



New South Wales

Children and Young Persons (Care and Protection) Amendment Bill 2018

Explanatory note

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

The *National Disability Insurance Scheme (Worker Checks) Bill 2018* is cognate with this Bill.

Overview of Bill

The object of this Bill is to implement improvements in the NSW child protection system resulting from certain proposals contained in the discussion paper entitled *Shaping a Better Child Protection System* released by the Department of Family and Community Services in October 2017 and to make provision for other matters:

- (a) by amending the *Children and Young Persons (Care and Protection) Act 1998* (the **principal Act**), as follows:
 - (i) to require the Secretary to offer alternative dispute resolution processes to the families of children and young persons at risk of significant harm, before seeking care orders from the Children's Court, subject to certain exceptions,
 - (ii) to extend the obligation of government agencies and government funded non-government agencies to co-operate in the delivery of services to children and young persons (where applicable), to the provision of prioritised access to services to children and young persons at risk of significant harm and their families,
 - (iii) to define **children's services** in relation to mandatory reporting by reference to relevant concepts in legislation governing children's education and care services,
 - (iv) to clarify that the Children's Court may make a guardianship order by consent to give effect to a care plan allocating parental responsibility, and the circumstances in which the order may be made,
 - (v) to enable the Children's Court to vary an interim order on an application by a party to proceedings before the Court if satisfied it is appropriate to do so,

- (vi) to limit the period for which an order of the Children's Court may allocate all aspects of parental responsibility for a child or young person solely to the Minister following its approval of a permanency plan involving restoration, guardianship or adoption,
 - (vii) to clarify the period within which the feasibility of restoration of a child or young person to his or her parents is to be considered, in connection with the preparation and approval of permanency plans,
 - (viii) to enable the Children's Court to conduct a review of progress in implementing the care plan for a child or young person if not satisfied, after considering a report under section 82 of the principal Act, that proper arrangements have been made for his or her care and protection,
 - (ix) to enable the Children's Court to make a contact order for the duration of a guardianship order if satisfied that it is in the best interests of the child or young person the subject of the guardianship order,
 - (x) to restate, as primary considerations and additional considerations, certain matters that the Children's Court must consider before granting leave to make an application to vary or rescind a care order,
 - (xi) to add to those primary considerations, matters concerning the views of the child or young person, the stability of present care arrangements and the least intrusive intervention into the life of the child or young person if those arrangements are stable and secure,
 - (xii) to enable the Children's Court to dismiss an application for leave to apply to vary or rescind a care order if satisfied that it is frivolous, vexatious, an abuse of process or one of a series made by the applicant with no reasonable prospect of success,
 - (xiii) to extend the period for which a child or young person who has been placed in statutory out-of-home care and is subject to a permanency plan involving restoration may live with his or her parents before the date of restoration,
 - (xiv) to allow supported out-of-home care (other than temporary care arrangements) only in respect of court ordered placements of children or young persons in out-of-home care with relatives or kin,
 - (xv) to prohibit the publishing or broadcasting of the names of children or young persons in any way that identifies them as being in out-of-home care or under the parental responsibility of the Minister,
 - (xvi) to create certain exceptions to the prohibition under the principal Act on publishing or broadcasting the name of a child or young person, in relation to the Coroner's Court,
 - (xvii) to vest the care responsibility for a child in the Secretary on the death of the child's sole or surviving guardian (or other person with full parental responsibility for the child) for up to 21 days,
 - (xviii) to provide for a penalty of up to 2 years imprisonment for offences relating to the abuse or neglect of children or young persons,
 - (xix) to make various other minor, ancillary or consequential amendments, and
- (b) by amending the *Adoption Act 2000* to enable the Supreme Court to make an order dispensing with a requirement for the consent of a person to a child's adoption if the application for adoption is made by the child's guardian.

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.

Schedule 1 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Prioritised access to services for children and young persons at risk of significant harm and their families

Schedule 1 [4] provides that the Secretary, in deciding what action should be taken to promote and safeguard the safety, welfare and well-being of a child or young person at risk of significant harm, may request government agencies and government funded non-government agencies (*relevant agencies*) to provide prioritised access to services to the child or young person and his or her family.

Schedule 1 [2] makes a consequential amendment to clarify that the role of the Secretary in promoting the development of interagency procedures and protocols includes procedures and protocols for the provision of prioritised access to services as referred to above.

Section 18 of the principal Act requires relevant agencies to use their best endeavours to comply with the Secretary's request if it is consistent with their own responsibilities and does not unduly prejudice the discharge of their functions. **Schedule 1 [5]** makes it clear that these responsibilities and functions include, in the case of provision of health services, the relevant agency's responsibilities under the Medicare Principles and Commitments and its functions in clinical decision-making.

Schedule 1 [7] and [9] make consequential amendments to insert notes referring to the power of the Secretary the subject of **Schedule 1 [4]**.

Schedule 1 [49]–[51] make ancillary amendments to clarify that provisions authorising certain agencies to exchange information to facilitate the provision of services to children and young persons and require them to take reasonable steps to co-ordinate decision-making and service delivery, apply to their provision of prioritised access to services the subject of **Schedule 1 [4]** (should they be obliged under section 18 to use their best endeavours to provide that access).

Defining “children’s services” in relation to mandatory reporting

Schedule 1 [8] defines *children’s services* for the purposes of the mandatory reporting provisions in the principal Act that require persons involved in the delivery of children’s services in their paid employment or who hold a management position in an organisation that involves the direct supervision of, or responsibility for, the provision of children’s services, to report children at risk of significant harm to the Secretary.

The term is defined by reference to relevant concepts in the *Children (Education and Care Services) National Law (NSW)* and the *Children (Education and Care Services) Supplementary Provisions Act 2011*.

Alternative dispute resolution

Schedule 1 [12] requires the Secretary to offer the family of a child or young person alternative dispute resolution processes before seeking care orders from the Children’s Court if the Secretary determines the child or young person is at risk of significant harm.

However, the Secretary is not required to offer alternative dispute resolution processes to a family if of the opinion that their participation in those processes would not be appropriate due to exceptional circumstances. The Secretary is also not required to do so if there are criminal proceedings or a police investigation and if of the opinion that it is not appropriate to do so after considering advice by the Commissioner of Police.

The requirement does not affect the Secretary’s overarching obligation under the principal Act to take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person in need of care and protection, and is subject to the principles of intervention applying to the Secretary in deciding the appropriate response to a report that a child or young person is suspected of being at risk of significant harm.

Schedule 1 [3] makes a consequential amendment to include the co-ordination of the early provision of alternative dispute resolution processes in the circumstances described above as an object of interagency procedures and protocols (the development of which is to be promoted by the Secretary under the principal Act).

Schedule 1 [10] makes a consequential amendment to include offering alternative dispute resolution processes in the circumstances described above in a list of actions that the Secretary might take in response to a report that a child or young person is at risk of significant harm.

Schedule 1 [3], [6], [10] and [17] make consequential amendments to insert notes referring to the proposed requirement into relevant provisions.

Schedule 1 [11] makes a minor amendment for plainer expression.

Guardianship orders by consent

Schedule 1 [13] restates the circumstances in which the Children's Court may make an order by consent to give effect to a care plan that allocates parental responsibility (other than to the parents), without the necessity of a care application or a finding that the child or young person is in need of care and protection. The proposed provisions clarify that the Court may make a guardianship order by consent for this purpose, and (additionally) without the necessity for a finding that there is no realistic possibility of restoration of the child or young person to his or her parents.

The matters of which the Children's Court must be satisfied before making the order by consent are that the proposed order will not contravene the principles of the principal Act and that the parties to the care plan understand its provisions and have freely entered into it (as currently), and that the parties have received independent legal advice about the nature and effect of the proposed order and the provisions of the care plan to which the proposed order will give effect (rather than independent advice about the latter, as currently).

Schedule 1 [14] applies certain requirements that apply to applications for guardianship orders to guardianship orders by consent, namely, that the Secretary must not seek a guardianship order to give effect to a care plan unless satisfied that the proposed guardian has satisfied the prescribed suitability assessments, that the Secretary must present to the Court a care plan prepared by the Secretary and a copy of any report on the well-being of the child or young person that is relevant to the care plan, and that the care plan must contain certain specified information, be in the prescribed form and meet any other requirements the regulations may prescribe.

Schedule 1 [1] and [19] make consequential amendments to clarify that certain references to or in relation to guardianship orders include a reference to or in relation to guardianship orders by consent.

Care responsibility on death of guardian or carer with full parental responsibility

Schedule 1 [15] vests the care responsibility for a child or young person in the Secretary on the Secretary becoming aware of the death of the sole or surviving guardian of, or other person who held full parental responsibility for, the child or young person. The vesting expires after 21 days or on the making of a court order that allocates parental responsibility for the child or young person, whichever occurs first. During the period of vesting, the Secretary is to make any investigations and assessments the Secretary considers necessary to determine the most appropriate care arrangements for the child or young person.

Schedule 1 [18] makes a consequential amendment to account for the proposed vesting in relation to a finding that the Children's Court must make (that the child or young person is in need of care and protection) before it may make a care order in relation to the child or young person.

Schedule 1 [46] makes a consequential amendment to include the death of a child or young person during the period of vesting as a reportable death for the purposes of the principal Act.

Shorter term Court orders allocating full parental responsibility to Minister

Schedule 1 [20] limits (to 24 months) the period for which an order of the Children's Court that follows its approval of a permanency plan involving restoration, guardianship or adoption, may allocate all aspects of parental responsibility for a child or young person solely to the Minister

(long-term placement with the Minister being the last preference under the permanent placement principles in section 10A of the principal Act).

The maximum periods do not apply if the Court is satisfied that special circumstances warrant the allocation being for a longer period.

Progress reviews of suitability of care arrangements

Schedule 1 [21] enables the Children's Court, on its own motion, to conduct a review of progress in implementing the care plan for a child or young person in respect of whom the Court has made an order (other than a guardianship order) allocating parental responsibility to a person other than to a parent. The Court may conduct the review (a *progress review*) if, after considering a report under section 82 of the principal Act as to the suitability of the care and protection arrangements for the child or young person, it is not satisfied that proper arrangements have been made. The Court may re-list the matter for the purpose of conducting the review.

The Court is to give notice of the progress review to the parties and may invite them to give evidence and make submissions at the review, in relation to the progress in implementing the care plan.

The proposed provision for a progress review replaces a provision requiring the Court (if not satisfied that proper arrangements have been made following consideration of a report under section 82) to invite the parties to make an application under section 90 of the principal Act to vary or rescind the order. **Schedule 1 [22]** makes a consequential amendment to omit a related provision.

Realistic possibility of restoration in relation to permanency plans

Schedule 1 [23], [24], [26] and [27] provide for the period (being a reasonable period, not exceeding 24 months) within which the feasibility of restoration of a child or young person to his or her parents is to be considered, in connection with the preparation and approval of permanency plans. The feasibility of restoration is required to be considered in that context:

- (a) by the Secretary, for the purposes of preparing an appropriate permanency plan for submission to the Children's Court, if the Secretary applies for a care order for removal of the child or young person, and
- (b) by the Court, before approving a permanency plan so submitted that involves restoration.

Schedule 1 [25] clarifies that a particular decision that the Court may defer in the best interests of the child or young person is as to whether to accept the Secretary's assessment of the feasibility of restoration.

Longer term contact orders if child or young person is the subject of a guardianship order

Schedule 1 [28] enables the Children's Court to make a contact order of more than 12 months duration (12 months being the maximum duration of contact orders, otherwise) if it concerns a child or young person the subject of a guardianship order and the Court is satisfied that a contact order of longer duration is in his or her best interests. Accordingly, the Court may make a contact order for the duration of a guardianship order if satisfied that it would be in the best interests of the child or young person the subject of the guardianship order.

Considerations in granting leave to apply to vary or rescind a care order

Schedule 1 [29] restates (as primary considerations and additional considerations) the existing matters that the Children's Court is required to consider before granting leave to make an application to vary or rescind a care order. The existing matter of 'plans for the child' is extended to plans also for young persons. New matters that the Court is to consider (as primary considerations) concern the views of the child or young person, the stability of present care arrangements and, if the Court considers that present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child or young person and whether that course would be in his or her best interests.

Schedule 1 [30] moves a provision that specifies who may make an application to vary or rescind a care order to a more appropriate location. **Schedule 1 [31]** amends a cross reference as a consequence.

Schedule 1 [32] makes amendments to ensure that certain matters that the Court is required to take into consideration before making an order to rescind or vary certain types of care order are expressed consistently with like matters the subject of **Schedule 1 [29]**.

Frivolous or vexatious applications for leave to apply to vary or rescind a care order

Schedule 1 [29] also enables the Children's Court to dismiss an application for leave to apply to vary or rescind a care order if satisfied it is frivolous, vexatious or an abuse of process. Without limiting those grounds, specific provision is also made to enable the Court to dismiss an application if satisfied it has no reasonable prospect of success and the applicant has previously made a series of applications that the Court has dismissed.

Variation of interim orders

Schedule 1 [34] enables a party to care proceedings before the Children's Court to make an application to vary an interim care order during the proceedings (instead of having to seek leave to make an application under section 90 of the principal Act). The Court may, by order, vary the interim order if satisfied on the application that it is appropriate to do so.

Schedule 1 [33] makes a consequential amendment to provide that section 90 does not apply to an application to vary an interim care order.

Schedule 1 [16] makes a consequential amendment to extend an exemption from the requirement for a written report to accompany a care application (that applies to applications to vary or rescind a care order under section 90 of the principal Act) to applications to vary an interim order under the proposed provision.

Prohibition on publishing names of children or young persons in a way that identifies them as being in care

Schedule 1 [35] prohibits the publishing or broadcasting of the name of a child or young person who is or has been under the parental responsibility of the Minister or in out-of-home care in any way that identifies the child or young person as being or having been under the parental responsibility of the Minister or in out-of-home care. A consequential amendment made by **Schedule 1 [36]** will result in the prohibition applying to the publication or broadcast of the name of the child or young person concerned until he or she turns 25 years of age or dies, whichever occurs first.

Schedule 1 [36] also makes consequential amendments that will result in maximum penalties for the offence of contravening the prohibition of 200 penalty units (\$22,000) or imprisonment for 2 years, or both, for an individual or 2,000 penalty units (\$220,000) in the case of a corporation. The offence will be a strict liability offence and, if committed by a corporation, will be an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation.

Schedule 1 [36] and [37] make consequential amendments to apply to the proposed prohibition the exceptions that apply to the existing prohibitions against publishing or broadcasting the name of a child or young person under the principal Act.

Exception from prohibition on publishing names of children or young persons for Coroner's Court

Schedule 1 [38] and [39] provide for 2 further exceptions to the prohibition against publishing or broadcasting the name of a child or young person under the principal Act (including as proposed to be extended by **Schedule 1 [35]**), as follows:

- (a) the publication by the Coroner's Court of the name of a child or young person the subject of an inquest concerning his or her suspected death in the Court's findings in the inquest

(the publication of the name of a child or young person who has died already being an exception),

- (b) the publication of the name of the child or young person the subject of such an inquest with the consent of the Coroner's Court if the Court considers the publication of the name would be in the public interest.

Flexibility in statutory out-of-home care to facilitate restoration

Schedule 1 [41] extends (from 6 months before the date for restoration to 12 months before that date) the period for which a child or young person who has been placed in statutory out-of-home care and is the subject of a permanency plan involving restoration may live with his or her parents in accordance with arrangements under an approved care plan without their contravening certain restrictions under the principal Act on who may provide statutory out-of-home care.

Supported out-of-home care only for court ordered placements

Schedule 1 [43] replaces current provisions that enable the Secretary to provide support in respect of the placement of a child or young person in out-of-home care regardless of whether the placement is court ordered, with a provision that enables the Secretary to provide support only in respect of the placement of a child or young person in out-of-home care with a relative or kin that is by virtue of an order of the Children's Court, or a parenting order in favour of the relative or kin under the *Family Law Act 1975* of the Commonwealth made in respect of proceedings to which the Secretary was a party. **Schedule 1 [40] and [42]** make consequential amendments to reflect the change in scope of the proposed provision.

Schedule 1 [44] revises the scope of provisions requiring reports and reviews of supported out-of-home care as a consequence of the amendment made by **Schedule 1 [43]**. The amendment also clarifies that the provisions do not apply to temporary care arrangements (being a type of supported out-of-home care).

Schedule 1 [45] inserts a reference to kin for consistency with other references to relatives and kin in similar contexts elsewhere in the principal Act.

Penalties for offences

Schedule 1 [47] inserts an additional penalty of up to 2 years imprisonment for abuse of a child or young person or causing damage to the development of a child or young person.

Schedule 1 [48] inserts an additional penalty of up to 2 years imprisonment for neglect of a child or young person.

Savings and transitional and other provisions

Schedule 1 [52] inserts a standard regulation-making power in relation to savings, transitional and other provisions in Schedule 3 to the principal Act.

Schedule 1 [53] inserts provisions of a savings or transitional nature as a consequence of the enactment of the proposed Act.

Schedule 2 Amendment of Adoption Act 2000 No 75

Dispensing with certain requirements for consent to adoption of child

Schedule 2 [1] and [2] enable the Supreme Court to make an order dispensing with a requirement under the *Adoption Act 2000* for the consent of parents or persons with parental responsibility for a child to the child's adoption. The Court may do so if the application for adoption is made by the child's guardians and the Court is satisfied that:

- (a) the child has established a stable relationship with his or her guardians, and
(b) the adoption of the child by his or her guardians will promote the child's welfare, and
(c) to do so is in the best interests of the child.

Schedule 2 [3] makes a consequential amendment to define *guardian* as it is defined in the principal Act.

Schedule 2 [4] inserts a savings and transitional provision as a consequence of the enactment of the proposed Act.