

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The main object of this Bill is to amend the Children and Young Persons (Care and Protection) Act 1998 (the principal Act) so as to provide for the following:

- (a) greater protection to children and young persons who are at risk of harm from a parent or carer,
- (b) reciprocal arrangements for the transfer of interstate and New Zealand child protection orders and child protection proceedings.

The Bill also makes various miscellaneous amendments to the principal Act, including amendments relating to the following:

- (a) the legal representation of children in proceedings before the Children's Court,
- (b) the disclosure to parents and certain other persons of information concerning the placement of children in out-of-home care,
- (c) the kinds of children's services that are required to be licensed under the principal Act.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, except for three amendments associated with two uncommenced amendments made by other Acts.

Clause 3 is a formal provision that gives effect to the amendments to the Children and Young Persons (Care and Protection) Act 1998 set out in Schedules 1, 2 and 3.

Clause 4 is a formal provision that gives effect to the amendments to other Acts set out in Schedule 4.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by the Act.

Schedule 1 Amendments to Children and Young

Persons (Care and Protection) Act 1998

relating to parent and carer harm

Schedule 1 [1] inserts proposed section 23 (f) in the principal Act. Section 23 sets out the circumstances in which a child or young person is taken to be at risk of harm for the purposes of Parts 2 (Reports) and 3 (Investigations and assessment) of Chapter 3 (Requests for assistance and reports) of the principal Act. Proposed section 23 (f) sets out an additional circumstance—namely, that the child was the subject of a pre-natal report under section 25 of the principal Act and that the birth mother did not engage successfully with support services to deal with the risk factors that gave rise to the report.

Schedule 1 [2] replaces the current note to section 25 (Pre-natal reports) to explain the three purposes of the section—that is, to allow assistance and support to be provided to the expectant mother to reduce any risk of harm to the child after his or her birth, to provide early information about possible risks to the child and to require reporting on the child after his or her birth if there are reasonable grounds to believe that the child is at risk.

Schedule 1 [3] inserts proposed section 106A in the principal Act. The proposed section requires the Children's Court, in proceedings before it under the principal Act, to admit any evidence adduced that a parent or primary care-giver of a child or young person to whom the proceedings relate is a person from whose care and protection a child or young person was previously removed by a court (and not restored), or is a person who has been identified by the coroner or a police officer as a person who may have been involved in causing a death of a child or young person that is reviewable by the Ombudsman under Part 6 of the Community Services (Complaints, Reviews and Monitoring) Act 1993. While the evidence is prima facie

evidence that the child or young person to whom the proceedings relate is in need of care and protection, that prima facie evidence is rebuttable on the balance of probabilities by the parent or primary care-giver concerned. Section 43 (Removal of children and young persons without warrant) of the principal Act deals with the removal of children and young persons from risk of harm prior to the making of a formal care application.

Schedule 1 [4] inserts proposed section 107 (3A) in the principal Act. Section 107 provides (among other things) that witnesses in the Children's Court must not be asked offensive or scandalous questions or examined in an oppressive manner. The proposed subsection makes it clear that questions to a witness who is a parent or a primary care-giver of a child or young person the subject of a care application concerning the witness's previous history of dealings with any child or young person are taken not to be intrinsically offensive, scandalous or oppressive.

Schedule 1 [5] inserts proposed section 248 (1A) in the principal Act. Section 248 deals with the provision and exchange of information about children and young persons. The proposed subsection makes it clear that information about an unborn child who is the subject of a pre-natal report under section 25, the family of the unborn child and the expected date of birth may be furnished under the section in the same way as information about children and young persons may be furnished.

Schedule 1 [6] makes consequential amendments.

Schedule 2 Amendments to Children and Young Persons (Care and Protection) Act 1998 relating to reciprocal arrangements

Schedule 2 [1] amends section 229 (Unauthorised removal of children and young persons) of the principal Act to create the offence of the unauthorised removal of a child or young person from the care of a person into whose care and protection the child or young person has been placed under a child protection order, or an interim order, within the meaning of proposed Chapter 14A, other than an order under the principal Act. (Section 229 (1) creates the relevant offence in relation to children and young persons placed into care and protection under the principal Act.)

Schedule 2 [2] inserts proposed Chapter 14A (proposed sections 231A–231ZB) in the principal Act. The proposed Chapter provides for the interstate transfer of final child protection orders and child protection proceedings.

Chapters 5 and 6 of the principal Act provide for the making of child protection orders and the conduct of child protection proceedings in the Children's Court. Laws of other States and Territories and New Zealand provide for similar orders and proceedings.

Chapter 14A Transfer of child protection orders and proceedings

Part 1 Introductory

Proposed section 231A sets out the purpose of the proposed Chapter. This is to provide for the transfer of child protection orders and proceedings between New South Wales and participating States so that children who are in need of protection may be protected despite moving from one jurisdiction to another, and so as to facilitate the timely and expeditious determination of court proceedings relating to the protection of a child or young person.

Proposed section 231B defines terms used in the proposed Chapter. The terms defined include child protection order, child protection proceeding, child welfare law, interstate law, interstate officer and participating State.

Part 2 Transfer of child protection orders

Division 1 Administrative transfers

Proposed section 231C sets out the circumstances in which the Director-General may transfer a child protection order to a participating State. These circumstances include the Director-General being of the opinion that a child protection order to the same or

a similar effect as the order to be transferred could be made under the child welfare law of the State concerned.

Proposed section 231D specifies the persons whose consent to the transfer of a child protection order is required before the order can be transferred administratively.

Proposed section 231E requires the Director-General to have regard to certain matters in determining whether to transfer a child protection order to a participating State. These matters include the matters referred to in section 9 (What principles are to be applied in the administration of this Act?) of the principal Act and the fact that it is preferable for a child or young person to be subject to a child protection order made under the child welfare law of the State where the child or young person resides.

Proposed section 231F requires the Director-General to give notice of a proposed transfer of a child protection order to the parent of the child or young person concerned (and to the child or young person, if he or she is 12 years of age or older). Certain information about the decision and the right of review by the Administrative Decisions Tribunal must also be provided. Schedule 2 [3] makes a consequential amendment to section 245 (Decisions that are reviewable by the Administrative Decisions Tribunal).

Division 2 Judicial transfers

Proposed section 231G provides for the transfer of a child protection order to a participating State by order of the Children's Court on the application of the Director-General.

Proposed section 231H requires the Director-General to serve a copy of an application under proposed section 231G on each party to the proceedings in relation to the child protection order concerned.

Proposed section 231I provides that, if the Children's Court determines to transfer a child protection order, the terms of the proposed interstate order must be terms that could be the terms of such an order under the child welfare law of the participating State and that the Court believes to be to the same or of a similar effect as the terms of the home order or otherwise in the best interests of the child or young person.

Proposed section 231J provides that the Children's Court must not make an order under the proposed Division unless it has received and considered an updated care plan (if a care plan had been prepared in relation to the original order) or a report by the Director-General that contains the matters required by the regulations to be included in such a report. The proposed section also specifies the matters to which the Court must have regard in determining the kind of order to make. These matters include the matters referred to in section 9 of the principal Act and the fact that it is preferable for a child or young person to be subject to a child protection order made under the child welfare law of the State where the child or young person resides.

Proposed section 231K provides for appeals to be made to the District Court against an order of the Children's Court transferring, or refusing to transfer, a child protection order to a participating State.

Part 3 Transfer of child protection proceedings

Proposed section 231L provides that the Children's Court may make an order under the proposed Part transferring a child protection proceeding pending in the Children's Court to the Children's Court in a participating State if an application for the making of the order has been made by the Director-General and the relevant interstate officer has consented in writing to the transfer.

Proposed section 231M specifies the matters to which the Children's Court must have regard in determining whether to make an order transferring a proceeding under the proposed Part. The matters concerned include the matters referred to in section 9 of the principal Act and the fact that it is preferable that a child is subject to a child protection order made under the child welfare law of the State where the child or young person resides.

Proposed section 231N provides for the Children's Court to make an interim order allocating parental responsibility for the child or young person to any person solely or jointly with another or giving responsibility for the supervision of the child or young person to the interstate officer in the participating State or to any other person in the participating State to whom that responsibility could be given under the child welfare law of that State.

Proposed section 231O provides for appeals to be made to the District Court against an order of the Children's Court transferring, or refusing to transfer, a child protection proceeding to a participating State.

Part 4 Registration

Proposed section 231P requires the Director-General to file in the Children's Court for registration a copy of a child protection order transferred to New South Wales under an interstate law and a copy of an order under an interstate law to transfer a child protection proceeding to New South Wales and any interim order made in relation to the latter order.

Proposed section 231Q requires the appropriate Children's Registrar to immediately notify the appropriate officer of the Children's Court in the sending State and the interstate officer in that State of the registration of any document filed under proposed section 231P or the revocation under proposed section 231R of the registration of any document so filed.

Proposed section 231R provides for the making of an application for the revocation of the registration of any document filed under proposed section 231P. The proposed section further provides for such revocation only if the Children's Court is satisfied that the document was inappropriately registered because the decision or order to transfer the child protection order or the order to transfer the child protection proceeding (as the case requires) was, at the time of registration, subject to appeal or review or a stay or the time for instituting an appeal or seeking a review had not expired under the interstate law.

Part 5 Miscellaneous

Proposed section 231S specifies the effect of registration of a transferred order. On an order being registered in a participating State under an interstate law, the child protection order made by the Children's Court under the principal Act ceases to have effect. That order is revived if the registration of the child protection order transferred from New South Wales is revoked in the participating State under the interstate law.

Proposed section 231T provides for the transfer of court files in connection with a child protection proceeding to the Children's Court in a participating State if the child protection order or proceeding is transferred to the participating State.

Proposed section 231U provides that, in hearing and determining a child protection proceeding transferred to the Children's Court under an interstate law, the Court is not bound by any finding of fact made in the proceeding in the Children's Court in the sending State before its transfer. However, the Children's Court may have regard to the transcript of, or any evidence adduced in, those proceedings.

Proposed section 231V empowers the Director-General to disclose to an interstate officer any information that has come to his or her notice in the performance of duties or exercise of powers under the principal Act if the Director-General considers it necessary to do so to enable the interstate officer to exercise functions under a child welfare law or an interstate law.

Proposed section 231W permits the Director-General to consent or refuse to consent to the transfer of a child protection order to New South Wales or a proposed transfer of child protection proceedings to the Children's Court of New South Wales.

Proposed section 231X specifies the evidentiary effect of consent of the relevant interstate officer.

Part 6 Reciprocity generally

Proposed Part 6 (proposed sections 231Y–231ZB) transfers the existing section 255

(Reciprocity between States and Territories) to proposed Chapter 14A, and, in doing so, updates the provisions of that section and breaks them into separate sections. In consequence, Schedule 2 [4] omits the existing section 255.

Schedule 3 Miscellaneous amendments to Children and Young Persons (Care and Protection) Act 1998

Schedule 3 [1] inserts definitions of terms used in other amendments.

Schedule 3 [2] inserts a provision that makes it clear that a person who is permitted or required by Part 2 of Chapter 3 of the principal Act to make a report about a child or young person who is suspected to be at risk of harm is not prevented, by reason only of having made the report, from responding to the needs of, or discharging any other obligations in respect of, the child or young person the subject of the report in the course of the person's employment or otherwise.

Schedule 3 [3] amends section 43 (5) of the principal Act, which currently states that until a person removed from a place of risk or certain other places under section 43 is placed in the care and protection of the Director-General, the person must be kept separately from any persons who are detained for committing offences or who are on remand. Under the amended section the person must also be kept separately from any persons who are subject to an order under section 33 (1) (g) of the Children (Criminal Proceedings) Act 1987 committing them to the control of the Minister administering the Children (Detention Centres) Act 1987.

Schedule 3 [4] permits the Children's Court to make an interim care order prior to determining whether the child or young person the subject of a care application is in need of care and protection if the Court is satisfied that it is appropriate to do so.

Schedule 3 [5] inserts a provision that makes it clear that for the purposes of the principal Act, it does not matter whether the conduct constituting a ground referred to in section 71 (Grounds for care orders) occurred wholly or partly outside New South Wales. This amendment is part of the establishment of reciprocal arrangements for the transfer of interstate and New Zealand child protection orders and child protection proceedings by provisions proposed to be inserted by Schedule 2 [2].

Schedule 3 [6] provides that, in a section empowering the Children's Court to require the attendance of a child or young person and his or her parents at proceedings before the Court with respect to the child or young person, a reference to a parent of the child or young person includes a birth parent, or an adoptive parent, of the child or young person who does not have parental responsibility for the child or young person. The proposed amendment is to commence on the commencement of an uncommenced provision of an earlier Act that inserts section 96 (4)–(6) in the principal Act.

Schedule 3 [7] repeals section 99 (Legal representation) of the principal Act concerning legal representation of children and young persons in proceedings before the Children's Court and replaces that section with proposed sections 99–99D. The proposed sections do not differ substantially from the current provision, but clarify its operation.

Proposed section 99 permits the Children's Court to appoint legal representatives to act for children and young persons appearing before the Court. A legal representative for a child or young person who has not been appointed by the Children's Court may appear before the Court only with its leave.

Proposed section 99A specifies the circumstances in which a legal representative is to act as a direct legal representative (that is, on the instructions of a child or young person who is capable of giving proper instructions and in respect of whom a guardian ad litem has not been appointed) or an independent legal representative (that is, for a child or young person who is not capable of giving proper instructions and in respect of whom a guardian ad litem may or may not have been appointed).

Proposed section 99B establishes a rebuttable presumption that a child who is less

than 12 years of age is incapable of giving proper instructions to his or her legal representative. The Children's Court may make an order to the contrary.

Proposed section 99C establishes a rebuttable presumption that a child who is not less than 12 years of age, or is a young person, is capable of giving proper instructions to his or her legal representative. The Children's Court may make an order to the contrary.

Proposed section 99D sets out certain aspects of the role of legal representatives of children and young persons.

Schedule 3 [8] repeals an existing provision dealing with the disclosure of information concerning the placement of a child or young person in out-of-home care to his or her parents. This matter is proposed to be dealt with more extensively by Schedule 3 [9].

Schedule 3 [9] inserts proposed Division 1A (proposed sections 149B–149K) of Part 2 of Chapter 8 (Out-of-home care) of the principal Act.

Proposed section 149B defines the term parent for the purposes of the proposed Division and interprets references to persons who are significant to a child or young person.

Proposed section 149C creates an obligation, subject to proposed sections 149E and 149I, on a designated agency responsible for the placement of a child or young person in out-of-home care to provide information concerning the placement of the child or young person to his or her parents and to any other person who is significant to the child or young person and who requests the information.

Proposed section 149D requires a designated agency, when considering the type and amount of information to be disclosed, to have regard to the wishes of the child or young person concerned and any guidelines prepared by the Children's Guardian in relation to disclosure.

Proposed section 149E requires the designated agency to seek the consent of the authorised carer of the child or young person concerned before disclosing high level identification information concerning the placement of the child or young person.

(High level identification information is defined in section 3 of the principal Act by an amendment to be inserted in that section by Schedule 1 [1] to the Children and Young Persons (Care and Protection) Amendment Act 2006.) The proposed section sets out the circumstances in which the information may be disclosed despite the authorised carer's refusal, or failure, to consent to the disclosure. These circumstances are that the designated agency:

(a) believes on reasonable grounds that disclosure of the information will not pose any risk to the safety, welfare or well-being of the child or young person concerned, any authorised carer of the child or young person, or any member of the family or household of the authorised carer, and

(b) has complied with proposed sections 149F and 149G.

Proposed section 149F prohibits a designated agency from disclosing high level identification information without the authorised carer's consent unless it has provided the authorised carer (and, in certain cases, the child or young person concerned or a nominee of the child or young person) with written reasons as to why it believes that the disclosure will not pose a risk of the kind referred to in proposed section 149E, and has also given the authorised carer a written notice stating that the information will not be disclosed within the period of 21 days after the date of the notice and setting out the authorised carer's rights of review of the decision to disclose the information.

Proposed section 149G provides for the making of an application to the Administrative Decisions Tribunal for a review of a decision to disclose high level identification information in a case where the authorised carer has not consented to the disclosure. The provision allows for the authorised carer to apply for the review or to require the designated agency to apply on the authorised carer's behalf. If an

application for review is made, the information concerned must not be disclosed otherwise than in accordance with the final determination of the application (unless the application is withdrawn by or at the request of the authorised carer).

Proposed section 149H modifies the Administrative Decisions Tribunal Act 1997 for the purposes of an application for review made by a designated agency on behalf of an authorised carer.

Proposed section 149I requires a designated agency to refuse to disclose information under the proposed Division if it believes on reasonable grounds that the disclosure of the information would adversely affect the safety, welfare or well-being of the child or young person concerned, an authorised carer of that child or young person or any member of the family or household of the authorised carer.

Proposed section 149J makes it clear that a disclosure of information made in good faith under the proposed Division does not constitute a contravention of any provision of the principal Act as to confidentiality or of certain privacy laws.

Proposed section 149K makes it clear that the proposed Division does not authorise a disclosure of information if that disclosure is prevented by an order of any court or tribunal, and does not prevent disclosure if the disclosure is ordered by any court or tribunal.

Schedule 3 [10] makes it clear that a reference in section 168 (Access to personal information) to records kept by a designated agency includes a reference to records formerly kept by the agency and delivered to the Director-General under section 170 (2A) (which is proposed to be inserted by the Children and Young Persons (Care and Protection) Amendment Act 2006). This will require the designated agency to request that the Director-General return the records if a child or young person seeks access to them.

Schedule 3 [11] makes it clear that the obligation on the Director-General to return records previously deposited in the records repository applies despite the provisions of the State Records Act 1998.

Schedule 3 [12] inserts a definition of exempt premises in section 199 (Definitions) of the principal Act. Currently, that definition appears in section 200 (3) of the principal Act and applies only for the purposes of section 200 (2) (g), which provides that a service provided at exempt premises is excluded from the definition of children's services in certain circumstances. The effect of the transfer of the definition is that it applies to the whole of Chapter 12, and not solely for the purposes of section 200 (2) (g). Schedule 3 [14] makes a consequential amendment.

Schedule 3 [13] amends the definition of home based children's service in section 199 of the principal Act to make it clear that the reference to the carer in that definition is a reference to the home-based licensee

Schedule 3 [15] amends the definition of children's services in section 200 of the principal Act to exempt a service involving medical or clinical care provided by a hospital. It also exempts certain regular child-minding services provided in connection with a hospital, health service or a recreational or commercial facility from treatment as "children's services" to which Chapter 12 of the Act relates. This preserves the exemption from licensing requirements relating to children's services currently enjoyed by certain informal services, but has the effect of requiring certain other currently-exempt services to be licensed.

Schedule 3 [16] repeals section 200 (3) of the principal Act (currently containing the definition of exempt premises, as referred to above) and re-enacts the subsection to insert a definition of hospital.

Schedule 3 [18] amends section 245 (Decisions that are reviewable by the Administrative Decisions Tribunal) of the principal Act in consequence of the review rights conferred in respect of a decision of a designated agency to disclose high level identification information concerning the placement of a child or young person or to refuse to disclose information concerning the placement of a child or young person.

Schedule 3 [19] further amends section 245 so as to provide that certain provisions of the Community Services (Complaints, Reviews and Monitoring) Act 1993, which would otherwise apply in respect of a review of a decision of the kinds referred to above, do not apply to reviews of decisions of those kinds.

Schedule 3 [20] omits a note, the substance of which is transferred to section 246 of the principal Act by Schedule 3 [21].

Schedule 3 [21] amends section 246 (Separation of children and young persons from offenders) of the principal Act to make it clear that while a child or young person in the care of the Minister or the Director-General must not be accommodated in premises for juvenile offenders, this restriction does not apply if the child or young person is a person on remand or is sentenced to serve a control order. The amendment also provides that if a child or young person is detained by the police on a warrant issued for his or her attendance at court, the child or young person cannot be held in a juvenile justice centre pending his or her appearance in court.

Schedule 3 [22] inserts proposed section 258A (Time for instituting proceedings) in the principal Act to permit the prosecution of an offence to be commenced within 6 months of the Director-General becoming aware that the offence has allegedly been committed (rather than within 6 months from the date on which the offence was alleged to have been committed, as set out under the Criminal Procedure Act 1986). A prosecution for an offence against Chapter 12 or against a regulation made in relation to children's services may be commenced within 2 years of the Director-General becoming aware that an offence allegedly has been committed.

Schedule 3 [17] makes a consequential amendment by repealing section 219 (Time for instituting proceedings) which is located in Chapter 12 and applies only for the purposes of that Chapter.

Schedule 3 [23] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 3 [24] inserts savings and transitional provisions in Schedule 3 (Savings, transitional and other provisions) to the principal Act in consequence of the enactment of the proposed Act.

Schedule 4 Amendment of other Acts

Schedule 4.1 amends the Child Protection (International Measures) Act 2006 as a consequence of the amendment made by Schedule 2 [2] inserting Chapter 14A, which enables the transfer of New Zealand and New South Wales final child protection orders and proceedings.

Schedule 4.2 amends a provision proposed to be inserted in the Children and Young Persons (Care and Protection) Act 1998 by the Children and Young Persons (Care and Protection) Amendment Act 2005 to provide that a reference to a parent of a child or young person includes a birth parent, or an adoptive parent, of the child or young person who does not have parental responsibility for the child or young person.

Schedule 4.3 [1] amends a cross-reference in an uncommenced provision in consequence of the repeal and re-enactment (as sections 99–99D) of section 99 of the principal Act proposed to be made by Schedule 3 [7].

Schedule 4.3 [2] omits amendments made by the Children and Young Persons (Care and Protection) Amendment Act 2006 that are made redundant by the amendment made by Schedule 3 [7] (which repeals and re-enacts section 99 of the Children and Young Persons (Care and Protection) Act 1998).