

# CHILDREN, YOUTH AND FAMILIES AMENDMENT ACT 2013

## SUMMARY OF MAJOR CHANGES FOR COURT USERS

**CYFA = Children, Youth and Families Act 2005 (as amended)**  
**FVPA = Family Violence Protection Act 2008 (as amended)**  
**PSIA = Personal Safety Intervention Orders Act 2010 (as amended)**

**A THIS PAPER:** The *Children, Youth and Families Amendment Act 2013* [“the *CYFAA*”] was assented to on 24/09/2013 and is to come into operation on 01/12/2013. This paper summarizes the major amendments made by the *CYFAA* that are likely to impact on judicial officers, registrars and court users.

### **B PURPOSES|CYFAA-s.1**

The main purposes of the *CYFAA* are-

- to amend various terms used in the *CYFA*;
- to change the *CYFA* to amend requirements for attendance of children at hearings in certain proceedings before the Family Division;
- to clarify the standard of proof that applies in child protection proceedings;
- to give judicial officers greater power to manage the conduct of Family Division proceedings;
- to provide for the enforcement of costs orders made in the Children’s Court Family Division;
- to amend the *FVPA* and the *PSIA* to give the Children’s Court jurisdiction in adult-adult intervention order proceedings if there are related child protection proceedings.

### **C AMENDMENT OF VARIOUS TERMS USED IN THE CYFA**

#### **⊗ “CONTACT” REPLACES “ACCESS”**

*CYFA*-ss.3(1), 10(3)(k), 166(2)(b), 169(3)(d), 253(c)(i), 263(8), 283(1)(e)(i), 284(1)(e)(i), 287(1)(d)(i), 291(3)(f), 295(3)(a), 321(1)(d) & (e), 497(c), Sch.1 cl.4

#### **⊗ “PLACE IN EMERGENCY CARE” REPLACES “TAKE INTO SAFE CUSTODY”**

*CYFA*-ss.3(1), 240(1), 241-243, 247, 247A, 261(1), 262(1), 268-270, 291, 313-315, 587, 597, 598

#### **⊗ “CONCILIATION CONFERENCES”**

- *CYFA*-ss.217(1), 217(2), 218 & 220-227: What used to be called a “dispute resolution conference” and the type of facilitative DRC that the Court had labelled a “new model conference” are each renamed a “conciliation conference”.
- *CYFA*-ss.217(3), 219 & 223(2): The sections providing for an “advisory dispute resolution conference” are repealed. In practice, there have been very few advisory conferences.
- New *CYFA*-s.226(7) gives the convenor(s) of a conciliation conference power to-
  - (a) permit any other person to attend the conference;
  - (b) specify whether, or in what manner, the person may participate in the conference;
  - (c) require the person to leave the conference at any time; and
  - (d) require that any other specified person not attend the conference.

### **D ATTENDANCE OF CHILDREN AT HEARINGS IN FAMILY DIVISION PROCEEDINGS**

*CYFA*-ss.216A, 228, 235, 240, 242-243, 246, 247, 247A, 252, 255, 257-261, 268-270, 273, 279, 291(3)(d), 291(3A), 291(6), 293-294, 300, 304-306, 312, 317-318, 320, 326

- ⊗ The *CYFA* had required children to attend or be brought to Court for the majority of child protection proceedings, although they were rarely actually present in the courtroom. The attendance of children at Court was commented on adversely in the Cummins report. New *CYFA*-s.216A provides that in any proceeding before the Family Division under the *CYFA*, a child is not required to attend before the Court unless-
  - (a) the child expresses a wish to attend; or
  - (b) the Court orders that the child attend; or
  - (c) the *CYFA* requires that the child attend.
- ⊗ New *CYFA*-s.291(3A) provides that an Interim Protection Order must not require a child to appear before the Court unless the Court considers it necessary for the child to appear. If the child is not required to appear before the Court under s.291, new *CYFA*-s.291(7) empowers the Court to make or refuse to make a further protection order under s.291(6) in the absence of the child.

- ⊗ The only applications for which the amended **CYFA** requires that the child attend Court are-
  - **CYFA-s.228**: Application for Temporary Assessment Order by notice;
  - **CYFA-s.246**: Application for Therapeutic Treatment Order;
  - **CYFA-ss.268, 270**: Application to Vary an Interim Accommodation Order or for a New Order where the IAO was made under **CYFA-s.262(1)(c)** on a Therapeutic Treatment Order application.
  - **CYFA-s.269**: Application for Breach of an Interim Accommodation Order where the IAO was made under **CYFA-s.262(1)(c)** on a Therapeutic Treatment Order application.
- ⊗ Unless a child wishes to attend or the Court orders that a child attend Court, the child is no longer required to attend or be brought before the Court for the hearing of any other child protection applications. These include-
  - **CYFA-s.235**: Application to Vary or Revoke a Temporary Assessment Order;
  - **CYFA-ss.240(1), 240(3), 243**: Protection Application;
  - **CYFA-s.252**: Application for a Therapeutic Treatment (Placement) Order;
  - **CYFA-s.255**: Application for Extension of Therapeutic Treatment Order or Therapeutic Treatment (Placement) Order;
  - **CYFA-ss.257-258**: Application to Vary or Revoke a Therapeutic Treatment Order or Therapeutic Treatment (Placement) Order;
  - **CYFA-ss.259-260**: Irreconcilable Differences Application;
  - **CYFA-ss.268, 270**: Application to Vary an Interim Accommodation Order or for a New Order [except where the IAO was made under **CYFA-s.262(1)(c)** on a Therapeutic Treatment Order application].
  - **CYFA-s.269**: Application for Breach of an Interim Accommodation Order [except where the IAO was made under **CYFA-s.262(1)(c)** on a Therapeutic Treatment Order application].
  - **CYFA-ss.273, 279**: Application to Vary or Revoke an Undertaking;
  - **CYFA-ss.293, 294**: Application for Extension of a Protection Order;
  - **CYFA-ss.300, 304**: Application to Vary or Revoke a Protection Order;
  - **CYFA-s.305**: Application to Revoke a Guardianship to Secretary Order;
  - **CYFA-s.306**: Application to Revoke a Long-Term Guardianship to Secretary Order;
  - **CYFA-s.312**: Application for Breach of Protection Order;
  - **CYFA-s.320**: Application for a Permanent Care Order;
  - **CYFA-s.326**: Application to Vary or Revoke a Permanent Care Order;
- ⊗ These amendments have resulted in changes to many prescribed forms: see **Children, Youth and Families (Children's Court Family Division) (Amendment No.4) Rules 2013**.

**E STANDARD OF PROOF IN FAMILY DIVISION APPLICATIONS|CYFA-ss.215A, 162(3)**

- ⊗ New **CYFA-s.215A** – which replaces s.215(1)(c) – provides that the standard of proof of any fact in an application under the **CYFA** in the Family Division is the balance of probabilities. The purpose of the amendment is to remove any suggestion that dicta from *Briginshaw v Briginshaw* (1938) 60 CLR 336 requires a higher standard of proof to be applied in certain child protection cases.
- ⊗ Applications under the **FVPA** and **PSIA** (excluding contravention applications) are also heard in the Family Division. Although **CYFA-s.215A** does not in its terms apply to them, the balance of probabilities test is enshrined in all of the substantive provisions relating to the making or extension of intervention orders: see, for example, **FVPA-ss.53(1)(a), 74(1), 76(1)(b), 77(2) & 106(2); PSIA-ss.35(1)(a), 61(1) & 83(2)**.
- ⊗ New **CYFA-s.162(3)** makes it clear that the balance of probabilities test in s.215A does not apply to the determination of the likelihood or unlikelihood of the occurrence of a future event for the purposes of proof of a protection application. Section 162(3) – which leaves alive the common law test enunciated by Lord Nicholls of Birkenhead in *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at 585 – provides:
  - “(3) For the purposes of ss.(1)(c), (d), (e) and (f)-
    - (a) the Court may find that a future state of affairs is likely even if the Court is not satisfied that the future state of affairs is more likely than not to happen;
    - (b) the Court may find that a future state of affairs is unlikely even if the Court is not satisfied that the future state of affairs is more unlikely than not to happen.”

## **F MANAGEMENT OF FAMILY DIVISION PROCEEDINGS|CYFA-s.215B**

**CYFA-s.215(1)(a)** requires the Family Division to “conduct proceedings before it in an informal manner”. **CYFA-s.215(1)(b)** requires the Family Division to “proceed without regard to legal forms”. New **CYFA-s.215B** gives judicial officers much greater power to manage the conduct of child protection proceedings<sup>1</sup> in a less adversarial way:

- “(1) Without limiting Part 1.2 [Best Interests principles] or s.215(1), in any proceeding before the Family Division under this Act, the Court may-
- (a) consider the needs of the child and the impact that the proceeding may have on the child;
  - (b) conduct proceedings in a manner that promotes cooperative relationships between the parties;
  - (c) ask any person connected to the proceeding whether that person considers that-
    - (i) the child has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence within the meaning of the **FVPA**;
    - (ii) he or she or any other person connected to the proceeding has been, or is at risk of being subjected to family violence;
  - (d) actively direct, control and manage proceedings;
  - (e) narrow the issues in dispute;
  - (f) determine the order in which the issues are decided;
  - (g) give directions or make orders about the timing of steps that are to be taken in proceedings;
  - (h) in deciding whether a particular step is to be taken, consider whether the likely benefits justify the costs of taking it;
  - (i) make appropriate use of technology, such as videoconferencing;
  - (j) deal with as many aspects of the matter on a single occasion as possible;
  - (k) where possible, deal with the matter without requiring the parties attend Court;
  - (l) do any other thing that the Court thinks fit.”

## **G ENFORCEMENT OF COSTS ORDERS MADE IN FAMILY DIVISION|CYFA-s.528A**

❖ Perhaps because it is comparatively uncommon for costs orders to be made in the Family Division of the Children’s Court, there has previously been no statutory mechanism for enforcing such orders. New **CYFA-s.528A** fills that gap. It provides:

- (1) ‘Order for costs’ means an order for costs made by the Court-
  - (a) in proceedings in the Family Division; or
  - (b) under **FVPA-s.154**; or
  - (c) under **PSIA-s.111**.
- (2) A person in whose favour an order for costs is made may enforce the order by filing in the appropriate court [viz. a court that has jurisdiction to enforce an amount of costs equivalent to that required to be paid under an order for costs] a copy of the order certified by the principal registrar of the Children’s Court to be a true copy.
- (3) On filing, the order must be taken to be an order of the appropriate court for payment of costs and may be enforced accordingly.

❖ New **FVPA-s.170(2)** and **PSIA-s.126(2)** provide that for the purposes of enforcement of an order for costs made under s.154 or s.111 (as the case may be), Division 5 of Part 5 of the **Magistrates’ Court Act 1989** and any relevant rules apply. These provisions also apply to the enforcement of costs orders made under the **FVPA** & **PSIA** in the Magistrates’ Court.

## **H ADDED JURISDICTION IN CERTAIN ADULT-ADULT INTERVENTION ORDER APPLICATIONS |FVPA-s.147A, PSIA-s.104A**

❖ The Magistrates’ Court has jurisdiction to hear and determine intervention order applications whether all the parties are adults, some are adults and some are children or all are children. However, the jurisdiction of the Children’s Court to hear and determine intervention order applications under both the **FVPA** and the **PSIA** has been limited to cases in which at least one of the parties is under the age of 18 years at the time the application is made or where the Court is dealing with a “related application” or a “related order” under the particular Act: see **FVPA-ss.146+147** & **PSIA-ss.103+104**.

<sup>1</sup> The heading of s.215B is “Management of child protection proceedings” but the section itself ambiguously refers to “any proceeding before the Family Division under this Act”. I have been advised that s.215B was intended to be restricted to child protection proceedings and that it does not apply to the conduct of intervention order proceedings.

- ⊛ New **FVPA-s.147A** and new **PSIA-s.104A** give the Children’s Court jurisdiction to hear and determine an adult-adult intervention order application if there is a related child protection proceeding. An intervention order application is related to a child protection proceeding if-
  - (a) the child who is the subject of the child protection proceeding is the child of, or is under the care and supervision of, the affected person/family member or protected person or the respondent for the application; and
  - (b) the application under the **FVPA** or **PSIA** raises issues relating to the safety of the child that are the same as, or similar to, the issues forming the basis for the child protection proceeding.

**J BREACH OF ACCOUNTABLE UNDERTAKING OR BOND | CYFA-ss.366 & 371**

**CYFA-ss.366(3)(b)(i) & 371(3)(b)(i)** are amended to permit a proceeding for breach of accountable undertaking or for breach of bond to be heard by another magistrate if it is impracticable for the sentencing magistrate to hear the proceeding.

**K TRANSITIONAL PROVISIONS | CYFA-ss.624-626, FVPA-s.225, PSIA-s.197**

In addition to temporary transitional regulation-making powers contained in **CYFA-s.625** and the transitional provisions in **FVPA-s.225** and **PSIA-s.197**, there are 11 transitional and saving provisions in **CYFA-s.624**. The thrust of the latter is:

- the standard of proof amendments in **CYFA-ss.215A & 162(3)** apply only to a proceeding that commences on or after 01/12/2013 and do not apply to proceedings already on foot but not determined before 01/12/2013;
- each person who held the office of dispute resolution conference convenor immediately before 01/12/2013 continues to hold office as a conciliation conference convenor on and after 01/12/2013;
- the amended conciliation conference provisions in **CYFA-ss.217-218 & 220-227** apply to any application referred by the Court on or after 01/12/2013 but the former provisions apply to any conference that had been commenced but not completed before 01/12/2013;
- **CYFA-s.216A**, limiting the circumstances in which a child is required to attend Court, generally applies both to proceedings on foot as at 01/12/2013 as well as those commenced on or after that date;
- the unamended Act continues to apply to any search warrant issued but not executed before 01/12/2013;
- the unamended Act continues to apply to an Interim Protection Order in force immediately before 01/12/2013.

## CHANGES TO THE COURT’S MINUTES OF ORDERS FORMS

- ⊛ Because of these amendments, minor changes have been made to the Court’s blue form headed “Minutes of Proposed Family Division Orders” and its pink form headed “Children’s Court – Family Division Conditions”. No changes have been made to its purple form headed “Minutes of Proposed Family Division Orders [CYFA] Supplementary Sheet”.
- ⊛ **ORANGE FORM**: A new form has been created and is annexed. It provides minutes of proposed Family Division orders relating to “Appointment of ICL” (plus ancillary orders) and “Costs”.
- ⊛ **BLUE FORM**:
  - One of the two “further listing” dates has been removed (to create more space).
  - The list of hearing types for the adjourned date has been amended to:  
FOR R/OVER | MENTION | CC | JRC | 1<sup>st</sup> DIR HRG | DIR HRG | CONTEST | IAO CONTEST
  - The list of hearing types for the further listing date has been amended to:  
FOR MENTION | CC | JRC | 1<sup>st</sup> DIR HRG | DIR HRG | CONTEST | IAO CONTEST
  - Tick-box for “RESERVED SUBMISSIONS” is added.
  - Optional order: “THE CHILD IS TO ATTEND COURT ON THE ADJOURNED DATE” is added.
- ⊛ **PINK FORM**:
  - Condition 10 [Breath Tests] is deleted as it is effectively covered by condition 9.
  - Condition 13 is deleted and condition 14 re-numbered 13.
  - New condition 14 provides for respite.
  - “Access” is replaced by “contact” in conditions 20, 31 & 32.

**MINUTES OF PROPOSED FAMILY DIVISION ORDERS [CYFA]  
SUPPLEMENTARY SHEET [ICL / COSTS]**

**CHILD(REN)** \_\_\_\_\_ **DATE** \_\_\_\_/\_\_\_\_/\_\_\_\_

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**APPOINTMENT OF INDEPENDENT CHILDREN'S LAWYER [ICL]**

- The Court having found that there are exceptional circumstances and that the child(ren)
- \_\_\_\_\_ D.O.B. \_\_\_\_/\_\_\_\_/\_\_\_\_
- \_\_\_\_\_ D.O.B. \_\_\_\_/\_\_\_\_/\_\_\_\_
- \_\_\_\_\_ D.O.B. \_\_\_\_/\_\_\_\_/\_\_\_\_

is/are

- aged under 10 years
- aged 10 years or more and not mature enough to give instructions

and that it is in the best interests of the child(ren) to be legally represented, the Court makes the following orders:

1. Pursuant to s.524(4) of the *Children, Youth and Families Act 2005*, the child(ren) be legally represented by an Independent Children's Lawyer [ICL] and it is requested that Victoria Legal Aid arrange such representation.
2. Within 2 working days of the notification to the parties of the appointment of an ICL, the parties provide the ICL with copies of all relevant documents in their possession or control which they have created or commissioned or upon which they otherwise rely.
3. The ICL is a party to the proceeding for all purposes under the *Children, Youth and Families Act 2005*.

- The Children's Court Clinic report(s) be released to the ICL on condition that no copies be made without Court order and on the following conditions:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

- The ICL be permitted to inspect any documents subpoenaed by any other party.

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**COSTS**

- The Court orders that \_\_\_\_\_
- is to pay to \_\_\_\_\_
- costs in the sum of \$\_\_\_\_\_.
- Stay of \_\_\_ month(s).

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**MAGISTRATE / JUDGE**

\_\_\_\_\_