



Tabled, by leave,

*M D'Adan*

*[Signature]*  
Clerk of the Parliaments

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**CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT BILL  
2024**

**STATEMENT OF PUBLIC INTEREST**

**Need: Why is the policy needed based on factual evidence and stakeholder input?**

The Children and Young Persons (Care and Protection) Amendment Bill 2024 (the **Bill**) makes it clear that the *Children and Young Persons (Care and Protection) Act 1998* (**Care Act**) is intended to apply to children who are no longer present or ordinarily living in NSW, in so far as the law-making power of the State allows, provided they have a sufficient connection to NSW.

The Bill seeks to address the system-wide impacts on child protection policy and operations caused by the recent NSW Court of Appeal decision in *DN v Secretary, Department of Communities and Justice* [2023] NSWCA 321 (**DN**). The decision held that the NSW Children's Court has no jurisdiction to make or vary orders for children and young people who are not ordinarily living, or present, in NSW at the time orders are made.

Prior to this decision, the jurisdiction of the Care Act was interpreted broadly and beneficially in recognition of the fact that it is not uncommon for children and young people who enter out-of-home care to be placed in other Australian jurisdictions, especially when these placements are with family, kin, or community. Overseas placements are extremely rare. Of the small number of children in care currently who are overseas, the majority are in New Zealand in family placements.

Stakeholders have raised concerns that the DN decision has resulted in significant uncertainty in the jurisdiction resulting in delays in numerous proceedings currently before the Children's Court and risks that decisions will be made that are not in the best interests of children or young people.

There are also concerns about the enforceability of previous orders made by the Children's Court for the safety and protection of children and young people. This creates risks of disruptions to otherwise stable, secure, and permanent placements, which would be detrimental for the children and young people involved.

**Objectives: What is the policy's objective couched in terms of the public interest?**

It is in the public interest to ensure that the safety, welfare, and wellbeing of children, young people is protected and promoted. This paramount principle guides all child protection actions and decisions under the Care Act and prevails over all other considerations. A key object of the Care Act is to ensure that children grow up in stable, secure, and safe homes and adverse impacts for children and young people who cannot be adequately cared for by their parents are minimised.

As a result of DN, there is a significant risk that the policy objectives of the Care Act cannot be achieved and that the provisions of the Care Act cannot be complied with or given effect.

For example, when children and young people cannot live safely at home with their parents, the Care Act requires that active efforts be taken to find the child's family, kin, and community and wherever practicable, place children in suitable family and kinship placements because this is the next best permanent placement for them. The DN

decision creates risks that family placements may not be fully considered if these are outside of NSW, even if those placements would be in the child or young person's best interests. The decision also risks disruptions to existing long-term interstate placements, with potentially detrimental impacts to the children or young people involved.

These implications are particularly significant for children and families living in NSW border towns and for Aboriginal and Torres Strait Islander children and young people, families, and communities where traditional lands, kin and community do not stop at the NSW border.

The Bill is child-focused. It enables functions under the Care Act to be exercised in the best interests of children and young people and in compliance with the objects and principles of the Care Act, including the Aboriginal and Torres Strait Islander Children and Young Person Placement Principles. It enables decisions to be made to facilitate the placement of children and young people with their family, kin, or community, wherever possible, and provide permanent and secure homes for children to grow up in.

The Bill will address the uncertainty that has resulted from the Court of Appeal decision and allow current child protection matters to be finalised.

**Options: What alternative policies and mechanisms were considered in advance of the Bill?**

The Department of Communities and Justice has considered alternative legal avenues and existing mechanisms and operational arrangements to address the issues that have arisen from the DN decision.

The NSW Government considered whether to appeal the decision in DN, however this avenue was not pursued.

The Department is collaborating with its counterparts in other Australian jurisdictions and New Zealand who are signatories to the Interstate Child Protection Protocol to seek to transfer orders for children and young people in care living in those jurisdictions. Chapter 14A of the Care Act enables transfers of child protection proceedings or orders between NSW and other states and territories, and New Zealand.

However, due to the decision in DN, there is uncertainty about whether the Children's Court can hear applications to transfer proceedings or orders under Chapter 14A which are generally made when the child or young person is already interstate. It is also noted that the transfer of proceedings or orders relies on the consent of the receiving jurisdiction, and the NSW care order must be compatible with the law of the receiving jurisdiction. This will often require the Children's Court to vary the order. However, the DN decision prevents this as the child or young person is interstate. Even if a transfer is feasible, transfers can be time-consuming, resource intensive, require the other jurisdiction's consent, and may not be in the best interests of the child or young person.

Another potential legal avenue which may be available for some children and young people affected by the DN decision is to register NSW Children's Court orders in the Federal Circuit and Family Court of Australia or seek parenting orders in that forum. However, this avenue is not open to all children, young people and their families as only specific types of orders can be registered or applied for in the Family Court and, further, proceedings in this Court are often more lengthy and costly than those in the Children's Court.

**Analysis: What were the pros/cons and benefits/costs of each option considered?**

The pros and cons of alternative options are outlined above.

While other alternative avenues and mechanisms have been explored and may provide a suitable alternative in particular cases, they are not a solution for the uncertainty in the jurisdiction that has arisen since the decision in DN. Legislative reform is necessary to enable decisions to be made, and functions to be exercised, under the Care Act consistent with the purpose and intent of the Care Act.

The Bill will avoid further delays in current proceedings which are detrimental to the best interests of the children and young people involved and ensure the enforceability of orders made by the Children's Court previously for the care and protection of children and young people.

**Pathway: What are the timetable and steps for the policy's rollout and who will administer it?**

The Department of Communities and Justice will be responsible for the implementation of the amendments and monitoring the impacts of the reforms. There are not expected to be significant implementation issues, as the reforms effectively restore the jurisdiction of the Care Act to how it was interpreted prior to the decision in DN.

All the provisions will commence immediately on assent.

**Consultation: Were the views of affected stakeholders sought and considered in making the policy?**

The Department of Communities and Justice conducted urgent targeted consultations with key stakeholders in the development of the legislative reform policy and in the drafting stage. The Department consulted closely with the Children's Court and with other legal stakeholders, including Legal Aid NSW, the NSW Law Society, the NSW Bar Association, and the Aboriginal Legal Service. The Department also sought and has acted on the expert advice of the Parliamentary Counsel's Office in terms of drafting legislation that has extraterritorial application.

Stakeholders' views were carefully considered in the development of the legislative reform proposal, and in the drafting of the Bill. There was wide support from stakeholders about the need for urgent legislative reform.