

Child Protection (International Measures) Bill 2006

Explanatory note

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

Overview of Bill

The object of this Bill is to implement in New South Wales the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the Child Protection Convention)*. The objects of the Child Protection Convention are:

- (a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child (which is dealt with in Parts 2 (Jurisdiction for the person of a child) and 3 (Jurisdiction for decisions about a guardian of a child's property) of the proposed Act), and
- (b) to determine which law is to be applied by such authorities in exercising their jurisdiction (which is dealt with in Part 4 of the proposed Act), and
- (c) to determine the law applicable to parental responsibilities (which is not dealt with in the proposed Act because it is dealt with by section 111CS of the *Family Law Act 1975* of the Commonwealth), and
- (d) to provide for the recognition and enforcement of such measures of protection in all Contracting States (which is dealt with in Part 5 of the proposed Act), and
- (e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of the Child Protection Convention (which is dealt with in Part 6 of the proposed Act).

Outline of provisions

Part 1 Preliminary

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.

Clause 3 specifies the objects of the proposed Act, which reflect the Preamble to the Child Protection Convention.

Clause 4 provides that the proposed Act does not apply to those matters to which the Child Protection Convention does not apply under Article 4 of the Convention.

Those matters are the establishment or contesting of a parent-child relationship, adoption, the name of a child, emancipation, maintenance obligations, trusts or succession, social security, public measures of a general nature in matters of education or health, measures taken as a result of criminal offences committed by children and decisions on asylum or immigration.

Clause 5 defines certain words and expressions used in the proposed Act.

Child is defined as a person who is under the age of 18 years. This definition is consistent with the Child Protection Convention and generally consistent with New South Wales law.

New South Wales personal protection measure relating to a child is defined as a measure under New South Wales law that is directed to the protection of the person of a child. Examples of New South Wales personal protection measures are provided.

New South Wales property protection measure relating to a child is defined as a measure under New South Wales law for appointing, or deciding the powers of, a guardian of a child's property.

Clause 6 provides that the proposed Act binds the Crown.

Clause 7 provides that when a New South Wales court exercises jurisdiction under the proposed Act it may exercise the jurisdiction for the matter on the application by the Director-General of the Department of Community Services (**the Director-General**) or the Public Trustee or on its own initiative.

Part 2 Jurisdiction for the person of a child

This proposed Part relates to Articles 5–14 of the Child Protection Convention in relation to the jurisdiction of New South Wales authorities (New South Wales courts and the Director-General) to take measures directed to the protection of the person of a child.

Clause 8 provides in effect that the rules of jurisdiction in proposed Part 2 in relation to personal protection measures apply only in the event of a conflict in jurisdiction between a New South Wales court or the Director-General and a competent authority in another country and not where the conflict in jurisdiction is between New South Wales and another Australian competent authority.

Clause 9 is a comprehensive statement of the grounds of jurisdiction of New South Wales authorities to take measures of protection for the person of a child.

Clause 10 relates to Article 7 of the Child Protection Convention, which provides that the authorities of the country of the child's habitual residence retain their jurisdiction to take personal protection measures for a child who has been wrongfully removed from or retained outside the country unless and until certain conditions are met.

Clause 11 relates to Article 13 of the Child Protection Convention, which in effect prohibits an authority in a Convention country that has jurisdiction under Articles 5–10 in relation to personal protection measures from exercising that jurisdiction if an authority in another Convention country is exercising jurisdiction in accordance with the Convention, that is, it deals with conflicts that may arise where concurrent jurisdictions exist under Articles 5–10 of the Convention.

Clause 12 relates to Articles 8 and 9 of the Child Protection Convention and sets out the process for a New South Wales authority to assume jurisdiction in relation to personal protection measures where another Convention country has jurisdiction under Article 5 or 6 of the Child Protection Convention.

Clause 13 relates to Articles 8, 9 and 13 of the Child Protection Convention and sets out the process for a competent authority in another Convention country to assume jurisdiction in relation to personal protection measures where New South Wales has jurisdiction under Article 5 or 6 of the Child Protection Convention.

Clause 14 relates to Articles 11 and 12 of the Child Protection Convention in relation to Convention countries and provides that an urgent personal protection measure for a child in accordance with proposed section 9 (2) (b) (i) (Article 11.1) or a provisional measure for a child in accordance with proposed section 9 (2) (b) (ii) (Article 12.1) ceases to operate if a measure directed to the protection of the person of the child taken by a competent authority in another Convention country is recognised by registration under proposed section 25, and, in relation to non-Convention countries, provides that an urgent personal protection measure for a child in accordance with proposed section 9 (2) (b) (i) (Article 11.1) or a provisional personal protection measure for a child in accordance with proposed section 9 (2) (b) (ii) (Article 12.1) ceases to operate if a measure directed to the protection of the person of the child taken by a competent authority in a non-Convention country is recognised under New South Wales law or the law of another State.

Part 3 Jurisdiction for decisions about a guardian of a child's property

This Part contains similar provisions to those in Part 2 to deal with the protection of a child's property.

This proposed Part relates to Articles 5–14 of the Child Protection Convention.

Clause 15 provides in effect that the rules of jurisdiction in proposed Part 3 in relation to property protection measures apply only in the event of a conflict in jurisdiction between a New South Wales court or the Public Trustee and a competent authority in another country and not where the conflict in jurisdiction is between New South Wales and another competent authority of Australia.

Clause 16 sets out the jurisdiction of New South Wales authorities to take property protection measures for children.

Clause 17 relates to Article 7 of the Child Protection Convention, which provides that the authorities of the country of the child's habitual residence retain their jurisdiction to take property protection measures for a child who has been wrongfully removed from or retained outside the country unless and until certain conditions are met.

Clause 18 relates to Article 13 of the Child Protection Convention, which deals with conflicts that may arise when concurrent jurisdictions exist under Articles 5–10 of the Convention in relation to property protection measures, and provides that a New South Wales authority must not exercise jurisdiction to take a New South Wales property protection measure if, before the authority exercised its jurisdiction, a corresponding measure had been sought from a competent authority in a Convention country.

Clause 19 relates to Articles 8 and 9 of the Child Protection Convention and provides the process for a New South Wales authority to assume jurisdiction in relation to property protection measures where another Convention country has jurisdiction under Article 5 or 6 of the Child Protection Convention.

Clause 20 relates to Articles 8, 9 and 13 of the Child Protection Convention and provides the process for a competent authority in another Convention country to assume jurisdiction in relation to property protection measures where New South Wales has jurisdiction under Article 5 or 6 of the Child Protection Convention.

Clause 21 relates to Articles 10, 11 and 12 of the Child Protection Convention and provides that an urgent property protection measure for a child in accordance with proposed section 16 (2) (b) (i) (Article 11.1) or a provisional property protection measure for a child in accordance with proposed section 16 (2) (b) (ii) (Article 12.1) ceases to operate if a foreign property protection measure is taken by a competent authority in another Convention country.

Part 4 Applicable law

Clause 22 relates to Articles in Chapter III of the Child Protection Convention and determines the law a Convention country must apply when exercising jurisdiction. The clause provides that a New South Wales authority exercising jurisdiction under Parts 2 and 3 of the proposed Act must apply New South Wales law, other than choice of law rules, except in exceptional circumstances.

Part 5 Recognition of foreign measures and their enforcement in New South Wales

Proposed Part 5 relates to Articles in Chapter IV of the Child Protection Convention relating to recognition and enforcement of measures. As required by the Convention, it establishes a scheme for recognition, by registration, of foreign protection measures. The proposed Act places an obligation on the Director-General, as the State central authority, to take certain action in relation to a foreign protection measure, if requested to do so under the Convention. A foreign protection measure includes a child protection order made in another Convention country. One of the options for action is recognition of the measure through its registration in a New South Wales court.

Recognition of a foreign measure is subject to exceptions such as where the measure is manifestly contrary to public policy or where the measure places a child in the care of an authorised carer or in the care of the principal officer of a designated agency as an authorised carer in New South Wales and the overseas authority did not obtain the prior consent of the Director-General for the measure. The proposed Act provides that a registered foreign measure has the same force and effect as a New South Wales measure.

The proposed Part also enables New South Wales protection measures to be recognised and enforced in another Convention country.

Clause 23 relates to Articles 15, 23, 24 and 26 of the Child Protection Convention in relation to foreign measures for the protection of the person of a child and provides that the clause applies when the Director-General is given a foreign personal protection measure and a request is made for the Director-General to take action under the Child Protection Convention. The clause requires the Director-General to consult with the competent authority in the other country and to take one of the listed actions in response.

Clause 24 relates to Article 26 of the Child Protection Convention in relation to foreign measures for the protection of the property of a child and provides that the clause applies when the Director-General or Public Trustee is given a foreign property protection measure and a request is made for the Director-General or Public Trustee to take action under the Child Protection Convention.

Clause 25 relates to Articles 14, 23.1, 26.1 and 28 of the Child Protection Convention and provides for recognition of foreign measures by registration in a New South Wales court and for the enforcement of those measures by means of legal proceedings in such a court.

Clause 26 provides for the cancellation of a registered foreign measure.

Clause 27 relates to Articles 25 and 27 of the Child Protection Convention by binding a New South Wales court in relation to the findings of fact on which the competent authority in the other Convention country based its jurisdiction and providing that the New South Wales court must not review the merits of the measure, except when determining a cancellation of registration application under proposed section 26.

Clause 28 relates to Articles 23, 26 and 28 of the Child Protection Convention by enabling the Director-General to give a New South Wales personal protection measure or property protection measure relating to a child, and the Public Trustee to give a property protection measure in relation to a child, to a central authority of another Convention country for recognition and enforcement of the New South Wales measure in that country. However, prior to giving a New South Wales personal protection measure to a central authority of another Convention country for recognition and enforcement, the Director-General must consult with the central authority or the competent authority for that country.

Part 6 Co-operation and other matters

Proposed Part 6 relates to Chapter V of the Child Protection Convention by setting out New South Wales's obligations to co-operate, and share information, with competent authorities in other Convention countries. The Convention likewise requires other Convention countries to co-operate with the Director-General by providing information about children and families upon request and to consult about taking measures for the protection of children.

Clause 29 relates to Article 29 of the Child Protection Convention by designating the Director-General as New South Wales's central authority for the Child Protection Convention.

Clause 30 relates to Article 33.2 of the Child Protection Convention by setting out the Director-General's functions in co-operating with central authorities of Convention countries.

Clause 31 provides that the Public Trustee's functions include co-operating with central authorities of Convention countries to apply to New South Wales courts for orders in response to requests from competent authorities in Convention countries to take measures directed to protecting the property of a child.

Clause 32 relates to Article 33 of the Child Protection Convention by requiring the New South Wales authority to obtain the consent of the competent authority in a Convention country before placing a child in the care of an authorised carer or of the principal officer of a designated agency as an authorised carer in the Convention country. The provision also requires the consent of the Director-General to such a

placement.

Clause 33 relates to Article 36 of the Child Protection Convention and provides for circumstances where authorities in one country take measures to protect a child and the child is moved to another country (for example, the child is moved by the child's parents). If the child is exposed to serious danger, the Convention obliges authorities in the first country to inform authorities in the second country about the danger. In practice, it would then be a matter for the authorities in the second country to consider taking measures of protection of the child in accordance with the jurisdiction provisions of the Convention.

Clause 34 relates to Article 35 of the Child Protection Convention and provides for New South Wales authorities to co-operate with authorities in other Convention countries to resolve disputes over contact by a parent with his or her child.

Clause 35 relates to certain Articles of the Child Protection Convention that deal with the disclosure of information. The Convention includes provisions that require the communication of information between authorities in Convention countries (Articles 8, 9, 30, 32, 33, 34, 35, 37, 41 and 42).

Part 7 Miscellaneous

Clause 36 relates to Article 40 of the Child Protection Convention and enables a New South Wales authority to provide, on request, a person exercising parental responsibility under a New South Wales measure with a written notice containing information about the powers conferred on the person by the measure.

Clause 37 relates to Articles 26 and 40 of the Child Protection Convention and provides for the Director-General and the Public Trustee to assist an interested person to request a competent authority in another country to vary or cancel a foreign measure.

Clause 38 enables the Director-General or the Public Trustee to delegate his or her powers under the proposed Act to any person.

Clause 39 provides that regulations may be made under the proposed Act. Clause 39 (2) provides that a regulation may prescribe that a particular measure or type of measure will have effect as a particular type of New South Wales measure and the way in which the type of measure has effect and can be varied.

Clause 40 provides for the review of the proposed Act.

Schedule 1 Child Protection Convention

Schedule 1 sets out the full text of the Child Protection Convention.