

CHILDREN, YOUTH & FAMILIES ACT 2005

SUMMARY OF FAMILY DIVISION CHANGES EFFECTED BY ACTS No.61 of 2014, No.27 of 2015 & No.8 of 2016

[1] LEGISLATIVE BACKGROUND

The Children, Youth and Families Act 2005 (Vic) [No.96/2005] [the CYFA] was assented to on 07/12/2005. The Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 [No.61/2014] was assented to on 09/09/2014. Amongst other things, this amending Act makes major changes to the processes and orders of the Children's Court's Family Division.

The purposes of the amendments effected by *Act No.61/2014* are said to include the following-

- to make further provision for the protection and permanent care of children; and
- to further improve the operation of the CYFA.

The amendments to s.276 of the CYFA effected by s.17 of *Act No.61/2014* have effectively been reversed by s.3 of the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Act 2015 [No.27/2015].

The Criminal Division amendments and a small number of the Family Division amendments effected by *Act No.61/2014* came into operation prior to 01/03/2016. The balance of the Family Division amendments came into operation on the default commencement date, 01/03/2016.

Further procedural and clarifying Family Division amendments are contained in the Children Legislation Amendment Act [No.8/2016] which was assented to on 15/03/2016 and came into operation on 16/03/2016. These amendments, the purposes of which are said to be to improve the operation of the CYFA, include (i) applications for a care by Secretary order or long-term care order (intended to be used upon the expiry of a family reunification order) and (ii) provisions to keep alive any current protection order upon the filing of either of these applications or of an application for a permanent care order.

[2] PURPOSE OF THIS PAPER

This paper, an update of the Family Division part of a paper published on 27/03/2015 and of a paper published on 15/02/2016, summarizes the significant changes to the processes and orders of the Children's Court's **Family Division** effected by *Act No.61/2014*, *Act No.27/2015* & *Act No.8/2016*. Save where otherwise indicated, the section references are to the amended CYFA.

[3] ACRONYMS USED IN THIS PAPER

ACRONYM	NAME OF ORDER	FORMER NAME
CBS	Care by Secretary order	Guardianship to Secretary order
FPO	Family preservation order	Supervision order
FRO	Family reunification order	Custody to Secretary order
IAO	Interim accommodation order	-----
LCO	Long-term care order	Long-term guardianship to Sec'tary order
PCO	Permanent care order	-----
TTO	Therapeutic treatment order	-----
TTPO	Therapeutic treatment (placement) order	-----

[4] FAMILY DIVISION AMENDMENTS NOW IN OPERATION

A CUSTODY & GUARDIANSHIP -> PARENTAL RESPONSIBILITY

Section 3(1) and repeal of ss.4-5

- ✦ The terms 'custody' and 'guardianship' – formerly defined in ss.4 & 5 – have been replaced throughout the CYFA by '**parental responsibility**', defined in s.3(1) as meaning "all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children".

- ⊛ The distinction between guardianship and custody rights and responsibilities has generally been dropped. However in certain provisions – e.g. CYFA-ss.175C, 287(2) – a distinction is drawn between major long-term issues in relation to a child and other aspects of parental responsibility. Under s.3(1) a “major long-term issue in relation to a child” is defined as “an issue about the care, wellbeing and development of the child that is of a long-term nature and includes an issue of that nature about–
 - (a) the child’s education (both current or future); and
 - (b) the child’s religious and cultural upbringing; and
 - (c) the child’s health; and
 - (d) the child’s name.”
- ⊛ In the definition of parent in s.3(1), item (d) is reworded to read “any person who has **custody of the child** parental responsibility for the child, other than the Secretary”.

B THREE PROTECTION ORDERS ABOLISHED

- **Interim protection orders** [former ss.275(1)(h) & 291-292] are abolished. However under the transitional provision in **Sch.5, item 6** an interim protection order in force immediately before 01/03/2016 continues in force for all purposes until its expiry.
- **Custody to third party orders** [former ss.275(1)(c) & 283] are abolished. However under the transitional provision in **Sch.5, item 5** a custody to third party order in force immediately before 01/03/2016 continues in force for all purposes until its expiry.
- **Supervised custody orders** [former ss.275(1)(d) & 284] are abolished. Under the transitional provision in **Sch.5, item 3** a supervised custody order in force immediately before 01/03/2016 is thereafter taken to be a family reunification order [FRO]. A drafting error in Sch.5, item 7(b) was corrected in the ***Children Legislation Amendment Act 2016***.

C CHANGE OF NAME/ORDER TYPE FOR FOUR OTHER PROTECTION ORDERS

- **Section 275(1)(b) & Sch.5, items 3 & 7(a):** **Family preservation order** [‘FPO’] is the new name for the former **supervision order**.
- **Section 275(1)(d) & Sch.5, items 3 & 7(c):** **Care by Secretary order** [‘CBS’] is the new name for the former **guardianship to Secretary order**.
- **Section 275(1)(e) & Sch.5, items 3 & 7(d):** **Long-term care order** [‘LCO’] is the new name for the former **long-term guardianship to Secretary order**.
- **Section 275(1)(c) & Sch.5, items 4 & 7(e):** **Family reunification order** [‘FRO’] is generally the new name for the former **custody to Secretary order**: However, a custody to Secretary order in force immediately before 01/03/2016 is thereafter–
 - (a) taken to be a **FRO** only where the child has been under a custody to Secretary order for less than 24 months on 01/03/2016;
 - (b) taken to be a **CBS** where the child has been under a custody to Secretary order for 24 months or more on 01/03/2016, in which case any conditions on the former order lapse.
- These changes of name/order type have resulted in a large number of consequential changes throughout the CYFA: see e.g. CYFA-ss.262(6), 262(7), 280-282, 287-290, 293, 296, 299 & 301-318.

D ‘BEST INTERESTS’ PRINCIPLES|CYFA-ss.8 & 10

The ‘best interests’ provisions in ss.8 & 10 are largely unchanged. The only amendments are–

- **Section 10(3)(f)**: “the desirability of continuity and **permanency stability** in the child’s care”;
- **Section 10(3)(fa)** replaces s.10(3)(p) and provides for consideration to be given to “the desirability of making decisions as expeditiously as possible and the possible harmful effect of delay in making a decision or taking an action”.

E CASE PLAN – ~~STABILITY PLAN~~ – PERMANENCY OBJECTIVES|CYFA-ss.166-169

- The provisions relating to a ‘stability plan’ for a child are deleted.
- **Section 167(1)** requires a case plan to include one of the following five ‘permanency objectives’ to be considered in the following order of preference as determined to be appropriate in the best interests of the child–

- (a) **family preservation**—the objective of ensuring a child who is in the care of a parent of the child remains in the care of a parent;
 - (b) **family reunification**—the objective of ensuring that a child who has been removed from the care of a parent of the child is returned to the care of a parent;
 - (c) **adoption**—the objective of placing the child for adoption under the **Adoption Act 1984**;
 - (d) **permanent care**—the objective of arranging a permanent placement of the child with a permanent carer or carers;
 - (e) **long-term out of home care**—the objective of placing the child in—
 - (i) a stable, long-term care arrangement with a specified carer or carers; or
 - (ii) if (i) is not possible, another suitable long-term care arrangement.
- **Section 167(2)(a)** provides that for the purposes of s.167(1)(c) to (e) it is to be preferred that a child is placed with a suitable family member of the child or other person of significance to the child.
 - **Section 167(3)** provides that a permanency objective of **family reunification** would be appropriate if the child has been in out of home care [defined in s.3 as “care of the child by a person other than a parent of the child”] for a cumulative period of less than 12 months and the safe reunification of the child with a parent is likely to be achieved.
 - **Section 167(4)** provides that a permanency objective set out in s.167(1)(c) to (e) would be appropriate if—
 - (a) the child has been in out of home care for a cumulative period of 12 months and there is no real likelihood for the safe reunification of the child with a parent in the next 12 months; or
 - (b) except in exceptional circumstances, the child has been in out of home care for a cumulative period of 24 months.
 - New provisions relating to preparation of a case plan are set out in **s.168** and relating to a review of a case plan are set out in **s.169**.

F POWERS TO SECRETARY TO SPECIFY CERTAIN ISSUES AND TO AUTHORISE A CARER TO MAKE CERTAIN DECISIONS|CYFA-ss.175A-175C

- **Section 175A** was introduced by *Act No.61/2014*, originally came into operation on 10/09/2014 and was amended on 16/03/2016. It now provides: “The Secretary may specify issues relating to a child in out of home care about which a person who has care of the child may be authorised to make decisions.” Examples given include-
 - the signing of school consent forms;
 - obtaining routine medical care for the child;
 - the day to day treatment of a child who suffers from a chronic or serious health condition.
 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 **IAO**, **FRO** or **TTPO** the specification must not relate to “a major long-term issue”.
- **Section 175B** which also originally came into operation on 10/09/2014 now reflects the new protection orders. It provides that the Secretary or person in charge of an out of home care service may authorise a person who has care of the child in accordance with-
 - an **IAO**; or
 - a protection order that confers parental responsibility for the child on the Secretary- to make decisions in relation to the child on the issues specified by the Secretary under s.175A.
- **Section 175C** provides that if a child who is subject to an **IAO** has been placed in out of home care or the Secretary has parental responsibility for a child under a **FRO** or **TTPO**—
 - ✪ the Secretary must, to the fullest extent possible, work with and engage any parent with whom the child is intended to be reunified in making case planning decisions for the child;
 - ✪ the Secretary must not make a decision (other than a decision the Secretary is expressly authorised to make under the *CYFA*) about a major long-term issue in relation to the child if a parent who has parental responsibility for the child disagrees with the decision;
 - ✪ the Secretary may make a decision on an issue which is not a major long-term issue without the agreement of a parent of the child.

G CULTURAL SUPPORT FOR ABORIGINAL CHILD|CYFA-s.176

- This reworded provision requires the case plan for an Aboriginal child placed in out of home care to include a cultural plan which addresses the cultural support needs of the child.

- Such case plan must reflect and be consistent with the child’s cultural support needs, having regard to the child’s circumstances, so as to–
 - (a) maintain and develop the child’s Aboriginal identity; and
 - (b) encourage the child’s connection to the child’s Aboriginal community and culture.

H TEMPORARY ASSESSMENT ORDER|CYFA-ss.228-239

There are no changes to this order.

I THERAPEUTIC TREATMENT ORDER|CYFA-ss.244-251, 255-258 THERAPEUTIC TREATMENT (PLACEMENT) ORDER|CYFA-ss.252-258

Save for the amendment to s.251 discussed in section **[5]** below, the only change to these orders is that **section 253** uses the term ‘parental responsibility’ in lieu of ‘sole custody’ for a child on a **TTPO** and the reference to a condition incorporating a cultural plan for an Aboriginal child on a **TTPO** is deleted.

J INTERIM ACCOMMODATION ORDER|CYFA-ss.262 & 263

- There are very few changes to the **IAO** provisions.
- **Section 262(5A)** provides that despite anything to the contrary in s.262, an **IAO** must not be made in respect of a child if the Court is satisfied that–
 - (a) a protection order could be made under Part 4.9; or
 - (b) a **PCO** could be made under s.319.
- **Section 263(1)(fa)** adds an extra **IAO** type: “the placement of a child with a disability service provider within the meaning of the *Disability Act 2006* if the child is the recipient of disability services under that Act”.

K RESTRICTIONS ON THE MAKING OF PROTECTION ORDERS|CYFA-s.276

- Subject to s.557(2), **section 276(1)** prohibits the Court from making a protection order unless–
 - (a) it has received and considered a disposition report; and
 - (b) it is satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child.
- Perhaps surprisingly, s.17 of *Act No.61/2014* removed requirement (b) that the Court be satisfied that all reasonable steps have been taken by the Secretary to provide the requisite services and replaced it with the requirement that the Court be “~~satisfied that the child cannot be sufficiently protected without a protection order~~”. A parallel amendment involved the deletion of s.276(2)(b) of the *CYFA*. These two amendments have since effectively been reversed by s.3 of *Act No.27/2015*.
- **Section 276(2)** has ended up effectively unchanged. It prohibits the Court from making a protection order that has the effect of removing a child from the care of the child’s parent unless-
 - (a) it has considered and rejected as being contrary to the best interests of the child an order allowing the child to remain in **the care of the child’s parent**; and
 - (b) it is satisfied by a statement in a disposition report that all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in **the care of the child’s parent**; and
 - (c) it considers that the making of the order is in the best interests of the child.
- **Section 276(3)** is unchanged. It provides that the fact that the child does not have adequate accommodation is not by itself a sufficient reason for the making of an order referred to in s.276(2).

L COURT MUST HAVE REGARD TO SECRETARY’S ADVICE IN DETERMINING WHETHER TO MAKE A PROTECTION ORDER|CYFA-s.276A

- **Section 276A** is a new provision which requires the Court to have regard to certain advice from the Secretary in determining whether to make a protection order. It does not, of course, require the Court to accept that advice in any particular case for to do so would probably violate the constitutional prohibition against administrative interference in the exercise of judicial power.
- **Section 276A(1)** requires the Court, in determining whether to make a protection order, to have regard to advice from the Secretary as to–
 - (a) the objectives of any case plan prepared in relation to the child; and
 - (b) the arrangements in place for the care of any siblings under the age of 18 years; and
 - (c) the age of the child and the period that the child has spent in out of home care during the child’s lifetime (whether or not as a consequence of a court order).

- **Section 276A(2)** requires the Court, in determining whether to make a protection order that has the effect of conferring parental responsibility for a child on the Secretary, to “have regard to advice from the Secretary as to–
 - (a) the likelihood of a parent permanently resuming care of the child during the term of the protection order; and
 - (b) the outcome of any previous attempts to reunify any child with the parent; and
 - (c) if a parent has previously had another child permanently removed from his or her care, the desirability of making an early decision about the future permanent care arrangements for the current child; and
 - (d) the benefits to the child of making a **CBS** to facilitate alternative arrangements for the permanent care of the child [curiously there is no reference to a **LCO**] if–
 - (i) the child is in out of home care as a result of an order under this Part and has been in out of home care under such an order for a cumulative period of 12 months determined in accord with s.287A(4); and
 - (ii) there appears to be no realistic prospect of the child being able to safely return to the care of the parent within a further period of 12 months; and
 - (iii) there are no permanent care arrangements already available for the child; and
 - (e) the desirability of making a **PCO**, if the child is placed with a person who is intended to have permanent care of the child.”

M UNDERTAKINGS|CYFA-ss.272-273, 275(1)(a), 278-279, 530(2)

There are no changes to any of these three undertakings-

- **Section 272**: An undertaking given upon the conclusion of a proceeding on a protection application or on an irreconcilable difference application which has not been proved.
- **Sections 278 & 275(1)(a)**: An undertaking in the nature of a protection order given upon proof of a protection application or an irreconcilable difference application.
- **Section 530(2)**: An undertaking given by a child or parent on an adjournment to appear or to produce the child before the Court on the resumption of the hearing of the proceeding.

N FAMILY PRESERVATION ORDER PLUS EXTENSION & VARIATION THEREOF|CYFA-ss.280-282, 294, 296(1), 298, 299-301

- Other than the change of name from **supervision order**, the **FPO** provisions – including provisions relating to extension and variation applications – are largely unchanged.
- **Section 280(1)** provides that a **FPO**–
 - (a) gives the Secretary responsibility for the supervision of the child; and
 - (b) **does not affect a person’s parental responsibility for the child**; and
 - (c) provides for the child to be placed in the day to day care of one or both of the child’s parents.
- **Sections 280(3)-(7) & 298**: The ‘notification requirements’ in relation to both an original **FPO** and an extended **FPO** > 12 months have been renumbered and somewhat reworded but remain largely to the same effect as previously. The Court remains obliged to direct the Secretary to review before the end of 12 months the operation of an original or extended **FPO** which exceeds 12 months in length: see ss.280(3) & 298(1). Following such review the Secretary may, with the agreement of the child (if 10 or older) and the child’s parent, determine administratively that the **FPO** should end. However, unlike the old ss.280(4) & 298(2), the amendments do not address the consequences of a failure by the Secretary to comply with a direction given by the Court under s.280(3) or s.298(1).
- **Section 281**: The pre-requisites governing conditions on a **FPO** are expanded. Conditions can only be included on a **FPO** which the Court considers–
 - are in the best interests of the child; and
 - **are reasonably capable of being carried out by each person the subject of the condition; and**
 - **promote the continuing care of the child by a parent.**
- **Section 301**: On an application for variation of a **FPO**, the Court may vary **the order** or any of the conditions included in the order or add or substitute a condition but must not extend the period of the order. This addition of the words “**the order or**” appears designed to enable a substitution of one carer for another in an appropriate case.

O FAMILY REUNIFICATION ORDER PLUS EXTENSION & VARIATION THEREOF|CYFA-ss.287-288A, 294-294A, 296, 298-302

- The **FRO** provisions – including provisions relating to extension and variation applications – are greatly changed from the **custody to Secretary order** provisions. Perhaps the most substantial change is that the 12 month maximum period for a custody to Secretary order is reduced by **section 287A** for a **FRO** in any case in which the child has been in out of home care (defined as care by a person other than a parent) as a result of an **IAO, FRO, CBS, LCO, TTPO**, interim protection order, custody to third party order, supervised custody order, custody to Secretary order, guardianship to Secretary order and/or long-term guardianship to Secretary order.

THE ORDER ITSELF AND ITS DURATION

- **Section 287** provides that a **FRO**–
 - (a) confers parental responsibility for the child on the Secretary (but this does not affect the parental responsibility of any other person in making decisions about major long term issues [as to which see the definition in s.3 reproduced in sub-section **A** above] except as provided for under the **CYFA** or by an order of the Court); and
 - (b) confers responsibility for the sole care of the child on the Secretary; and
 - (c) subject to s.287A, remains in force for the period (not exceeding 12 months) specified in the order; and
 - (d) may include any conditions (including a condition concerning contact between the child and a parent or another person of significance to the child) that the Court considers–
 - to be in the best interests of the child; and
 - are reasonably capable of being carried out by each person the subject of the condition; and
 - promote the reunification of the child with a parent;
 - (e) must provide that if, while the order is in force, the Secretary is satisfied that it is in the child's best interests, the Secretary may in writing direct that a parent of the child is to resume parental responsibility for the child to the exclusion of the Secretary [as to the associated change of order provisions see s.288A].
- **Former section 287(2)** which required the Court, in determining whether or not to make a custody to Secretary order, to have regard to the advice of the Secretary as to the workability of such order is deleted. So finally dies the ghost of s.99(2) of the **Children and Young Persons Act 1989 (Vic)** which the writer had always considered to be constitutionally unsound in its original formulation.
- **Sections 287A & 296(2)-(3)** are new provisions substantially affecting the determination of the period of both an original **FRO** and an extended **FRO**. They are likely to present some difficulties to legal practitioners in their practical application. They apply to any child who has been in out of home care as a result of an **IAO, FRO, CBS, LCO** and/or **TTPO** and provide as follows–
 - ⊛ **Child in out of home care for a total of X days [X < 365]:** **Sections 287A(2) & 296(3)** provide that the period specified in the **FRO** must not have the effect that child will be placed in out of home care for a cumulative period that exceeds 12 months commencing on the date the child is first placed in out of home care under the first of those orders.
 - ⊛ **Child in out of home care for a total of X days [365 =< X < 730]:** **Sections 287A(3) & 296(4)** provide that the period specified in the **FRO** must not have the effect that child will be placed in out of home care for a cumulative period that exceeds 24 months commencing on the date the child is first placed in out of home care under the first of those orders.
 - ⊛ **Periods of out of home care must be disregarded for the purposes of determining a cumulative period** in the circumstances set out in **section 287A(4)** [see also s.296(5)]:
 - (a) any period under a child care agreement under Part 3 or under a private arrangement made by a parent is to be disregarded;
 - (b) any period that child is being cared for by a parent under an **IAO**, an undertaking or an **FPO** under Part 4.9, including after that order or undertaking ceases to be in force, must be disregarded;
 - (c) any period that the child was in out of home care must be disregarded if the child has subsequently been in the care of a parent without the child being subject to any protection order under Part 4.9.
 - ⊛ The formulations in ss.287A(2) & 287A(3) appear to lead to a strange anomaly. If a child has been in out of home care under one or more of the relevant orders for a period totalling 330 days it would appear that under s.287A(2) the maximum period of a **FRO** is 35 days. However if the child has been in out of home care for a period totalling 390 days it would appear that under s.287A(3) the maximum period of a **FRO** is 340 days.

- ✧ There is no provision in s.287A which specifically applies if a child has been in out of home care for a total period that is 24 months or longer. Does the Court have power to make a **FRO** of up to 12 months duration in such a case or can a **FRO** not be made at all? The writer regards this question as moot.

ADMINISTRATIVE CONVERSION FRO -> FPO

- **Section 288A:** Old s.286 empowered the Secretary to change administratively a supervised custody order into a supervision order by directing that the child was to return to a parent. There was no such provision enabling a change to the nature of a custody to Secretary order. New s.288A provides for a **FRO** to be administratively converted to a **FPO** if the Secretary directs that a parent or parents of a child are to resume parental responsibility for the child to the exclusion of the Secretary.
- ✧ **Sections 288A(1) & (2)** provide that from the date of such a direction (a copy of which the Secretary must give to the Court, the child and the parent)–
 - (a) the Secretary ceases to have parental responsibility for the child; and
 - (b) the parent resumes parental responsibility for the child as specified in the direction; and
 - (c) the **FRO** is taken to be a **FPO** giving the Secretary responsibility for the supervision of the child and placing the child in the day to day care of the parent or parents who have parental responsibility for the child; and
 - (d) the conditions of the **FRO** continue to apply as conditions of the **FPO**; and
 - (e) Division 3 of Part 4.9 applies to the order; and
 - (f) the order ceases to be a **FRO** for the purposes of the *CYFA*.
- ✧ **Section 288A(3)** empowers the Secretary to apply to the Court to determine that the **FPO** is to include conditions. On such application **section 288A(4)** provides that the Court may determine that the **FPO** is to include conditions of the type referred to in s.281 without requiring the parties to attend, or be represented at, the proceedings.

EXTENSION OF FRO

- **Sections 294, 294A(1) & 296:** On an extension application the Court may extend a **FRO** if satisfied that this is in the best interests of the child. However it must not extend a **FRO** unless satisfied that–
 - (a) there is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension; and
 - (b) the extension will not have the effect that the child will be placed in out of home care for a cumulative period that exceeds 24 months calculated in accordance with s.287A.
 In practice these amendments are likely to lead to many fewer applications to extend a **FRO**.
- **Former section 295** has been deleted. Amongst other things, it listed matters which the Court was required to take into account in determining an application to extend a custody to Secretary order. It has been replaced by the generic **section 276A**.
- **Former section 297** has been deleted. It authorised the Court to grant a limited extension of a custody to Secretary order in conjunction with a direction to the Secretary to take steps to ensure that at the end of the period of the extended order a person other than a parent applies to a court for an order relating to the custody or the custody and guardianship of the child. While it may seem strange that a provision giving the Court power to expedite permanency for a child has been deleted by amendments said to be designed to promote permanency, s.297 was rarely used in practice as the factual circumstances in which it is applicable rarely arose.

VARIATION OF FRO

- **Section 300A:** This new section provides that the Secretary may apply to the Court for a variation of the conditions of a **FRO** without serving notice under s.277 if the Secretary is satisfied on reasonable grounds that–
 - (a) there has been an unexpected change in circumstances; and
 - (b) the application is necessary for the safety and wellbeing of the child.
- **Section 301:** On an application for variation of a **FRO**, the Court may vary the order or any of the conditions included in the order or add or substitute a condition but must not–
 - (a) extend the period of the order; or
 - (b) make any change to the conferral of parental responsibility for the child.
- **Section 302(1):** There is no longer a pre-requisite that there be exceptional circumstances before the Court may make an interim variation of conditions of a **FRO**.

P CARE BY SECRETARY ORDER PLUS EXTENSION THEREOF|CYFA-ss.289-289A, 290(1)(c), 293-294A, 296(6), 298

- The **CBS** provisions – including provisions relating to extension applications – are moderately changed from the **guardianship to Secretary order** provisions.

THE ORDER ITSELF AND ITS DURATION

- **Section 289(1)** provides that a **CBS**–
 - (a) confers parental responsibility for the child on the Secretary to the exclusion of all other persons; and
 - (b) subject to Division 7 of Part 4.9 remains in force for a period of 2 years [note that this is a fixed period of 2 years in comparison with ~~“the period (not exceeding 2 years) specified in the order”~~ which applied in s.289(1)(b) to the duration of a guardianship to Secretary order]; and
 - (c) ceases to be in force when the child attains the age of 18 years or when the child marries, whichever happens first; and
 - (d) must provide that if, while the order is in force, the Secretary is satisfied that it is in the child’s best interests, the Secretary may in writing direct that a parent of the child is to resume parental responsibility for the child to the exclusion of the Secretary [as to the associated change of order provisions see s.289A].

By comparison between s.289(1) which makes no reference to conditions and ss.281 & 287(1)(d) which provide for conditions on a **FPO** and a **FRO**, it is clear that the Court has no power to place conditions on a **CBS**.

- **Sections 289(1A)-(1C)** provide that–
 - (A) A **CBS** may be made on the application of the Secretary provided that the child is under the age of 18 years [see amendment to definition of ‘child’ in s.3(1) and new s.275(3); note that s.525(1)(ea) requires a child aged 10 years or more to be legally represented in proceedings involving this application].
 - (B) A protection order applying to a child at the date of an application for a **CBS** in relation to the child continues in force until the application is determined.
 - (C) On an application for a **CBS**, if the Court decides not to make a **CBS** it may, if satisfied that the grounds for a finding under s.274 still exist, make–
 - (a) an order requiring a person to give an undertaking under Part 4.9; or
 - (b) a **FPO**; or
 - (c) a **FRO**; or
 - (d) a **LCO**; or
 - (e) an order extending a current protection order.

This new application type is intended to be used in circumstances where there has previously been a **FRO** which is unable to be extended due to the ‘time in out of home care’ provisions contained in ss.287A & 296.

- **Sections 289(2)-(7) & 298**: The ‘notification requirements’ in relation to both an original **CBS** and an extended **CBS** > 12 months have been renumbered and somewhat reworded but remain largely to the same effect as previously. The Court remains obliged to direct the Secretary to review before the end of 12 months the operation of an original or extended **CBS** which exceeds 12 months in length: see ss.289(2) & 298(1). Following such review the Secretary may, with the agreement of the child (if 10 or older) and the child’s parent, determine administratively that the **CBS** should end. However, unlike the old ss.289(3) & 298(2), the amendments do not address the consequences of a failure by the Secretary to comply with a direction given by the Court under s.289(2) or s.298(1).

ADMINISTRATIVE CONVERSION CBS -> FPO

- **Section 289A**: New s.289A provides for a **CBS** to be administratively converted to a **FPO** if the Secretary directs that a parent or parents of a child are to resume parental responsibility for the child to the exclusion of the Secretary.
 - ✦ **Sections 289A(1) & (2)** provide that from the date of such a direction (a copy of which the Secretary must give to the Court, the child and the parent)–
 - (a) the Secretary ceases to have parental responsibility for the child; and
 - (b) the parent resumes parental responsibility for the child as specified in the direction; and
 - (c) the **CBS** is taken to be a **FPO** giving the Secretary responsibility for the supervision of the child and placing the child in the day to day care of the parent or parents who have parental responsibility for the child; and
 - (d) Division 3 of Part 4.9 applies to the order; and
 - (e) the order ceases to be a **CBS** for the purposes of the *CYFA*.

- ✳ **Section 289A(3)** empowers the Secretary to apply to the Court to determine that the **FPO** is to include conditions. On such application **section 289A(4)** provides that the Court may determine that the **FPO** is to include conditions of the type referred to in s.281 without requiring the parties to attend, or be represented at, the proceedings.

EXTENSION OF CBS

- **Section 294**: On an extension application the Court may extend a **CBS** if satisfied that this is in the best interests of the child.
- **Section 294A(2)**: However the Court must not extend a **CBS** unless it is satisfied that–
 - (a) firstly, a **PCO** is not appropriate in the circumstances; and
 - (b) secondly, a **LCO** is not appropriate in the circumstances.
 This new provision accords with the permanency objectives in ss.167(1)(d) & (1)(e). In this regard, s.290(1)(c) permits the Court hearing an application to extend a **CBS** to make an **LCO** in lieu of extending the **CBS**.
- **Section 294A(3)**: Despite the restriction in s.294A(2), the Court may extend a **CBS** if satisfied there are exceptional circumstances which justify the making of a further **CBS**.
- **Section 296(6)**: On an application to extend a **CBS**, the Court may extend the order for a period of 2 years [note that this is a fixed period of 2 years subject only to the child turning 18 or marrying in the intermediate period].
- **Former section 295** has been deleted. Amongst other things, it listed matters which the Court was required to take into account in determining an application to extend a guardianship to Secretary order. It has been replaced by the generic **section 276A**.
- **Former section 297** has been deleted. It authorised the Court to grant a limited extension of a guardianship to Secretary order in conjunction with a direction to the Secretary to take steps to ensure that at the end of the period of the extended order a person other than a parent applies to a court for an order relating to the custody or the custody and guardianship of the child. While it may seem strange that a provision giving the Court power to expedite permanency for a child has been deleted by amendments said to be designed to promote permanency, s.297 was rarely used in practice as the factual circumstances in which it is applicable rarely arose.

Q LONG-TERM CARE ORDER|CYFA-s.290

- The **LCO** provisions are significantly changed from the **long-term guardianship to Secretary order** provisions in four significant respects–
 - ✳ **Section 290(1)** allows an **LCO** to be made for a child of any age. Unlike a long-term guardianship to Secretary order it is not restricted to children of or over the age of 12 years.
 - ✳ **Sections 290(1A)-(1C)** provide that–
 - (A) A **LCO** may be made on the application of the Secretary provided that the child is under the age of 18 years [see amendment to definition of 'child' in s.3(1) and new s.275(3); note that s.525(1)(eb) requires a child aged 10 years or more to be legally represented in proceedings involving this application].
 - (B) A protection order applying to a child at the date of an application for a **LCO** in relation to the child continues in force until the application is determined.
 - (C) On an application for a **LCO**, if the Court decides not to make a **LCO** it may, if satisfied that the grounds for a finding under s.274 still exist, make–
 - (a) an order requiring a person to give an undertaking under Part 4.9; or
 - (b) a **FPO**; or
 - (c) a **FRO**; or
 - (d) a **CBS**; or
 - (e) an order extending a current protection order.
 This new application type is intended to be used in circumstances where there has previously been a **FRO** which is unable to be extended due to the 'time in out of home care' provisions contained in ss.287A & 296.
 - ✳ **Section 290(2)(a) & (b)**: The pre-requisite remains that an **LCO** can only be made if there is a person or are persons available with whom the child will continue to live for the duration of the **LCO**. However, there is also a new pre-requisite enabling the Court to make an **LCO** only if the carers will not consent to the making of a **PCO**.

- ✧ **Section 290(2)(d)**: The pre-requisite that the child consents to the making of an **LCO** is changed to: “if the child is of or over the age of 10 years, the child does not oppose the making of the order”. There is an added pre-requisite that the carer “will not consent to the making of a **PCO**”.
- **Sections 290(3)-(7)**: The obligation of the Court to direct the Secretary DHHS to review the operation of the **LCO** before the end of each period of 12 months remains. The effect of a failure by the Secretary to comply with the direction is not specified. Following such review the Secretary may, with the agreement of the child (if 10 or older) and the child’s parent, determine administratively that the **LCO** should end.

R LAPSING OR REVIVING OF FRO, CBS, LCO & PCO|CYFA-ss.288, 289(7), 290(8) & 324

Apart from the changes of names of the orders, there are no changes to the provisions governing the circumstances in which the above orders lapse and/or revive.

S REVOCATION OF FPO, FRO, CBS & LCO|CYFA-ss.303-310

Apart from the changes of names of the orders and the removal of names of deleted protection orders, there are no substantive changes to the provisions governing the revocation of **FPO**, **FRO**, **CBS** and **LCO** or of the orders that can be made in lieu upon revocation.

T BREACH OF FPO|CYFA-ss.311-316, 318

Apart from the change of name of an **FPO** and the removal of names of deleted protection orders, there are no substantive changes to the provisions governing breach of a **FPO** or orders that can be made in lieu upon finding the breach proved.

U PERMANENT CARE ORDER |CYFA-ss.319-327

THE ORDER ITSELF AND ITS PRE-REQUISITES

- **Section 319**: Apart from the change of terminology from ‘custody and guardianship’ to ‘parental responsibility’, there are no changes to the provisions relating to the general pre-requisites for the making of a **PCO**, namely that the Court is satisfied that–
 - (a) the child’s surviving parent has not had care of the child for at least 6 months or periods totalling 6 months in the last 12 months;
 - (b) the parent is unwilling or unable to resume parental responsibility for the child or it would not be in the best interests of the child for the parent to resume parental responsibility;
 - (c) the proposed carers are suitable to have parental responsibility for the child;
 - (d) the proposed carers are willing and able to assume permanent care of the child;
 - (e) as far as practicable the wishes and feelings of the child have been ascertained and given due consideration; and
 - (f) the best interests of the child will be promoted by making the order.
- **Section 320**: Apart from the change of terminology, the only changes to the provisions relating to an application for a **PCO** are the addition of the following–
 - ✧ **s.320(1A)**: “The Secretary must not approve a person as suitable to have parental responsibility for a child under a **PCO** unless the Secretary is satisfied that the person will comply with the condition to be included in the **PCO** under s.321(1)(ca)” [see below].
 - ✧ **s.320(6)**: “A protection order applying to a child at the date of an application for a permanent care order in relation to the child continues in force until the application is determined.”
 - ✧ **s.320(7)**: “If the Court decides not to make a **PCO**, it may, if satisfied that the grounds for a finding under s.274 still exist, make–
 - (a) an order requiring a person to give an undertaking under Part 4.9; or
 - (b) a **FPO**; or
 - (c) a **FRO**; or
 - (d) a **CBS**; or
 - (e) a **LCO**; or
 - (f) an order extending a current protection order.”
- **Section 322**: The concept of a stability plan has been removed from the **CYFA** generally [see section **E** above] so it is no longer a pre-requisite to the making of a **PCO**. The other 3 restrictions in s.322 on the making of a **PCO** are unchanged in substance.

- **Section 323(2)**: Some pre-requisites for making a **PCO** for an Aboriginal child are significantly changed. Previously the Court was prohibited from making a **PCO** to place an Aboriginal child solely with a non-Aboriginal person or persons unless the Court had received a report from an Aboriginal agency that recommended the making of the order. Under new s.323(2) the Court is prohibited from making a **PCO** in respect of an Aboriginal child – irrespective of the Aboriginality or otherwise of the proposed carer(s) – unless–
 - (a) it has received a report from an Aboriginal agency that recommends the making of the **PCO**; and
 - (b) a cultural plan has been prepared for the child [whether the Court requires it or not].
- **Section 323(1)**: The other pre-requisites for making a **PCO** for an Aboriginal child are unchanged. The Court is still prohibited from making a **PCO** to place a child solely with a non-Aboriginal person or persons unless the disposition report states that–
 - (a) no suitable placement can be found with an Aboriginal person or persons;
 - (b) the decision to seek the **PCO** has been made in consultation with the child, where appropriate; and
 - (c) the Secretary is satisfied that the order sought will accord with the Aboriginal Child Placement Principle.

CONDITIONS ON A PCO

- **Section 321(1)(ca)**: This new provision requires the Court to include a condition on any **PCO** that the person caring for the child must, in the best interests of the child and unless the Court otherwise provides, preserve–
 - (i) the child’s identity and connection to the child’s culture of origin; and
 - (ii) the child’s relationships with the child’s birth family.
- **Section 321(1)(d)-(f), 321(1A), 327(2)**: In addition to the existing provisions for contact with siblings and other persons significant to the child [s.321(1)(e)] and for a condition incorporating a cultural plan for an Aboriginal child [s.321(1)(f)], the Court may include conditions on a **PCO** that the Court considers in the best interests of the child concerning contact with the child’s parent **which may provide for contact up to 4 times a year** [s.321(1)(d)]. These contact conditions do not prevent additional contact being arranged from time to time by agreement in the child’s best interests [s.321(1A)]. Nor do they apply to the variation of a contact condition of a **PCO** if the variation is made more than 12 months after the making of the **PCO** [s.327(2)].
- **Section 321(1B)**: In addition to an obligation on the Court to have regard to the primacy of the child’s relationship with the permanent care family, there are five new pre-requisites in s.321(1B) which must be met before the Court can include any parental or sibling contact conditions or a cultural plan condition under ss.321(1)(d), (e) or (f). These are whether the condition–
 - (a) is necessary to protect the child or support the permanence of the placement;
 - (b) is necessary to promote the child’s continuing connection to the child’s parents, siblings or culture;
 - (c) is sufficiently flexible to accommodate the child’s changing developmental needs over time;
 - (d) is reasonable in the context of the child’s permanent care family’s life; and
 - (e) is necessary given the capacity of the person caring for the child to meet the conditions relating to preserving the child’s identity and connection to the child’s culture of origin and the child’s relationships with birth family.
- **Section 321(1C)**: This new provision empowers the Court to include a condition that the child not have contact with a parent, sibling or other person.

ADMINISTRATIVE CONVERSION PCO -> CBS IF ALL CARERS HAVE DIED

- **Section 325A**: This new provision effects an administrative change from a **PCO** to a **CBS** in circumstances where the Secretary has been informed that each person having parental responsibility for the child under a **PCO** has died.
 - ✦ Upon being so informed the Secretary must notify the Court.
 - ✦ On and from the date that notice is given to the Court [a copy of which the Secretary must also give to the person who has (temporary) care of the child, the child (if aged 10 years or over) and the parent]–
 - (a) the Secretary is taken to have sole parental responsibility for the child; and
 - (b) the **PCO** is taken to be a **CBS**; and
 - (c) Division 7 of Part 4.9 applies to the order; and
 - (d) the order ceases to be a **PCO** for the purposes of the *CYFA*.

VARIATION OR REVOCATION OF PCO

- **Section 326(1)(c)**: Under new s.326(1)(c) a person who is a parent of the child [other than the permanent carer who is also deemed a 'parent' under limb (d) of the definition in s.3(1)] can only make an application for variation or revocation of a **PCO** with leave of the Court.
- **Section 326(1A)**: This new provision enables a sibling to apply for a variation of a **PCO** as of right.
- **Section 326(1B)**: An application by a parent [other than the permanent care parent] to vary a **PCO** made less than 12 months before may only be made on the basis that a contact condition in the **PCO** has not been complied with.
- **Section 326(1C)**: This new provision sets out the matters which the Court must consider in determining whether to grant leave to a parent to make an application to vary or revoke a **PCO**. It states that "the best interests of the child are the paramount consideration" and requires the Court to—
 - (a) first have regard to the current circumstances of the child; and
 - (b) have regard to the matters in s.321(1B); and
 - (c) have regard to the potential disruption to the child's permanent care placement and the child's relationship with the permanent care family;
 - (d) in the case of an application to vary, have regard to whether—
 - (i) it appears that a party has not complied with any condition of the order; or
 - (ii) there has been a significant change in the circumstances of the parent or child since the original **PCO** was made.
 - (e) in the case of an application to revoke, have regard to whether the circumstances of the parent have changed significantly to the extent that the parent can demonstrate he or she would be able to permanently fulfil the responsibilities and duties of parenthood, including the capacity to provide adequately for the emotional, intellectual, educational and other needs of the child.
- **Sections 326(1D) to (1F)**: These new provisions empower the Court to request a report from the Secretary to assist in determining whether to grant leave, whether to vary a contact condition and whether to revoke the **PCO**.
- **Section 326(2A)**: If a parent requires leave of the Court to bring an application to vary or revoke a **PCO**, notice of the application must not be served on the child or carer unless that leave is granted.
- **Section 327(2)**: The limit on contacts set out in s.321(1)(d) does not apply to the variation of a contact condition of a **PCO** if the variation is made more than 12 months after the making of the **PCO**.

V FILING OF REPORTS |CYFA-ss.554, 561, 562, 565 & 569

Minor amendments to provisions governing the filing of protection reports, additional reports, Clinic reports and therapeutic treatment application or placement reports have been in operation since 21/01/2015.

[5] INADMISSIBILITY OF STATEMENT MADE BY A CHILD IN THE COURSE OF THERAPEUTIC TREATMENT

Section 251 extends as and from 04/03/2015 the inadmissibility in criminal proceedings of any statement made by a child participating in a therapeutic treatment program under a **TTO** to include a child participating "voluntarily in an appropriate therapeutic treatment program".