

Explanatory note

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

Overview of Bill

The object of this Bill is to amend various Acts and other legislation to give effect to certain recommendations in the Report of the Special Commission of Inquiry into Child Protection Services in NSW (the Wood Report). In particular, the Bill:

(a) amends the Children and Young Persons (Care and Protection) Act 1998 (the Care Act):

(i) to raise the “risk of harm” reporting threshold so that a child or young person will not be reported to the Director-General of the Department of Community Services (DoCS) unless the circumstances that are causing concern for the safety, welfare or well-being of the child or young person are present to a significant extent, and

(ii) to extend the circumstances when a child or young person is at risk of significant harm to include the situation when the child or young person is not receiving an education as required by the Education Act 1990, and

(iii) to provide for alternative mandatory reporting arrangements under which matters relating to children being at risk of significant harm may initially be assessed within the reporter’s agency instead of being reported directly to DoCS, and

Explanatory note page 2

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

(iv) to modify the legislative framework for the provision of out-of-home care, and

(v) to authorise certain agencies to exchange information concerning the safety, welfare and well-being of children and young persons and to co-ordinate the services those agencies provide, and

(vi) to make a number of changes in relation to care proceedings in or before the Children’s Court and the making of care orders by the Court, and

(b) amends the Children’s Court Act 1987 to provide for the appointment of a District Court Judge as the senior judicial officer of the Children’s Court (to be known as the President of the Children’s Court), and

(c) amends the Commission for Children and Young People Act 1998 to extend the child-related employment provisions under that Act (including the requirement for background checking) to a wider class of people, and

(d) makes a number of other amendments in response to the recommendations of the Wood Report.

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.

Clause 3 repeals the Children (Care and Protection) Act 1987.

Schedule 1 Amendment of Children and Young Persons (Care and Protection) Act 1998

No 157

Schedule 1.1 Amendments relating to recommendations 6.2 and 10.1

At present under section 23 of the Care Act, a child or young person is at risk of harm (which in turn leads to the making of a report to DoCS) if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence of any of the circumstances currently listed in that section (eg neglect or abuse).

Schedule 1.1 [2] amends the definition by requiring the circumstances concerned to be present to a significant extent. As a consequence, Schedule 1.1 [1] and [5] change references to the term “at risk of harm” (including the defined term itself) to “at risk

of significant harm”.

Schedule 1.1 [3] extends the circumstances in which a child or young person is at risk of significant harm to include, in the case of a child or young person who is subject to the compulsory education requirements under the Education Act 1990, the fact that the parents or caregivers have not arranged (or are unable or unwilling to arrange) for the child or young person to receive an education as required by that Act.

Explanatory note page 3

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

Schedule 1.1 [4] makes it clear that the circumstances that constitute a child or young person being at risk of significant harm may relate to a single act or omission or to a series of acts or omissions.

Section 27 of the Care Act currently makes it an offence for certain persons whose work involves (or relates to) the delivery of services to children (eg school teachers) not to make a report to DoCS if the person has grounds to suspect the child is at risk of harm. Schedule 1.1 [6] and [7] provide that it will no longer be an offence if the person does not report the matter to DoCS, but it will still be a duty to make the report.

Schedule 1.1 [8] provides for alternative reporting arrangements that will apply in relation to certain mandatory reporters who are required to report to DoCS their suspicion that a child is at risk of significant harm. Under such an arrangement, the mandatory reporter may, instead of reporting to DoCS, refer the matter to an assessment officer in the reporter’s agency. The assessment of the matter in accordance with the guidelines of DoCS may result in a report being made to DoCS or other appropriate action being taken in respect of the child. Making such a referral discharges the mandatory reporter’s obligation to report the matter to DoCS under section 27 and also attracts the same protections and safeguards as if the reporter had made a report to DoCS.

Schedule 1.2 Amendments relating to recommendations 11.1 and 11.3

Schedule 1.2 [2] and [3] modify the objects of the Care Act and the principles to be applied in the administration of the Act, in particular so as to separate the overriding principle of the Care Act (namely, that the safety, welfare and well-being of a child or young person is paramount in all decisions) from the other principles. Schedule 1.2 [16], [18] and [26] are consequential amendments and Schedule 1.2 [27] and [28] make amendments for the purposes of consistency in terminology.

Schedule 1.2 [4] and [5] clarify the extent of a non-government agency’s obligation to co-operate with requests from DoCS.

Schedule 1.2 [6] provides that a non-government agency in receipt of government funding may make a request for assistance from DoCS on behalf of the child or young person in respect of whom the agency is providing services.

Schedule 1.2 [7] makes it clear that the Director-General of DoCS must assess a request for assistance but is not required to take any further action in response to the request.

Schedule 1.2 [8] modifies the requirement for the Director-General to keep records in relation to reports made to DoCS and the action taken as a consequence of a report.

Schedule 1.2 [9] will permit the disclosure of the identity of a person who has made a report to DoCS if the disclosure is made for the purposes of the investigation of a serious offence against a child or young person and is necessary for the protection of a child or young person (whether or not the victim of the alleged offence). However, it will be necessary for a senior officer of a law enforcement agency, or for the person or body making the disclosure, to certify that it was not practical to obtain the consent of the reporter to having his or her identity disclosed or to certify that obtaining that

Explanatory note page 4

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

consent would prejudice the investigation of the offence. The person or body disclosing the identity of the reporter will also be required to notify the reporter about the disclosure. Schedule 1.2 [10] is a consequential amendment.

Schedule 1.2 [11] provides that the Children's Court Clinic will not have the option of informing the Children's Court that it is unwilling to prepare an assessment report for the Children's Court.

Schedule 1.2 [12] will enable the Children's Court to order the Children's Court Clinic or other person appointed to prepare an assessment report to provide to the Court such other information as may be within the expertise of the clinic or other person to provide.

Schedule 1.2 [13] and [14] make it clear that the reasons specified in section 71 of the Care Act for which the Children's Court may make a care order are not exhaustive.

Schedule 1.2 [15], [17] and [21] provide that permanency planning for children or young persons is not required to provide detail about the exact long-term placement of the child or young person concerned.

Schedule 1.2 [19] restricts the Children's Court's capacity to allocate parental responsibility for a child or young person to a designated agency.

Schedule 1.2 [20] provides that the Children's Court may order a party to proceedings in which it allocates parental responsibility of a child or young person to report to the Court at a later time on the suitability of the care and protection arrangements. The Court may invite the parties to apply to vary or rescind the arrangements, but it no longer has an on-going monitoring role in relation to orders allocating parental responsibility.

Schedule 1.2 [22] limits the circumstances in which the Children's Court may make a contact order in care proceedings.

Schedule 1.2 [23] enables regulations to be made in relation to the referral, to alternative dispute resolution services, of disputes involving contact between children and their parents or other family members, but only in relation to matters in respect of which the Children's Court does not have power to make a contact order.

Schedule 1.2 [24] provides that an application to the Children's Court for the rescission or variation of a care order may be made by the child or young person concerned.

Schedule 1.2 [25] repeals provisions relating to the making of compulsory assistance orders by the Children's Court. Schedule 1.2 [1] and [30] are consequential amendments.

Schedule 1.2 [29] enables the regulations to make provision with respect to the collection of information by the Director-General of DoCS and the Children's Court and requiring the Director-General and the Court to make certain information publicly available.

Explanatory note page 5

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

Schedule 1.3 Amendments relating to recommendations 11.1 (xvii) and 16.16 (i) and (viii)

Schedule 1.3 [4] modifies the definition of out-of-home care by providing for 3 types of out-of-home care under the Care Act. Statutory out-of-home care is essentially foster care provided pursuant to an order of the Children's Court.

Supported out-of-home care comprises temporary care arrangements made by the Director-General of DoCS and foster care that is supported by the Director-General. Voluntary out-of-home care comprises voluntary arrangements made by parents with organisations that provide out-of-home care. As a result of the reclassification of out-of-home care, various provisions of the Care Act are modified so that they

only apply to a particular type of out-of-home care (see Schedule 1.3 [1], [2], [7] and [9]–[14]). Schedule 1.3 [3] is also consequential on the modification of the scheme for the provision of out-of-home care.

Schedule 1.3 [5] provides that statutory out-of-home care may, as is the case at present, only be provided by a carer who is authorised by a designated agency that is accredited by the Children’s Guardian in accordance with the regulations. However, the prohibition on providing unauthorised statutory out-of-home care does not prevent the child or young person from returning to live with his or her parents during the last 6 months of the placement in out-of-home care if the arrangements concerned are in accordance with a care plan approved by the Children’s Court.

Schedule 1.3 [6] prevents the parents of a child or young person from being given care responsibility of, or being authorised by a designated agency as the authorised carer of, the child or young person if the Children’s Court has, in making a care order for the child or young person, accepted that there is no realistic possibility of the child or young person being restored to his or her parents.

Schedule 1.3 [8] inserts provisions relating to supported out-of-home care (which will always involve DoCS in some capacity) and voluntary out-of-home care which is arranged by the parents and does not necessarily involve DoCS. The provisions relating to temporary care arrangements made by the Director-General of DoCS are similar to the current provisions of the Care Act.

Schedule 1.3 [15] prohibits a parent from placing a child or young person in out-of-home care that is provided by an organisation unless the organisation is a designated agency or is registered by the Children’s Guardian.

Schedule 1.4 Amendments relating to recommendation 16.16 (ii)–(vii)

Schedule 1.4 [1] and [2] remove the Children’s Guardian from the list of persons who may make an application to the Children’s Court for the rescission or variation of a care order and provide that the Children’s Guardian is no longer required to be notified about such an application.

Schedule 1.4 [3] provides that the Director-General of DoCS, rather than the Children’s Guardian, will be able to consent to the publication of the name of a child or young person who is under the parental responsibility of the Minister if the publication is of benefit to the child or young person.

Explanatory note page 6

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

Schedule 1.4 [4] provides that the Children’s Guardian will no longer have the function of exercising the Minister’s parental responsibilities for a child or young person nor the function of examining care plans for children or young persons in out-of-home care.

Schedule 1.4 [5] removes the Children’s Guardian’s power to resolve disputes arising under the Care Act.

Schedule 1.4 [6] rationalises the delegation power of the Children’s Guardian.

Schedule 1.5 Amendment relating to recommendations 24.1 and 24.6

Schedule 1.5 establishes a scheme for the sharing of information between certain agencies (primarily human services and justice or law enforcement agencies) relating to the safety, welfare or well-being of children and young persons. The scheme also requires these agencies to take reasonable steps to co-ordinate decision-making and delivery of services regarding children and young persons. Under the proposed scheme, agencies will be authorised to provide and receive information that would assist decision-making in relation to children’s services or that would assist in the management of risks to children and young persons. The provision of information may also be requested by an agency and the agency that receives the request will be required to comply with it. Provision is made under the proposed scheme for the safeguarding of information that is shared and for the protection of persons from

liability for providing information under the scheme.

Schedule 1.6 Other miscellaneous or consequential amendments

Schedule 1.6 contains some minor or miscellaneous amendments to the Care Act, including several amendments that are consequential on other amendments made elsewhere by the proposed Act. In particular, Schedule 1.6 [6] will enable regulations of a savings or transitional nature to be made as a consequence of the amendments made by the proposed Act to the Care Act.

Schedule 2 Amendments relating to recommendations 11.2, 13.1, 13.3, 13.4, 13.9 and 13.12

Schedule 2.1 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Schedule 2.1 [1] provides that the Director-General of DoCS is required to apply to the Children's Court for a care order no later than 72 hours after the child or young person concerned is removed under the Care Act or after care responsibility for the child or young person is assumed. At present, such an application is required no later than the next sitting day of the Court.

Schedule 2.1 [2] requires care applications to the Children's Court to be accompanied by a written report in accordance with the rules under the Children's Court Act 1987.

Explanatory note page 7

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

Schedule 2.1 [3] and [4] are consequential on the amendments made by Schedule 2.2 to the Children's Court Act 1987.

Schedule 2.2 Amendment of Children's Court Act 1987 No 53

Schedule 2.2 [1] and [2] make provision for a new office of President of the Children's Court. The person appointed as the President must be a Judge of the District Court, and will remain a Judge for certain purposes, but will only perform duties as the President of the Children's Court while holding that office. Schedule 2.2 [2] also provides for the appointment of a Children's Magistrate to act as the President in certain circumstances.

Schedule 2.2 [6], [9] and [11] amend or repeal provisions relating to the appointment and functions of the Senior Children's Magistrate who will be replaced by the President as the senior judicial officer of the Children's Court. The functions of the President include exercising the functions of a Children's Magistrate under the Children's Court Act 1987 or any other Act.

Schedule 2.2 [3]–[5] and [14] confer on the President a role in relation to the appointment of Children's Magistrates, the courses of training required to be undertaken by Children's Magistrates and the manner in which a Children's Magistrate resigns office.

Schedule 2.2 [7] provides that persons employed as Children's Registrars must be qualified lawyers.

Schedule 2.2 [8] makes it clear that the jurisdiction of the Children's Court may be exercised by the President.

Schedule 2.2 [10] provides for the Children's Court Clinic (which primarily has functions under the Care Act in relation to the preparation of assessment reports) to be established and maintained by the Minister for Health rather than the Attorney General.

Schedule 2.2 [12] enables the regulations to provide that an appeal under any Act or law in relation to a decision of the Children's Court when constituted by the President is taken to be an appeal to the Supreme Court instead of the District Court.

Schedule 2.2 [13] enables the President to issue practice notes in relation to the practice and procedure of the Children's Court. Schedule 2.2 [13] also enables the

Court, when it is sitting, to give directions in relation to a particular matter for which the rules or practice notes do not make provision.

Schedule 2.2 [15] will enable regulations of a savings or transitional nature to be made as a consequence of the amendments made by the proposed Act to the Children's Court Act 1987.

Schedule 2.2 [16] confirms that the person holding office as the Senior Children's Magistrate immediately before the abolition of that office by the proposed Act is entitled to hold office, without any loss of remuneration, as a Magistrate or Children's Magistrate for the remainder of his or her term of appointment as Senior Children's Magistrate. Schedule 2.2 [16] also enables the regulations to make

Explanatory note page 8
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009
Explanatory note

provision for the transfer of staff from the Children's Court Clinic and to make other changes in relation to the Clinic.

Schedule 2.3 Amendment of Constitution Act 1902 No 32

Schedule 2.3 provides that the office of President of the Children's Court, which has the same status as that of Judge of the District Court, is recognised as a judicial office for the purposes of Part 9 of the Constitution Act 1902.

Schedule 2.4 Amendment of Judicial Officers Act 1986 No 100

Schedule 2.4 [1] also recognises the office of President of the Children's Court as a judicial officer for the purposes of the Judicial Officers Act 1986.

Schedule 2.4 [2] provides that the Governor is the appropriate authority in relation to the suspension or removal under Part 7 of the Judicial Officers Act 1986 of a person from the office as President of the Children's Court.

Schedule 2.5 Amendment of Statutory and Other Offices Remuneration Act 1975 (1976 No 4)

Schedule 2.5 lists the President of the Children's Court as a public office for the purposes of the Statutory and Other Offices Remuneration Act 1975 and makes amendments that are consequential on the abolition of the office of Senior Children's Magistrate.

Schedule 2.6 Amendment of Children's Court Rule 2000

Schedule 2.6 [1], [2], [4] and [5] are consequential on the amendments made to the Children's Court Act 1987 by Schedule 2.2.

Schedule 2.6 [3] prescribes the information to be included in the report that is required to accompany a care application under section 61 of the Care Act.

Schedule 3 Amendments relating to recommendations 23.3, 23.4 and 23.8

Schedule 3.1 Amendment of Commission for Children and Young People Act 1998 No 146

Schedule 3.1 [3] and [5] extend the definition of child-related employment in Part 7 of the Commission for Children and Young People Act 1998 (that Part prohibits certain persons from being employed in child-related employment and requires background checking for certain kinds of child-related employment) to include employment of the following kind:

(a) employment comprising the provision of a children's service that is licensed under Chapter 12 of the Care Act,

(b) employment as a person involved in the control or management of a licensed children's service,

Explanatory note page 9

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009
Explanatory note

(c) employment as an authorised supervisor in relation to a licensed children's service,

(d) employment as an assessment officer (as referred to in proposed section 27A of the Care Act),

(e) employment as the principal officer of a designated agency under the Care Act,

(f) employment as the principal officer of an accredited adoption service provider under the Adoption Act 2000,

(g) employment as a self-employed person or as a subcontractor (by, in or on behalf of a relevant agency, which includes DoCS) if it involves direct unsupervised contact with children.

Schedule 3.1 [4] makes it clear that the Director-General of DoCS is the employer for the purposes of employment referred to in paragraphs (a) and (b) above and Schedule 3.1 [6] inserts a definition for the purposes of that kind of employment. Schedule 3.1 [6] also defines relevant agency for the purposes of employment referred to in paragraph (g) above.

At present under Division 3 of Part 7 of the Commission for Children and Young People Act 1998, it is the duty of an employer to carry out background checking of the preferred applicant before employing the person in primary child-related employment (which includes paid child-related employment and fostering of children). A background check may involve a check for any relevant criminal record of the person. Schedule 3.1 [7] extends the definition of primary child-related employment to include working as a student in DoCS and working as a volunteer in providing mentoring services to disadvantaged children or as a volunteer providing personal care services to children with disabilities.

Schedule 3.1 [8] extends the background checking provisions so that they will also apply in relation to an adult person who resides in the home of an authorised carer or children's service provider (ie the provider of a family day care or home based children's service under the Care Act). In the case of an adult person residing in the home of an authorised carer the "employer" will be the designated agency that authorises the carer. In the case of an adult person residing at the home of a children's service provider, the licensee of the service will be the "employer". It will be the duty of the employer to carry out background checking of the adult person to determine whether it is appropriate for that person to reside at the home of the authorised carer or children's service provider.

Schedule 3.1 [1] and [2] reflect the extension of the background checking provisions in accordance with the amendment made by Schedule 3.1 [8].

Schedule 3.1 [9] will enable regulations of a savings or transitional nature to be made as a consequence of the amendments made by the proposed Act to the Commission for Children and Young People Act 1998.

Explanatory note page 10

Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

Explanatory note

Schedule 3.2 Amendment of Community Services (Complaints, Reviews and Monitoring) Act 1993 No 2

Schedule 3.2 [1] requires Official Community Visitors to provide the Children's Guardian with information obtained by the Visitor that the Children's Guardian specifies as being relevant to the Children's Guardian's functions in accrediting organisations as designated agencies under the Care Act.

Schedule 3.2 [2] provides that the death of a child (or a child who is a sibling of a child) who was the subject of a risk of harm report under the Care Act within the period of 3 years before the child's death will not be a death that is subject to review by the Ombudsman under Part 6 of the Community Services (Complaints, Reviews and Monitoring) Act 1993.

Schedule 3.2 [3]–[5] provide that the Ombudsman is to report to Parliament every 2 years, instead of annually, on the Ombudsman's work and activities in relation to

reviewable deaths of children and other persons in care.

Schedule 3.3 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Schedule 3.3 provides that, in order to facilitate the background checking under the Commission for Children and Young People Act 1998 of adult persons residing in the home of an authorised carer or licensed provider of a family day care or home based children's service, it will be a condition of the carer's authorisation or the service provider's licence under the Care Act to notify the Director-General of DoCS if an adult person has been residing in the carer's or licensee's home on a regular basis for a period of at least 3 months.

Schedule 3.4 Amendment of Children's Services Regulation 2004

The amendments contained in Schedule 3.4 are consequential on the amendments made to the Commission for Children and Young People Act 1998 by Schedule 3.1 [3].