

Children and Young Persons (Care and Protection) Amendment 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 make a number of miscellaneous amendments to the *Children and Young Persons (Care and Protection) Act 1998 (the Act)* in relation to the care and protection of, and the provision of services to, children and young persons, including amendments relating to the following:

- (a) the confidentiality and other protection afforded to those concerned in the making of reports about children and young persons,
- (b) procedural matters concerning Children's Court proceedings,
- (c) the disclosure of information about children and young persons,
- (d) access by children to their personal information and documents,
- (e) the regulation of out of school hours care services,
- (f) penalties for offences under the 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.

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 Schedule 1.

Clause 4 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

Schedule 1 [1] inserts a definition of **high level identification information** in the Act. Provision is made by the Bill for limiting the disclosure of high level identification information by the Director-General (under section 51 or 154, as amended by Schedule 1 [13]–[15] and [51] and [52], respectively). A definition of **non-court proceedings**, a term used in the amendments proposed to be made by Schedule 1 [40]–[42], is also inserted.

Schedule 1 [2] amends section 29 (1) (f) so as to provide that a duty of confidentiality in relation to the identity of a person who makes a report about a child or young person in good faith to the Director-General (or to a person who has the power or responsibility to protect the child or young person) extends to all bodies that subsequently obtain the report.

Schedule 1 [3] extends the protections currently provided by section 29 for persons who make reports referred to above. Under the amendment, the protections extend to a person who does not directly report but who in good faith provides information to another person who makes a report, is concerned in the making of such a report or otherwise causes such a report to be made.

Schedule 1 [4] extends the protections given by section 29 to persons who make certain other reports in good faith. At present, those protections are limited to those who make reports under sections 24, 25, 27 and 122. The proposed amendment will extend the protections to those who make reports under sections 120 (Homelessness of children) and 121 (Homelessness of young persons).

Schedule 1 [5] amends a provision that refers to a child or young person removed from a place of risk or certain other places and who is placed in the "care and protection" of the Director-General (which is not defined) to refer instead to the child or young person being under the "care responsibility" of the Director-General, that

is, to the Director-General who will thereby have the authority to exercise the functions specified in section 157 of the Act in relation to the child or young person. This ensures consistency of language with other sections of the Act. **Schedule 1 [6], [8], [11], [12], [18], [48], [58] and [71]–[74]** make amendments for the purposes of consistency of language of the Act that are similar to the amendment made by Schedule 1 [5].

Schedule 1 [9] provides that if an application is made for an extension of an emergency care and protection order before the order expires, the order remains in force until the Children’s Court makes a final determination on the application, even if that determination is after the original expiry date.

Schedule 1 [10] omits a section that is proposed to be transferred by Schedule 1 [31] to Part 2 of Chapter 5 of the Act (as proposed section 90A). The effect of this (together with the amendment to section 45 (4) by Schedule 1 [7]) is that an order prohibiting any person, including the parent of a child or young person, from doing anything that could be done by the parent in carrying out his or her parental responsibilities can be made by the Children’s Court in any care proceedings, including any proceedings in relation to emergency care and protection orders. At present, section 47 is located in a Division that deals only with proceedings in relation to emergency care and protection orders.

Schedule 1 [13] amends section 51 of the Act to provide that the Director-General is not required to release high level identification information in disclosing a child’s whereabouts to his or her parents if that disclosure would be prejudicial to the safety, welfare, well-being or interests of the child. **Schedule 1 [51]** makes the same amendment to another provision of the same kind.

Schedule 1 [14] and [15] replace the term “whereabouts” with the term “high level identification information” in a provision that empowers the Children’s Court to disclose information about a child.

Schedule 1 [16] inserts a note about the operation of provisions dealing with the disclosure of high level identification information about children and young persons.

Schedule 1 [17] provides that the orders sought in a care application can be varied, without the leave of the Children’s Court, at any time before a determination is made under section 72 and, with the leave of the Children’s Court, at any time after that.

Schedule 1 [19] provides that, although the Director-General is required to notify a child or young person who is the subject of a care application of the making of the application, the Children’s Court may order the Director-General not to do so. The amendment also provides that the Children’s Court may order a parent not to show an application or any particular information in the application to the parent’s child or young person, and not to tell the child or young person about the application or any particular information in it.

However, the Children’s Court may make any such order only if, in the opinion of the Children’s Court, the psychological or other harm that is likely to be caused to the child or young person if the child or young person became aware of the application or information outweighs the prejudicial effect of the child’s or young person’s being unaware of the application or information or it would otherwise be detrimental to the safety, welfare or well-being of the child or young person to notify that child or young person of the application or information concerned.

Schedule 1 [20] permits a party to proceedings to file further documentary evidence in connection with a care application, but only with the leave of the Children’s Court. In particular, the proposed amendment provides that if documentary evidence has been filed in proceedings and the Children’s Court subsequently determines under section 93 (3) that the rules of evidence, or specified rules of evidence, are to apply to the proceedings, the party that filed the documentary evidence may file further evidence or withdraw all or part of the evidence filed and file alternative evidence, with the leave of the Children’s Court. In giving leave, the Court must be satisfied

the grant of leave will not result in undue delay in the matter being finalised.

Schedule 1 [21] amends the reasons for which the Children's Court may make a care order. At present, such an order may be made if the child or young person is in need of care and protection or if the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents. As a result of the amendment, a care order can be made if those needs are not being met by either the parents or the primary care-givers of the child or young person. **Schedule 1 [22]** makes a consequential amendment.

Schedule 1 [23] defines *primary care-giver*, in relation to a child or young person, to mean the person primarily responsible for the care and control, including day-to-day care and control, of the child or young person, who may or may not also be the person with parental or care responsibility for the child or young person.

Schedule 1 [25] provides that only those children who have exhibited sexually abusive behaviour may be the subject of an order to attend a therapeutic or treatment program for sexually abusive behaviours.

Schedule 1 [26] provides that only children convicted of an offence arising from sexually abusive behaviour are to be excluded from the possibility of the making of an order to attend a therapeutic or treatment program for sexually abusive behaviours. At present, any child the subject of criminal proceedings relating to that behaviour must be excluded.

Schedule 1 [27] ensures that orders can be made allocating parental responsibility to the Minister for Community Services and two or more other people (rather than just one other person) jointly. This would, for example, allow for parental responsibility to be allocated to the Minister and grandparents jointly. The amendment also ensures that orders can be made for allocating parental responsibility to more than one person.

Schedule 1 [28] provides that the Children's Court may order a person who makes an application for rescission or variation of a care order to notify those persons whom the Children's Court specifies of the making of the application.

Schedule 1 [29] and [30] provide that if an application for variation of a care order is opposed by the Director-General on a ground that has not been previously considered by the Children's Court, the ground must be proved as if it were a ground of opposition to a fresh application for a care order.

Schedule 1 [31] transfers section 47 of the Act to Part 2 of Chapter 5. The effect of the transfer is explained in the matter relating to Schedule 1 [10]. **Schedule 1 [7]** makes a consequential amendment.

Schedule 1 [32] provides that, in proceedings before the Children's Court under the Act, the standard of proof is proof on the balance of probabilities. **Schedule 1 [24]** makes a consequential amendment.

Schedule 1 [33] provides that despite the fact that a child or young person is presumed to have the capacity to instruct his or her legal representative, the child or young person is not required to attend the Children's Court to give those instructions, unless required to do so under section 96 of the Act.

Schedule 1 [34] provides that if the Children's Court is of the opinion that a party to the proceedings is incapable of giving proper instructions to a legal representative, the Children's Court is to appoint a guardian ad litem for the person under section 100 or 101.

Schedule 1 [35] raises the age at which a child is presumed capable of giving proper instructions to his or her legal representative from 10 to 12 years and makes consequential amendments to other provisions. The presumption is rebuttable.

Schedule 1 [36]–[39] make it clear that if a child or young person is not capable of giving instructions, a guardian ad litem may be appointed.

Schedule 1 [40] extends a provision excluding certain persons from proceedings to all aspects of proceedings not held before the Children's Court. The provision is

redrafted as the following proposed sections:

Proposed section 104 provides that while the Children's Court is hearing proceedings, or while any non-court proceedings are being held, with respect to a child or young person the Court may direct the child or young person to leave (or not to be present at) the place where the proceedings are being heard or held in certain circumstances and must, if such a direction is given in relation to court proceedings, also exclude the media.

Proposed section 104A provides for the exclusion of particular persons from proceedings (including non-court proceedings).

Proposed section 104B provides for the exclusion of the general public from proceedings.

Proposed section 104C confers an entitlement on the media to hear proceedings (other than non-court proceedings).

Schedule 1 [41] and [42] extend provisions prohibiting the publication of names and identifying information to all aspects of proceedings not held before the Children's Court.

Schedule 1 [43] extends a provision prohibiting the publication of names and identifying information to protect any child or young person who is the subject of a report under specified provisions of the Act from such publication.

Schedule 1 [45] provides that the prohibition on the publication of names and identifying information about a child or young person applies until the child or young person reaches 25 years of age or dies (whichever occurs first).

Schedule 1 [44] makes a consequential amendment to a prohibition on the publication of names and identifying information about children and young persons the subject of proceedings, so that it applies to protect a child or young person even after the proceedings have been disposed of.

Schedule 1 [46] provides that the prohibition on the publication of names and identifying information does not apply if the child or young person has died.

Schedule 1 [47] provides that the Children's Court may order a person who makes an application for an order for an alternative parenting plan to notify those persons whom the Children's Court may specify of the making of the application.

Schedule 1 [49] makes it clear that Part 2 of Chapter 8 of the Act (Out-of-home care by order of Children's Court) applies to young persons as well as children. The other provisions of the Part refer to both children and young persons.

Schedule 1 [50] provides that a person who makes an application for an order for sole parental responsibility must notify those persons whom the Children's Court may specify of the making of the application.

Schedule 1 [51] provides that a provision of the Act that requires disclosure of a child's whereabouts to the child's parents does not require the Director-General to release high level identification information if that disclosure would be prejudicial to the safety, welfare, well-being or interests of the child.

Schedule 1 [52] replaces the term "whereabouts" with the term "high level identification information" in a provision that empowers the Children's Court to disclose information about a child or young person.

Schedule 1 [53] inserts a note about the disclosure of high level identification information about a child or young person.

Schedule 1 [54]–[57] allow an authorised carer of a child or young person to consent to minor dental surgery or dental treatment involving major surgery that is urgent.

Schedule 1 [59] provides that the Minister is obliged to provide accommodation for a child or young person only if the Minister has sole parental responsibility or parental responsibility in relation to residence of the child or young person.

Schedule 1 [60] provides that the Minister may cause to be published guidelines specifying the circumstances in which assistance may be granted after leaving out-of-home care.

Schedule 1 [61] provides that a child or young person is entitled to have access to information about himself or herself held by the Director-General, when he or she was under the parental responsibility of the Minister, in addition to that held by the designated agency. At present, a child or young person is entitled to access only to personal information kept by the designated agency that supervised the placement or by his or her authorised carer.

Schedule 1 [62] provides that information requested by a child or young person leaving out-of-home care is to be provided orally or in writing, at the option of the child or young person.

Schedule 1 [63] provides that a child or young person is entitled to possession of personal documents about himself or herself held by the Director-General, when he or she was under the parental responsibility of the Minister, in addition to those held by the designated agency. At present, a child or young person is entitled to possession only of documents kept by the designated agency that supervised the placement or by his or her authorised carer.

Schedule 1 [64] makes it clear that a designated agency that was responsible for supervising a child or young person in out-of-home care, has (if it is still in existence) an ongoing obligation to provide access to the records of that child or young person even after the records have been deposited in a records repository. The amendment provides that the Director-General must provide the designated agency that was responsible for supervising the child or young person in out-of-home care with access to the records of that child or young person that have been delivered to the Director-General, or that have been authorised by the Director-General to be deposited in the records repository nominated by the Director-General, if the designated agency requests them in order to comply with a request for the documents from the child or young person concerned.

Schedule 1 [65] provides that Part 6 of Chapter 8 of the Act, which allows a designated agency to disclose certain original documents held in the agency's files to a child or young person, overrides any provisions contained in the *State Records Act 1998* that may prohibit the release of original records.

Schedule 1 [66] omits references to a "young person" from section 177 of the Act, which is about medical and dental treatment with the consent of a person who is not an authorised person under the Act. The section provides that persons authorised to give consent to medical treatment for persons in out-of-home care under the Act are taken to be parents or guardians under the *Minors (Property and Contracts) Act 1970*. The consent of an authorised person under the Act in relation to a young person (that is, a person aged 16 or 17) would not be taken to be an effective consent for the purposes of section 49 of the *Minors (Property and Contracts) Act 1970*. That section has no application in relation to parental consent for medical treatment for young persons.

Schedule 1 [67] and [68] allow a children's service licence to specify a maximum of two authorised supervisors, provided that, on any one day, only one authorised supervisor can have overall responsibility for the service. This will allow for job-share positions to be available to potential authorised supervisors.

Schedule 1 [69] empowers regulations to be made to enable probity checks to be carried out on all persons over 14 years residing at the home of a family day carer or a home based carer.

Schedule 1 [70] empowers regulations to be made for or with respect to the provision of out of school hours care services.

Schedule 1 [75] and [76] enable notices to be served on a person's legal representative where a notice of address for service has been filed in accordance with the rules of the Children's Court.

Schedule 1 [77] provides for the Children's Court to dispense with service of a notice having regard to the physical safety, welfare or well-being of a child or young person

or a party to the proceedings.

Schedule 1 [78] increases the maximum penalty that can be imposed by a Local Court from 100 penalty units (presently \$11,000) or the maximum monetary penalty provided by the Act for the offence, whichever is the smaller, to 200 penalty units (presently \$22,000) or the maximum monetary penalty provided by the Act for the offence, whichever is the smaller.

Schedule 1 [79] and [81] separate the provisions of Schedule 3 into Parts.

Schedule 1 [80] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [82] inserts savings and transitional provisions consequent on the enactment of the proposed Act.