.R.No.127/2020 | *Children's Court Criminal Procedure, (Family Violence Protection) and (Personal Safety Intervention Orders) Amendment Rules 2020* | To amend S.R.No.161/2019, 169/2018 and 94/2011 to enable filing of documents in accordance with Order 3 of S.R. No. 126/2020. | |
| IN OPERATION 17/11/2020 |
|  |
| S.R.No.22/2021 | *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* | 1. To prescribe proceedings that may be dealt with by the ChCV constituted by a judicial registrar. 2. To delegate to judicial registrars some of the powers of the ChCV. 3. To establish a procedure for the review by the ChCV of a determination of the Court constituted by a judicial registrar. | |
| IN OPERATION 25/03/2021 |
| **AMENDED BY S.R.No.90/2021 AS AND FROM 23/07/2021. FURTHER AMENDED BY S.R.No.70/2023 AS AND FROM 10/07/2023.** | |
| S.R.No.113/2021 | *Children's Court (Personal Safety Intervention Orders) Rules 2021* | To make rules of procedure for proceedings in the Children’s Court of Victoria under the PSIA. | |
| IN OPERATION 01/09/2021 |
| **REPLACES S.R. No.94/2011** |

Several of the sets of rules detailed above contain prescribed forms for various purposes. In this connection it is noted that s.53 of the *Interpretation of Legislation Act 1984* – under the heading “**Strict compliance with prescribed forms not necessary**” – provides as follows:

“Where a form is prescribed by an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law.”

## **1.4 Practice Directions/Notes, Court Guidelines & Court Information Guides**

### **1.4.1 Practice Directions & Practice Notes**

Section 592 of the CYFA empowers the President (or pursuant to s.509(4) the Acting President) to issue practice directions, statements or notes – which must not be inconsistent with any provision in any legislation – for the Court–

* in relation to proceedings or any class of proceedings in either the Family Division or the Criminal Division of the Court; or
* in relation to the exercise by a registrar of any jurisdiction, power or authority vested in the registrar as registrar under Schedule 3 of the CYFA.

Practice Directions have been issued by the President since 2006. The current Practice Directions are summarised as follows.

|  |  |
| --- | --- |
| [**No.3 of 2016**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-02/Practice%20Direction%203%20of%202016.pdf)  08/06/2016 | **LISTING OF MATTERS IN THE CHILDREN’S KOORI COURT (CRIMINAL DIVISION) AT MELBOURNE**  This PD aims to ensure that matters adjourned to the Children’s Koori Court at Melbourne are in a position to proceed as either a plea of guilty or, where appropriate, for diversion to be considered pursuant to s.59 of the *Criminal Procedure Act 2009* and s.528 of the CYFA. |
| [**No.2 of 2018**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-02/Practice%20Direction%202%20of%202018.pdf)  05/04/2018 | **PROCEDURE FOR INDICTABLE OFFENCES THAT MAY BE HEARD AND DETERMINED SUMMARILY**  This PD sets out directions in relation to the listing, procedure and venue for charges falling within s.356(6) [Category A serious youth offence committed by child aged 16+] and s.356(8) [Category B serious youth offence committed by child aged 16+]. |
| [**No.3 of 2022**](https://www.childrenscourt.vic.gov.au/sites/default/files/2022-03/Practice%20Direction%20No.3%20of%202022_0.pdf)  01/03/2022 | **LISTING & HEARING ARRANGEMENTS FOR ALL INTERVENTION ORDER MATTERS HEARD BY THE CHILDREN’S COURT**  This PD (which revokes PD No.3 of 2021 & Nr.15 of 2021) is effective from 07/06/2021. It outlines protocols for the listing and hearing of all intervention order proceedings (under the *Family Violence Protection Act 2008* or the *Personal Safety Intervention Orders Act 2010*) heard by the Children’s Court of Victoria at all Court venues. |
| [**No.2 of 2023**](https://www.childrenscourt.vic.gov.au/sites/default/files/2023-07/Practice%20Direction%20No.%202%20of%202023.pdf)  31/07/2023 | **CRIMINAL DIVISION**  This P.D. (which revokes Practice Directions No.1 of 2022; Nos.4‑6 of 2018; No.1 of 2009 & Nos.1-2 of 2007) is effective from 31/07/2023. It contains directions under the following headings:  **ALL CHILDREN’S COURTS – STATEWIDE**   * **3: FILING** * **4-6: ONLINE HEARINGS** * **7-9: FIRST REMAND HEARINGS** * **10-12: SECOND AND SUBSEQUENT REMAND HEARINGS** * **13-14: BAIL APPLICATIONS** * **15-25: BAIL VARIATION(S)** * **26: SUMMARY CASE CONFERENCING** * **27-38: DIVERSION HEARING(S)** * **39-40: SEXUAL OFFENCE(S)** * **41-42: INTERMEDIARIES** * **43-47: GROUND RULES HEARINGS** * **48-50: CONFIDENTIAL COMMUNICATIONS AND PROTECTED HEALTH INFORMATION**   **CHILDREN’S COURT OF VICTORIA SITTING AT MELBOURNE**   * **51-55: REMAND COURT** * **56-59: MOORABBIN AND SUNSHINE CUSTODY LISTINGS** |
| [**No.2 of 2024**](https://www.childrenscourt.vic.gov.au/sites/default/files/2024-10/Children%27s%20Court%20of%20Victoria%20Practice%20Direction%202%20of%202024%20-%2022%20October%202024_1.pdf)  21/10/2024 | **CRIMINAL DIVISION**  This P.D. – commencing on 22/10/2024 – contains directions involving transitional arrangements for the listing and hearing in dedicated metropolitan Melbourne Children’s Courts of–   * criminal cases; and * intervention order [IVO] cases where the respondent is a child.   The directions are primarily focussed on the child’s residential address and are structured as follows:   * **1-3: BACKGROUND RE NEW CATCHMENT AREAS** * **4: LISTING OF A NEW CASE** * **5: WHERE A CHILD HAS MORE THAN ONE CASE FOR MENTION** * **6: ADJOURNMENT OF CASES** * **7: CRIMINAL CASES WHERE THE CHILD IDENTIFIES AS ABORIGINAL OR TORRES STRAIT ISLANDER** * **8: WHERE THE CHILD AT THE TIME OF THE OFFENCE IS UNDER 14** * **9: PART HEARD CASES** * **10: RETURN OF CASES** * **11: CASES ALREADY LISTED IN 2025**   For further details see **section 2.5.2**. |
| [**No.1 of 2025**](https://www.childrenscourt.vic.gov.au/sites/default/files/2024-04/Practice%20Direction%20No%201%20of%202024.pdf)  01/01/2025 | **FAMILY DIVISION**  This P.D. (which revokes and replaces P.D. No.1 of 2024 dated 18/04/2024) is effective from 01/01/2025. It contains directions for the listing and hearing of all child protection proceedings (under the Children, Youth and Families Act 2005) heard by the Children’s Court of Victoria at all venues of the Court. It also contains directions for the listing and hearing of Family Division matters pursuant to the Terrorism (Community Protection) Act 2003. The directions are set out under the following headings:   * **1-9: MANAGEMENT OF CHILD PROTECTION PROCEEDINGS** * **10: CHILD PROTECTION PRACTITIONERS** * **11-15: LEGAL PRACTITIONERS** * **16-17: ADULT PARTY TO CHILD PROTECTION APPLIC’N IN CUSTODY** * **18-19: DIGITAL RECORDINGS** * **20: INTERSTATE CHILD PROTECTION ORDERS** * **21: CHILDREN’S COURT CLINIC** * **22-29: LISTING AND HEARING OF CHILD PROTECTION CASES** * **30-37: READINESS HEARINGS** * **38-45: WITNESS SUMMONS TO PRODUCE** * **46-51: MARRAM-NGALA GANBU (KOORI FAMILY HEARING DAY)** * **52-58: SUPPORT AND ENGAGEMENT ORDERS (TERRORISM ACT)** |

All Practice Directions listed in this section can be downloaded from the Children’s Court of Victoria website [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au).by clicking on the relevant P.D. Number above.

### **1.4.2 Court Guidelines**

The Court has also issued the following Guidelines which are summarised below. They can be read and downloaded from the linked websites by clicking on the relevant heading.

|  |  |
| --- | --- |
| **01/03/2016**  **Since 20/12/2024CC’s are no longer conducted by the ChCV.** | [**GUIDELINES FOR CONCILIATION CONFERENCES**](https://www.childrenscourt.vic.gov.au/sites/default/files/2020-07/Guidelines%20for%20Conciliation%20Conferences%20-%201%20March%202016_0.pdf)  A conciliation conference was intended to facilitate the early resolution of applications in the Family Division of the Court through a non-adversarial mediation process. The Guidelines are structured under the following headings:   1. **INTRODUCTION AND PURPOSE** 2. **PROCEDURAL MATTERS** 3. **ROLE OF CONVENOR** 4. **RESPONSIBILITIES OF ALL PARTICIPANTS** 5. **ROLE OF LAWYERS** 6. **ROLE OF CHILD PROTECTION PRACTITIONERS** 7. **ROLE OF FAMILY AND COMMUNITY MEMBERS** 8. **CONCILIATION CONFERENCE REPORT** |

The **Intermediary Program** summarised below commenced as a Pilot Program on 01/07/2018 but is now an ongoing program, future funding having been confirmed. The original Guidelines dated 28/06/2018 were updated on 28/07/2023 to reflect an amendment made to the *Criminal Procedure Act 2009* [‘CPA’] which provides that from 30/07/2023 a ground rules hearing must be held for all complainants in relation to a charge for a sexual offence. The Children’s Court uses the “Multi‑jurisdictional Court Guide for Ground Rules and the Intermediary Program” which can be downloaded from the County Court website by clicking on the link below.

|  |  |
| --- | --- |
| **28/06/2018 UPDATED ON 28/07/2023** | [**MULTI-JURISDICTIONAL COURT GUIDELINES FOR GROUND RULES AND THE INTERMEDIARY PROGRAM**](https://www.countycourt.vic.gov.au/practice-notes?filter%5bdivision%5d%5b0%5d=13&filter%5bkeyword%5d=multi-jurisdictional)   1. These Guidelines relate to the use of intermediaries and the conduct of ground rules hearings in the **Intermediary Program** [IP] which has operated since 01/07/2018. The scheme relating to intermediaries and ground rules hearings is set out in Part 8.2A of the CPA which commenced on 28/02/2018 and was expanded from 30/07/2023. 2. The introduction of an intermediary scheme, based on the English model, was recommended in the 2016 VLRC report “The Role of Victims of Crime in the Criminal trial Process”. An intermediary scheme and the use of ground rules hearings in Victoria was endorsed in *R v Ward (a pseudonym)* [2017] VSCA 37 on the subject of questioning of children and obligations of counsel and judicial officers. The principles also apply equally to other vulnerable witnesses. 3. The IP came into effect from 01/07/2018 after the participating venues of the Court were gazetted pursuant to s.389F(1)(b) of the CPA and a panel of intermediaries was established pursuant to s.389H. 4. The IP operates more narrowly than the scheme set out in the CPA and is not currently available for all witnesses who would otherwise be eligible. It applies to witnesses who are under the age of 18 years or have a cognitive impairment (‘vulnerable witnesses’) in the following circumstances: 5. complainants in sexual offence matters who are vulnerable witnesses; 6. vulnerable witnesses, apart from the accused, in homicide matters; 7. where (a) or (b) applies, in Melbourne Children’s Court, Melbourne Magistrates’ Court, the Melbourne venues of the County Court & Supreme Court and in Bendigo, Geelong and Warrnambool and other participating venues as gazetted from time to time; and 8. police SOCIT sites in Bendigo, Box Hill, Fawkner, Frankston, Geelong, Knox, Melbourne & Warrnambool and other locations as nominated by the IP from time to time. 9. Intermediaries are trained professionals with specialist skills in communication. They are not expert witnesses called by a party. They are officers of the Court [see s.389I(2) CPA] who, under the IP, assist the vulnerable witness and the Court so that the witness can give their best evidence during the conduct of any VARE and in their evidence in Court. 10. A ground rules hearing is a hearing at which the Court considers the communication, support and other needs of witnesses and decides how the proceeding is to be conducted to fairly and effectively meet those needs. The Court sets ground rules – which take the form of Court directions – for the questioning of the witness. 11. In the past the conduct of ground rules hearings was limited to cases in which an intermediary had been appointed. However, the CPA was expanded on 28/07/2023 to require a ground rules hearing to be held for ALL complainants in relation to a charge for a sexual offence whether or not an intermediary is appointed: see new s.389B(3) CPA. 12. The rest of the Guidelines contain information about:  * Ground rules hearings – an introduction [section 4] * Ground rules hearings – the process [section 5] * Intermediaries – an introduction [section 6] * Intermediaries – the process [section 7]. |

### **1.4.3 Court Information Guides**

In addition to the above Practice Directions & Court Guidelines the Court has provided a number of Information Guides on its website. Under the “**Going to Court**” tab information is available on the following matters:

* under the heading “**Court Divisions and Programs**” information is provided on:

[**Criminal Division**](https://www.childrenscourt.vic.gov.au/criminal-division)

[**Family Division (Child Protection)**](https://www.childrenscourt.vic.gov.au/family-division)

[**Intervention Orders**](https://www.childrenscourt.vic.gov.au/family-division/intervention-orders)

[**Conciliation Conferences**](https://www.childrenscourt.vic.gov.au/family-division/child-protection/conciliation-conferences)

[**Children’s Court Clinic**](https://www.childrenscourt.vic.gov.au/childrens-court-clinic)

* under the heading “**Attending Court**” information is provided on:

[**Court Locations**](https://www.childrenscourt.vic.gov.au/court-locations)

[**Court Documents and Recordings**](https://www.childrenscourt.vic.gov.au/court-documents-and-recordings)**.**

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## **1.5 *Charter of Human Rights and Responsibilities Act 2006* [Act No.43/2006]**

The *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’) was assented to on 25/07/2006. Under s.1(2), the main purpose of the Charter is to protect and promote human rights by–

1. setting out the human rights that Parliament specifically seeks to protect and promote; and
2. ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
3. imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
4. requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
5. conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

Section 4 of the Charter lists organizations which are public authorities for the purposes of the Charter. In s.4(1)(j) the list specifically excludes “a court or tribunal except when it is acting in an administrative capacity”. A note to s.4(1)(j) states: “Committal proceedings and the issuing of warrants by a court of tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.”

In *LG v Melbourne Health* [2019] VSC 183 at [73]-[82] Richards J – applying *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373 at [123]-[129] – held that–

* VCAT was acting in an administrative capacity and the exception in s.4(1)(j) does not apply; and
* VCAT had not given proper consideration to the relevant human rights of the applicants in making guardianship and administration orders in relation to LG.

### **1.5.1 Human Rights**

Part 2 of the Charter sets out the human rights that Parliament specifically seeks to protect and promote:

|  |  |
| --- | --- |
| **SECTION** | **HUMAN RIGHT** |
| 8 | Recognition and equality before the law |
| 9 | Right to life |
| 10 | Protection from torture and cruel, inhuman or degrading treatment |
| 11 | Freedom from forced work |
| 12 | Freedom of movement |
| 13 | Privacy and reputation |
| 14 | Freedom of thought, conscience, religion and belief |
| 15 | Freedom of expression |
| 16 | Peaceful assembly and freedom of association |
| 17 | Protection of families and children |
| 18 | Taking part in public life |
| 19 | Cultural rights |
| 20 | Property rights |
| 21 | Right to liberty and security of person |
| 22 | Humane treatment when deprived of liberty |
| 23 | Children in the criminal process |
| 24 | Fair hearing |
| 25 | Rights in criminal proceedings |
| 26 | Right not to be tried or punished more than once |
| 27 | Retrospective criminal laws |

Section 7(2) of the Charter – headed “**Human rights—what they are and when they may be limited**” – provides: “A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including–

1. the nature of the right; and
2. the importance of the purpose of the limitation; and
3. the nature and extent of the limitation; and
4. the relationship between the limitation and its purpose; and
5. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

Section 8 of the Charter – headed “**Recognition and equality before the law**” – provides:

“(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Section 12 of the Charter – headed “**Freedom of movement**” – provides: “Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.”

Section 13 of the Charter – headed “**Privacy and Reputation**” provides:

“A person has the right–

1. not to have his or her privacy, family, home or correspondence unlawfully ot arbitrarily interfered with; and
2. not to have his or her reputation unlawfully attacked.

Section 17 of the Charter – headed “**Protection of families and children**” – provides:

“(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.”

Section 19 of the Charter – headed “**Cultural rights**” – provides:

“(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community–

1. to enjoy their identity and culture; and
2. to maintain and use their language; and
3. to maintain their kinship ties; and
4. to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.”

Section 21 of the Charter – headed “**Right to liberty and security of person**” – provides:

“(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention.

(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.

(5) A person who is arrested or detained on a criminal charge–

1. must be promptly brought before a court; and
2. has the right to be brought to trial without unreasonable delay; and
3. must be released if paragraph (a) or (b) is not complied with.

(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear–

1. for trial; and
2. at any other stage of the judicial proceeding; and
3. if appropriate, for execution of judgment.

(7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must–

1. make a decision without delay; and
2. order the release of the person if it finds that the detention is unlawful.

(8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.”

Section 22 of the Charter – headed “**Humane treatment when deprived of liberty**” provides:

“(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

Section 23 of the Charter – headed “**Children in the criminal process**” – provides:

“(1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.

1. An accused child must be brought to trial as quickly as possible.
2. A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.”

Section 24 of the Charter – headed “**Fair hearing**” – provides:

“(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.”

Section 25 of the Charter – headed “**Rights in criminal proceedings**” – provides:

“(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees–

1. to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
2. to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
3. to be tried without unreasonable delay; and
4. to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and
5. to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
6. to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and
7. to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
8. to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
9. to have the free assistance of an interpreter if he or she cannot speak or understand English; and
10. to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
11. not to be compelled to testify against himself or herself or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation.”

In *DPP v SL* [2016] VSC 714; 263 A Crim R 193, in the course of giving directions as to the conduct of proceedings in the Supreme Court in which the 15 year old accused was pleading guilty to charges including attempted murder and burglary, Bell J said at [13] that the procedures in s.522(1) of the CYFA regarding the conduct of proceedings in the Children’s Court are clearly intended to give effect to the human rights principles in ss.8(3), 17(2), 23(1),(2) & (3) and 25(3) of the *Charter of Human Rights and Responsibilities Act 2006*.

In *Thompson v Minogue* [2021] VSCA 358 the Court of Appeal (Kyrou, McLeish & Niall JJA) the respondent Dr Minogue, a prisoner at Barwon Prison, had been ordered on 04/09/2019 to undergo a random drug test by providing a urine sample after being strip-searched. On 01/02/2020 he was directed to undergo a random drug test again. On 18/02/2020 he was directed to undergo a strip search before and after a contact visit from his lawyer. At first instance Richards J had held that the directions on 04/09/2019 & 01/02/2020 were incompatible with Dr Minogue’s right to privacy in s.13(a), his right to be treated humanely and with respect for the inherent dignity of the person in s.22(1) and in breach of s.38(1) of the Charter. The search on 18/02/2020 was compatible with Dr Minogue’s human rights. In a lengthy judgment in which it discussed the scope of and the onus of proof for the justification requirement in s.7(2) of the Charter and applied *HJ v Independent Broad-based Anti-corruption Commission* [2021] VSCA 200, the Court of Appeal allowed the appeal.

See also *JL v Mental Health Tribunal* [2021] VSC 868 at [81]-[108].

### **1.5.2 Interpretation of Laws**

Perhaps the main impact of the Charter on the operation of the Children’s Court of Victoria is to be found in s.32 which came into operation on 01/01/2008. That section provides–

“(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of–

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.”

Section 33 empowers a court or tribunal, on application of a party or on its own motion, to refer to the Supreme Court a question of law which arises that relates to the application of the Charter or a question which respect to the interpretation of a statutory provision in accordance with the Charter. If such question has been referred, the referring court or tribunal must not–

1. make a determination to which the question is relevant while the referral is pending; or
2. proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

Section 36(2) of the Charter provides that subject to any relevant override declaration (by Parliament under s.31), if the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, it may make a declaration of inconsistent interpretation. Section 36(5) provides that such a declaration does not–

1. affect in any way the validity, operation or enforcement of the statutory provision; or
2. create in any person any legal right or give rise to any civil cause of action.

Section 38(1) of the Charter provides that subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Section 39(1) of the Charter provides that if, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter. Section 39(3) provides that a person is not entitled to be awarded any damages because of a breach of this Charter.

In *Gebrehiwot v State of Victoria* [2020] VSCA 315 the applicant had brought proceedings in tort against the State of Victoria claiming damages for battery and false imprisonment following an incident with officers of Victoria Police in which he was injured. The State admitted that force was used but relied on the defence that the police officers acted with lawful justification in accordance with s 462A of the *Crimes Act 1958*. The Court of Appeal (Tate, Kaye & Emerton JJA) allowed an appeal against a decision of a jury which accepted the defence. In the course of its reasons the Court of Appeal addressed several issues in relation to the Charter:

* At [132]: The judge was correct to conclude that a breach of s.38 could not found a claim for damages. Unlike human rights instruments in other jurisdictions, which confer an entitlement to plenary forms of relief for breach [see, eg, *Human Rights Act 1998* (UK) s.8(1)] or expressly acknowledge that damages may be awarded [HRA, s.8(2)] the prohibition on damages in the *Charter* is unequivocal.
* At [134]: However, Gebrehiwot also advanced an alternative submission relying on the *Charter*, namely, that any direction the judge gave to the jury about the meaning and application of s.462A in the circumstances had to be informed by an interpretation that was compatible with the human rights that were engaged. The judge’s failure to give a direction on s.462A also meant that she did not consider and apply the interpretive obligation under the *Charter* in construing s.462A.
* At [142]: We consider that the judge was incorrect to hold that s.32 of the *Charter* was irrelevant to the jury’s deliberations. In our view, s.32 was relevant to the jury’s deliberations on liability because it may have affected its consideration of whether s.462A applied in the circumstances. However, there is no ground of appeal that identifies an error by the judge in the application of s.32 of the *Charte*r and the determination of an interpretation of s.462A that is human rights-compatible must wait for another day.

The Court of Appeal also referred to the following cases in its discussion of the Charter: *R v DA* [2016] VSCA 325 at [44] per Ashley, Redlich and McLeish JJA; *Nguyen v DPP* (2019) 59 VR 27; [2019] VSCA 20; *Momcilovic* (2011) 245 CLR 1; [2011] HCA 34; *Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4; *Castles v Secretary, Department of Justice* (2010) 28 VR 141; [2010] VSC 310 (Emerton J).

### **1.5.3 Application of the Charter to child protection and associated VCAT proceedings**

In *DOHS v Sanding* [2011] VSC 42 four Aboriginal children aged 9, 7, 4 & 2 had been residing in the care of their maternal grandmother under custody to Secretary orders. At [279] Bell J described “the real risk to the wellbeing of the children” as “the drug-taking activity of their mother and her disturbance of the home of the grandmother in which the family was living”. Nine weeks after the custody to Secretary orders were made, the Department removed the children from the care of their grandmother and placed them separately in out of home care with non-Aboriginal families. No family was available to take the four children together and no Aboriginal family was available to take any of them. Within a week of their separation, the behaviour of the two oldest children substantially regressed. The mother made applications to revoke each of the custody to Secretary orders on the basis that the children would live with her mother and that she would not live in the home. A Children’s Court magistrate conducted a submissions contest, revoked the custody to Secretary orders and placed the children on interim accommodation orders in the grandmother’s care. An appeal by DOHS was dismissed.

At [155]-[207] Bell J discussed the application of the Charter to the conduct of protection proceedings and the making of protection orders by the Children’s Court. In the course of this, his Honour considered numerous provisions of the CYFA and referred with approval to dicta in *Kracke v Mental Health Review Board* [2009] VCAT 646; *Sabet v Medical Practitioners Board* (2008) 20 VR 414; *R v Williams* (2007) 16 VR 168, 177; *In Re K (infants)* [1963] 1 Ch 381; *Humberside County Court v R* [1977] 1 WLR 1251; *J v Lieschke* (1987) 162 CLR 447, 451; *Reynolds v Reynolds* (1973) 47 ALJR 499, 501-2; *M v M* (1988) 166 CLR 69, 76; *Neale v Colquhoun* [1944] SASR 199; *W Children* [2010] UKSC 12 and a different *M v M* [1993] 1 VR 391, 393. At [204] his Honour said:

“In protection proceedings, a number of important civil rights and obligations are at stake. These include whether the child will be taken away from their parents, whether the child will be protected from physical and emotional harm and how, where and with whom the child will live, whether the child will live with their siblings, who will have custody of the child, who will grow the child up, where the child will go to school, whether and what kind of cultural contact the child will have with their community, including the Aboriginal community (where applicable), whether and what religious instruction the child will have, what conditions will be imposed on those caring for the child and whether the child and their parents will have access to each other. The court can make interim and final orders with respect to those and other matters. Any such orders will be determinative, legally enforceable and impact heavily on the lives of the people concerned. The orders will be determinative not just of the rights and obligations of the child and their parents under the Act, but also of their fundamental rights and freedoms as children and parents under the common law and under human rights specified in the Charter, especially the right to family and to protection as a child in s.17(1) and (2). Therefore protection proceedings under Chapter 4 of the *Children, Youth and Families Act* come within the scope of the human right to a fair hearing in s.24(1) of the Charter.”

At [206]-[207] his Honour concluded:

“[A] protection proceeding (including a revocation proceeding) in the court under Chapter 4 of the *Children, Youth and Families Act* is a ‘civil proceeding’ under s.24(1) of the Charter; the child and their parents are parties to the proceeding, as may be other persons, depending on the nature of the application and the actual circumstances.

In the present case, the represented parties to the mother’s application to revoke the custody to secretary orders were the secretary, the mother and the grandmother. The father of three of the children appeared personally and was also joined as a party. All these persons were, in my view, parties to the protection proceeding for the purpose of s.24(1) of the Charter, except the secretary. The secretary was not covered by that right as she appeared in the performance of a statutory function and not in an individual capacity.”

For reasons discussed in detail in **sections 5.11.7 & 5.11.16** of these Research Materials, in *ZD v DHHS* [2017] VSC 806 Osborn J dismissed the mother’s appeal against a decision of a magistrate of the Children’s Court to include on IAOs a condition allowing for three children aged 5, 3 & 2 placed in foster care to be immunised against measles. Such immunisation was also a condition precedent to the two younger children being able to attend child care. During the hearing of the appeal the parties sought to rely on the Charter – in particular ss.17(1) & 17(2) – in support of their respective proposed interpretations of s.263(7) of the CYFA. At [106] & [109] Osborn J said:

[106] “…I have determined that s.263(7) of the CYFA is not capable of more than one interpretation. It follows that s.32(1) of the Charter, and that the Charter rights identified as potentially relevant, do not assist in the construction to s.263(7) of the CYFA and cannot be used as a basis for preferring some alternative construction than that already identified.”

[109] “…It cannot be said that a construction of s.263(7) of the CYFA that has properly taken the factors in s.10 into account is inconsistent with the rights in s.17 of the Charter.”

In *Secretary to the Department of Families, Fairness and Housing v AM (a pseudonym)* [2023] VSC 291 Ginnane J rejected the father’s submission that an IAO condition under s.267(3) of the CYFA releasing the children into the care of the mother on condition that they reside at an address not known to the father was inconsistent with ss.12, 13(a), 17(2) & 19(1) of the Charter. His Honour applied the approach of Osborn JA in *ZD v DHHS* [2017] VSC 806 – quoting in particular paragraphs [103]-[111] & [116] – and concluded at [72]-[73]:

[72] “The reasoning in *ZD* is directly applicable in this case to the rights contained in s 17(2) and s 13 of the Charter. In addition to that reasoning, I add that a condition properly imposed under s 263(7) releasing the children into the care of the mother on condition that they reside at an address not know to the father, would not unlawfully restrict their rights of freedom of movement.

[73] I consider that the Court’s power to make an IAO with the Secretary’s condition does not infringe any applicable Charter rights because it involves an exercise of discretion as to what is required in the best interests of the children. The discretion is given under a statute which carefully balances the applicable human rights by reference to the best interests of the children.”

In *INP v Secretary, Department of Families, Fairness and Housing* [2025] VSC 31 the unrepresented applicant is the father of 3 children. He and the children’s mother had separated in 2014, the mother leaving the family home and taking the children with her. The Federal Circuit Court had made orders, including for shared parenting responsibilities and for the children to spend time with the father and mother. In October 2018 child protection practitioners had removed the children – then aged 15,12 & 11 – from the applicant’s care and ceased his contact with them but the Department had not commenced child protection proceedings in the Children’s Court. One effect of the Department’s actions – some of which the Department’s internal review ultimately conceded were invalid – was that the younger two children’s contact with INP was removed for two weeks and INP understood that he could only contact the oldest child in or about August 2019 after the completion of the internal review.

INP had sought a review by VCAT of five decisions made by the Department’s child protection practitioners. VCAT had summarily dismissed the proceeding as misconceived and lacking in substance. Ginnane J granted leave to appeal, allowed INP’s appeal, set aside VCAT’s order and remitted the proceeding to VCAT for a hearing by a differently constituted Tribunal. The Charter rights which INP submitted had not been properly considered included:

* s.8 – Recognition and equality before the law
* s.13 – Privacy and reputation
* s.17 – Protection of families and children
* s.21 – Right to liberty and security of person

At [172]-[175] & [178] his Honour said:

[172] “I consider that the Tribunal was acting in an administrative capacity and therefore the requirements of the Charter, including in s 38(1), applied. I accept the Attorney General’s submissions in that respect.

[173] I accept, as ground 30 contended, that INP possessed rights under the Charter distinct from his children’s rights. I also accept his submission that it was inadequate for the Tribunal to merely mention the Charter and not demonstrate that it had applied to the facts in evidence in the proceeding. I also accept INP’s contentions in ground 28 that the Tribunal did not consider his Charter rights as s 38(1) of the Charter required.

[174] Section 38(1) required the Tribunal in making its decision to give proper consideration to INP’s and the children’s human rights. The Court of Appeal in *HJ (a pseudonym) v Independent Broad-Based Anti-Corruption Commission*, (2021) 64 VR 270, 306 [155] – citing *Bare v IBAC* (2015) 48 VR 129, 198-9 [217]-[221], 218-23 [277]-[289], 234 [323], 236 [326], 297-8 [535]-[536] and *Castles v Secretary Department of Justice* (2010) 28 VR 141, 184 [185]-[186] – stated the applicable test to the application of s 38(1) as follows:

For a decision-maker to give ‘proper’ consideration to a relevant human right in compliance with s 38(1) of the Charter, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.

[175] In *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 184 [185]‑[186] Emerton J described the proper consideration required under s 38(1) as follows:

Proper consideration need not involve formally identifying the correct ‘rights’ or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implication thereof for the affected person, and that countervailing interests or obligations were identified.

…

[178] I consider that INP has established… that the Tribunal did not consider the children’s or INP’s rights under the Charter when considering its decision to summarily dismiss the proceeding…”

See also **Part 3.14** of these Research Materials.

## **1.6 Towards an electronic Court [eCourt]**

### **1.6.1 Remote hearings using Webex**

In Victoria a State of Emergency was declared on 16/03/2020 because of the health risks associated with the COVID-19 pandemic. As a consequence, most hearings in both divisions of the Children’s Court of Victoria were generally conducted remotely from late March 2020 to early 2022 by means of an off-the-shelf computer application known as **Webex**.

### **1.6.2 Courtlink & Bridge**

In the mid-1980s a DOS-based computerized listing and order processing system known as **Courtlink** was developed for criminal proceedings in the Magistrates’ Court. In about 1991 the **Courtlink** system was extended to include listing and order processing for intervention orders (IVOs) in the Magistrates’ Court. In about 2001 the **Courtlink** intervention order system and a modified version of the **Courtlink** criminal system were introduced in the Children’s Court throughout the State.

In the mid-1990s a simple order processing system for child protection cases was built by the author based on Word5 templates. This system – known as **Kidlink** – was only available at Melbourne Children’s Court.

In about 2001 a web-based computer system known as **Lex** was developed as a replacement for Kidlink and was introduced for listing and order processing of child protection cases in the Children’s Court state-wide. On 12/11/2018 an upgraded version of Lex – named **Bridge** – replaced Lex state-wide. On 23/10/2023 **Bridge** was replaced by **CMS** and all its data was migrated to **CMS**.

### **1.6.3** **Case Management System (CMS), including eDocs**

The 2017/18 Victorian State Budget provided $89.2 million to Court Services Victoria for a modern computerized case management system for the Magistrates’ Court and the Children’s Court as part of a whole of government response to the Royal Commission into Family Violence. This new electronic **Case Management System (CMS)** is intended to replace Courtlink and Bridge.

The CMS Project aims to provide–

* processes and systems that support minimal reliance on paper within the courts and when dealing with external parties;
* an electronic case record which acts as a single source of truth;
* automation of a number of manual processes to enable staff to focus on higher-value tasks;
* electronically signed documents and orders that will be treated as the official court record;
* functionality that allows authorised third parties, where appropriate, to initiate cases (e.g. system identified agents and lawyers), submit documents and track cases through interfaced systems or online portals.

The CMS Project includes an application called **eDocs**, an online filing portal to enable the electronic transmission of documents to the Court which is intended to replace manual and paper-based processes. Release of the first phase of eDocs was fast-tracked because of the COVID-19 pandemic and the associated need to minimise face-to-face human contact. The completed eDocs operates as an electronic filing and document exchange portal between the Court and authorised agencies and other court users.

Access to the eDocs portal was introduced in the Children’s Court for all Criminal Division proceedings and also for IVO applications by Victoria Police, Victoria Legal Aid and authorised legal practitioners on a staggered basis between 17/11/2020 & 08/12/2020.

A fully developed **CMS** for child protection matters was implemented in the Children’s Court of Victoria as and from 23/10/2023. The whole CMS Project is scheduled for completion later.

To support the introduction of the electronic case management system [CMS] in the Family Division of the Children’s Court, the following amendments were made to the CYFA to operate as and from 11/10/2023:

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| --- |
| To enable electronic filing of documents via CMS, the words “by the appropriate registrar” or similar words in **ss.214, 228, 243, 246, 253, 258, 259, 260, 262, 266, 320, 326, 409L, 409W, 527, 532, 550, 574, 579 & 588 CYFA** are either omitted or replaced by “in the Court” or similar words. For the same purpose a minor amendment is made to **s.587 CYFA**. |
| **Section 533A(2A) CYFA** is added: “Without limiting subsections (1) and (2), the issuing or transmission of any order, process or document by electronic communication may include the use of an information system.” In **s.3(1) CYFA** “information system” is newly defined as having “the same meaning as in the *Electronic Transactions (Victoria) Act 2000*.” |
| **Section 533B CYFA** is added: “Any document to be filed in the Court may be filed by electronic communication, including by using an information system.” |
| **Section 538(3) CYFA** is replaced by:  “(3) Process issued by a registrar may be recalled and cancelled by— (a) the principal registrar; or (b) a judicial registrar; or (c) any other registrar; or (d) a magistrate.” |

To further support the introduction of the electronic case management system [CMS] in the Family Division of the Children’s Court, the *Children's Court Authentication and Electronic Transmission Rules 2020* [S.R.No.126/2020] were amended by S.R.No.104/2023 as and from 09/10/2023 as follows:

|  |
| --- |
| The following definition of **CMS** is inserted into **Rule 1.04**: “**CMS** means the computer system in operation in the Court from time to time which, among other things–   1. deals with process; and 2. issues documents; and 3. stores and retrieves documents and information;   **Example**  Process and court orders.” |
| **Rule 2.02** is substituted by:  “Process may be issued by–   1. a person– 2. signing the process; or 3. signing the process with an electronic signature; or 4. sealing the process with an electronic seal; or 5. CMS with an electronic signature or seal.” |
| **Rule 3.01(1)** is substituted by–  “(1) Subject to subrule (2) and Rule 3.03, a document may be submitted for filing in the Court by–   1. lodging that document into CMS in accordance with the requirements of CMS; or 2. other electronic communication in accordance with any practice direction, statement or note issued by the President under section 592 of the Act.” |
| **Rules 3.01(3**) and (4) are substituted by–  “(3) Subject to Rule 3.02(3), a document that is accepted for filing in the Court is taken to be filed in the Court at the time and on the date that the document was first submitted in accordance with subrule (1).” |
| **Rule 3.02(1)** is substituted by–  “(1) A registrar may refuse to accept a document submitted for filing under Rule 3.01 until satisfied that the document complies with–   1. these Rules; or 2. any other Act or Rule; or 3. any practice direction, statement or note issued by the President under section 592 of the Act." |

## **1.7** **Yoorrook Justice Commission’s Second Interim Report & Govt response**

The Yoorrook Justice Commission [‘Yoorrook’] possesses the full powers of a royal commission. Yoorrook’s second interim report – [Report into Victoria’s Child Protection and Criminal Justice Systems](https://yoorrookforjustice.org.au/wp-content/uploads/2023/08/Yoorrook-for-justice-report.pdf) – was tabled on 04/09/2023. After receiving over 100 submissions, hearing from 84 witnesses over 27 hearing days, undertaking 12 roundtable discussions across Victoria, making 5 adult and youth prison visits and reviewing more than 4,000 government documents, Yoorrook in its 445-page second report–

* details extensive systemic injustice, racism, discriminatory laws and policy failures that have caused, and continue to cause, harm to First Peoples; and
* makes 46 recommendations for legislative and system reform.

In its response dated April 2024 the Victorian Government noted at p.5 that–

“The 445-page Report emphasises that present injustice has deep roots in the colonial foundations of the State and makes 46 recommendations for change. In considering the Report’s recommendations, the Victorian Government:

* **supports [in full]** 4 recommendations and **supports in principle** 24 recommendations to reform the child protection and criminal justice systems
* will further consider 15 recommendations (categorised as **under consideration**)
* **does not support** 3 recommendations.”

The Yoorook recommendations for reform include giving full effect to self-determination by transferring to First Peoples decision-making power, authority, control and resources in the child protection and criminal justice systems as these relate to them and requiring the Victorian Government to uphold its commitment to self-determination through negotiations under the Treaty process [recommendations **1 & 2** **under consideration**]. This includes in recommendations **1b & 1c** negotiation through the Treaty process of new, dedicated legislation – developed by First Peoples, for the safety, wellbeing and protection of First Peoples children and young people – which goes beyond the transfer of existing powers and functions under s.18 CYFA.

Other Yoorrook recommendations require the Victorian Government–

**6**. to clarify and strengthen the *Charter of Human Rights and Responsibilities Act* [**not supported**];

1. to create a new independent police oversight authority to end the practice of police investigating police complaints [**under consideration**];
2. to make changes to bail laws to stop people being unnecessarily imprisoned that go beyond the amendments introduced to Parliament in the *Bail Amendment Bill 2023* [**not supported**];
3. to raise the minimum age of criminal responsibility to 14 years without exceptions and to prohibit the detention of children under 16 years [**not supported**];
4. to prohibit routine strip searching in all Victorian adult and youth prisons [**support in principle**].

Additional Yoorrook recommendations which may have some relevance – direct or indirect – to the Children’s Court include the following–

|  |  |
| --- | --- |
| **NUMBER** | **RECOMMENDATION** |
| **5** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must as soon as possible significantly upscale the capability, competence and support in relation to human rights, including Aboriginal cultural rights, of all persons appointed to work or working in:   1. the child protection system; 2. the corrections system, including prisons; 3. the youth justice system, including youth detention and like facilities and the bail system; 4. the adult justice system including the bail system; 5. Victoria Police; and 6. the forensic mental health system,   to ensure that they have that capability, competence and support necessary for them to carry out their obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and other human and cultural rights laws, and in particular for this purpose the government must:   1. review and revise all relevant policies, procedures, protocols, administrative directions, guidelines and like documents 2. review all relevant training courses and programs, and 3. ensure that Victorian First Peoples businesses or consultants participate on a paid basis in the review and revision of training courses and programs, and the delivery of these, wherever possible. |
| **8b** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must enshrine prevention and early help/intervention as a guiding principle in the CYFA and take all necessary steps to implement this principle in the administration of the CYFA. |
| **9** | **GOVERNMENT SUPPORTS IN FULL**  The Victorian Government must publicly report annually on the amount and proportion:   1. of total child protection and family services funding allocated to early intervention (family and parenting services) compared to secondary and tertiary services (community delivered child protection services, care services, transition from care services and other activities), and 2. of funding allocated to Aboriginal Community Controlled Organisations compared to mainstream services for early intervention (family and parenting services), secondary and tertiary services. |
| **12** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  When DFFH receives a pre-birth report regarding a pregnant Aboriginal woman or a child protection report is substantiated regarding an Aboriginal child, then subject to the consent of the person to whom the report relates, DFFH must automatically notify a Victorian Aboriginal legal service provider to be funded by the Victorian Government so that the child’s parents and/or primary care giver are offered legal help and, where appropriate, non-legal advocacy. |
| **14** | **GOVERNMENT SUPPORTS IN FULL**  The Department of Families, Fairness and Housing must ensure that:   1. all incoming child protection staff, as part of their pre-service education, complete cultural awareness and human and cultural rights training covering issues including: 2. the history of colonisation and in particular the impact of ‘protection’ and assimilation policies; 3. the continuing systemic racism and paternalism inherent in child protection work today that must be identified, acknowledged and resisted; 4. the value of First Peoples family and child-rearing practice; 5. upholding human rights including Aboriginal cultural rights; and 6. the strength of First Peoples families and culture and culturally appropriate practices; 7. all child protection staff and Department executives undertake regular, mandatory cultural safety training, to be designed and delivered by a Victorian First Peoples business or consultants on a paid basis; and 8. completion rate for training are published by the Department annually. |
| **15a** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  DFFH, in consultation with the Commissioner for Aboriginal children and Young People and relevant Aboriginal Community Controlled Organisations must improve how they identify and deindentify First Peoples children in the Victorian child protection system. |
| **17** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must amend the CYFA to:   1. specify that priority be given to keeping siblings together in placement decisions (both in out of home care and permanent placements); 2. include in the decision-making principles a presumption that removal of a First Peoples child from their family or community causes harm; 3. provide that a child protection practitioner must record how they have considered the presumption of harm caused by removal in their decision to remove a First Peoples child; and 4. provide that the Children’s Court is required to include in its reasons for a removal decision how the presumption of harm caused by removal has been considered. |
| **18** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must:   1. ensure Children’s Court of Victoria judicial officers determine child protection matters state-wide; and 2. abolish the current practice of having non-specialist magistrates determining child protection matters in some rural and regional court locations. |
| **19** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must as soon as possible expand and sufficiently resource the Marram-Ngala Ganbu (Koori Family Hearing Day) state-wide [see **section 4.9.8** for details of Marram-Ngala Ganbu]. |
| **20** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must address barriers to First Peoples becoming carers for First Peoples children in the child protection system by making 3 specified changes. |
| **21** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must amend the CYFA to require DFFH to ensure that all children who are placed in out of home care receive a developmental disability assessment and health assessment consistent with the National Out of Home Care Standards and in a timely way. |
| **22** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must amend the CYFA to provide the Children’s Court with greater powers to ensure that cultural plans are developed, implemented and monitored, particularly when out of home care orders are being extended and children’s separation from their families is prolonged. |
| **25** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must amend the CYFA to allow the Children’s Court of Victoria to extend the timeframe of a Family Reunification Order [as to which see **section 5.17.4** for relevant details] where it is in the child’s best interest to do so. |
| **30** | **GOVERNMENT SUPPORTS IN FULL**  In relation to the decriminalisation of public intoxication:   1. the Chief Commissioner of Police must ensure that Victoria Police conduct is closely monitored to ensure police members do not use existing powers to unnecessarily take intoxicated people into custody, for example by ‘upcharging’; and 2. the Victorian Government’s planned independent evaluation of the monitoring of police conduct must: 3. be First Peoples led, with appropriate governance by them; 4. cover at least the first 12 months and then 3 years of implementation; and 5. have results that are made public. |
| **33** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must:   1. develop, deliver and publicly report on a cultural change action plan to ensure all bail decision-makers exercise their powers and functions on the basis that imprisonment on remand (including that of First Peoples) is used only as a last resort, and 2. ensure that the development and ongoing monitoring of performance of the action plan is First Peoples led. |
| **34** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must ensure access to culturally safe and appropriate ball hearings for Aboriginal people, and culturally safe support for First Peoples on bail. |
| **36** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government’s planned new *Youth Justice Act* must:   1. explicitly recognise the paramountcy of human rights, including the distinct cultural rights of First Peoples, in all aspects of the youth justice system; 2. embed those rights in the machinery of the Act; and 3. require all those involved in the administration of the Act to ensure those rights. |
| **38** | **UNDER CONSIDERATION BY GOVERNMENT**  The Victorian Government must amend the *Criminal Procedure Act 2009* and the CYFA to remove the requirement that the prosecution (including police) consent to diversion and replace it with a requirement that the prosecution be consulted. |
| **45** | **GOVERNMENT SUPPORTS IN FULL**  By 29 February 2024 the Victorian Government must legislate to create a new statutory protection for public records that ensure that information shared on a confidential basis with Yoorook will be kept confidential for a minimum of 99 years once Yoorook finishes its work and its records are transferred to the Victorian Government. |
| **46** | **GOVERNMENT SUPPORTS IN PRINCIPLE**  The Victorian Government must:   1. review s.534 CYFA to identify a workable model that: 2. places clear time limits on the operation of s.534 so that where the only individuals identified in a publication are adults who have provided their consent, and the Children’s Court matter is historical in nature, then the prohibition does not apply; and 3. enables a Royal Commission or similar inquiry to publish information about a child who is subject to protection proceedings or a protection order, where the child provides that information, is capable of understanding the consequences of losing anonymity and provides their consent; and 4. ensure that any review of s.534 CYFA is First Peoples led insofar as the proposed reforms affect First Peoples. |

