

[Act 2002 No 42]



New South Wales

Community Services Legislation Amendment Bill 2002

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to extend the operation of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (the **Principal Act**) to the exercise of statutory functions,
- (b) to abolish the Community Services Commission and the office of Commissioner for Community Services and to confer their functions under the Principal Act on the Ombudsman and the Community Services Division of the Ombudsman's Office,
- (c) to provide for the appointment of a Deputy Ombudsman as the Community Services Commissioner for the purposes of performing functions under the Principal Act as directed by the Ombudsman and to provide for the

* Amended in committee—see table at end of volume.

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establishment of a Community Services Division of the Ombudsman's Office to perform the Ombudsman's functions under the Principal Act, subject to direction and delegation by the Ombudsman,

- (d) to provide for Community Visitors under the Principal Act to be appointed by the Minister for Community Services on the recommendation of the Ombudsman,
- (e) to expand the categories of children in care and persons in care whose situation may be reviewed under the Principal Act,
- (f) to confer on the Ombudsman the function of reviewing the systems of providers of community services (*service providers*) for handling complaints and making reports and recommendations in relation to them,
- (g) to confer on the Ombudsman powers that the Ombudsman has under the *Ombudsman Act 1974* (the *Ombudsman Act*) for the purpose of carrying out reviews under the Principal Act relating to children in care, persons in care, complaint handling systems and deaths and for the purpose of inquiries and investigations,
- (h) to apply to complaints under the Principal Act the powers of the Ombudsman under the Ombudsman Act and the procedures of the Ombudsman Act, with the effect that the grounds on which such a complaint may be made (currently limited to unreasonable actions) are the broader grounds under the Ombudsman Act,
- (i) to confer on the Ombudsman the power to review deaths of children in care, deaths of certain children at risk, deaths of children that may have been caused by abuse or neglect or that occur in suspicious circumstances, deaths of children in children's detention centres and similar places and deaths of persons in residential care who have a disability (*reviewable deaths*), and as part of that power, to confer power to maintain a register of such deaths, formulate recommendations to prevent or reduce such deaths, carry out research projects, give out information and report in relation to such deaths,
- (j) to require service providers, the State Coroner, the Commissioner of Police and other persons and bodies to notify the Ombudsman of reviewable deaths and to provide information and assistance to the Ombudsman in relation to such deaths,
- (k) to abolish the Community Services Review Council,
- (l) to enable the appointment of an additional Deputy State Coroner,
- (m) to require reviewable deaths to be reported to a police officer or a coroner,
- (n) to confer on the State Coroner or a Deputy State Coroner exclusive jurisdiction to hold an inquest into a reviewable death,

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- (o) to require the State Coroner to make a written report to the Ombudsman about a reviewable death after concluding or terminating an inquest into the death of the person concerned and to provide other information to the Ombudsman,
- (p) to enable the Ombudsman (with the approval of the Minister) or a Deputy Ombudsman or Assistant Ombudsman (with the approval of the Ombudsman) to engage in paid duties outside his or her office,
- (q) to enable the Ombudsman to appoint one or more Deputy Ombudsman and to enable the Ombudsman to appoint a deputy for a Deputy Ombudsman or an Assistant Ombudsman,
- (r) to exclude the Children's Guardian from investigating a reviewable death and from exercising functions relating to a dispute that is the subject of a community services complaint within the meaning of the Principal Act,
- (s) to exclude the Child Death Review Team from exercising review functions in relation to reviewable deaths,
- (t) to make consequential and other amendments,
- (u) to insert savings and transitional provisions consequential on the enactment of the proposed 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 giving effect to the amendments to the *Community Services (Complaints, Reviews and Monitoring) Act 1993* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Coroners Act 1980* set out in Schedule 2.

Clause 5 is a formal provision giving effect to the amendments to the *Ombudsman Act 1974* set out in Schedule 3.

Clause 6 is a formal provision giving effect to the amendments to the Acts set out in Schedule 4.

Schedule 1 Amendment of Community Services (Complaints, Reviews and Monitoring) Act 1993

Extension of operation of Act to exercise of statutory functions

Under the Principal Act, complaints and reviews may currently be made or carried out with respect to the provision of services by service providers. Service providers include bodies, and persons, who as service providers exercise statutory functions.

Schedule 1 [5] inserts a definition of *service* and *rendering* or *providing* a service to make it clear that the provisions of the Principal Act that extend to the provision of services extend to statutory or other functions and the exercise of such functions.

Children in care

Schedule 1 [5] extends the categories of children in care for the purposes of the Principal Act relating to review powers and reviewable death powers. Additional categories include children who are protected persons within the meaning of section 135 of the *Children and Young Persons (Care and Protection) Act 1998*, who are the subject of a sole parental responsibility order under section 149 of that Act and who are otherwise in the care of a service provider.

Abolition of Community Services Commission, office of Community Services Commissioner and conferral of functions on Ombudsman

Schedule 1 [21] inserts proposed Part 3. The proposed Part confers the community services functions previously exercised by the Commissioner for Community Services on the Ombudsman, except for functions relating to advocacy which have been replaced (proposed section 11). References to additional functions conferred under the proposed Act have also been included as well as other functions relating to monitoring and reviews and making recommendations.

Proposed section 12 requires the Ombudsman to establish a Community Services Division, as part of the Ombudsman's Office to exercise the Ombudsman's functions under the proposed Act.

Proposed section 13 re-enacts the functions relating to the review of the situation of children and other persons in care and extends them to groups of children or persons in care.

Proposed section 14 confers a new function on the Ombudsman relating to the review of complaints handling systems of service providers, including the power to report and make recommendations.

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Proposed section 15 enables the Ombudsman to use powers under the Ombudsman Act, relating to the holding of investigations, obtaining information, holding inquiries, entering premises, obtaining expert assistance and consultation. The proposed section also applies certain protections under the Ombudsman Act. The powers have been conferred on the Ombudsman for the purpose of exercising powers to monitor and review the delivery of community services, initiating inquiries into matters affecting service providers and providers of visitable services and carrying out reviews.

Proposed sections 16–19 re-enact powers under the Principal Act relating to powers of entry and obtaining search warrants and a related offence. Proposed section 20 makes it clear that the powers are in addition to the powers of the Ombudsman under the Ombudsman Act, including any powers applied under the Principal Act. The powers are conferred on the Ombudsman for the purpose of exercising powers to monitor and review the delivery of community services, initiating inquiries into matters affecting service providers, carrying out reviews and investigating complaints.

Schedule 1 [4] substitutes the definitions of *Community Services Commissioner* and *Community Services Division*.

Schedule 1 [23] re-enacts the provision setting out the right to appeal to the Administrative Decisions Tribunal about certain decisions under community welfare legislation and other decisions related to community services. The new provision omits the current rights to appeal about decisions of the Community Services Commission to investigate a complaint and about other decisions of the Commission. There will be no such right to appeal against decisions of the Ombudsman.

Schedule 1 [30] repeals provisions establishing the Community Services Commission and the office of Commissioner for Community Services.

Schedule 1 [1], [18], [19], [24], [27], [32], [35], [37], [38] and [40]–[45] make consequential amendments.

Community Visitors

Schedule 1 [13] provides for Community Visitors to be appointed by the Minister for Community Services on the recommendation of the Ombudsman (currently they are appointed by the Minister after consultation with the Community Services Review Council).

Schedule 1 [14] enables the Minister, on the recommendation of the Ombudsman, to remove a Community Visitor from office on the ground of misbehaviour, incompetence or incapacity. A person may not be removed from office because the person is suffering from a disability or a temporary disability (other than mental incapacity) unless the person is incapable of performing his or her duties.

Schedule 1 [17] enables the Ombudsman to investigate matters raised in advice or reports given by community visitors. Any such matter will be treated as a complaint. The amendment also includes residential centres for handicapped persons as services that may be visited by community visitors.

Complaints

Schedule 1 [22] inserts proposed Part 4 relating to complaints.

Proposed section 21 defines *community services complaint*, so that it includes complaints about the conduct of service providers under the Ombudsman Act and complaints under the Principal Act.

Proposed section 22 enables a person to make a complaint to the Ombudsman about conduct of a service provider (or an employee of, or a person who acts for or on behalf of, a service provider) with respect to the provision, failure to provide, withdrawal, variation or administration of a community service in respect of a particular person or group of persons. This right does not affect any right to complain under the Ombudsman Act.

Proposed section 23 sets out the persons who may make a community services complaint.

Proposed section 24 applies the Ombudsman Act to a complaint made under the Principal Act about the conduct of a service provider, and to the conduct of a service provider, in the same way that it applies to a complaint made under the Ombudsman Act and to the conduct of a public authority. This will have the effect of applying the procedures and functions of the Ombudsman under the Ombudsman Act (including those relating to investigation, reporting and furnishing of information) to complaints made under the Principal Act. The proposed section also applies the power to investigate a matter about which a complaint could be made. The grounds for dealing with a complaint, and the grounds on which a complaint can be made, will be those in the Ombudsman Act.

Proposed section 25 re-enacts the power to refer a complaint to another person or body and retains the existing power to refer a complaint to the service provider concerned for resolution.

Proposed section 26 re-enacts the existing provisions relating to withdrawal of complaints.

Proposed section 27 re-enacts existing grounds on which a complaint may be made relating to public safety and public interest and significant questions about the care of a person by a service provider. These grounds are in addition to those under the Ombudsman Act.

Reviewable deaths

The Child Death Review Team, established under legislation relating to the care and protection of children, currently exercises review, research and recommendation powers relating to deaths of children in care and other child deaths. Deaths of persons in care who have a disability are reviewed by a body established administratively. The proposed Act confers on the Ombudsman under the Principal Act review and related functions relating to reviewable deaths and removes functions relating to reviews from the Child Death Review Team insofar as they relate to reviewable deaths. It also confers on the State Coroner jurisdiction to hold an inquest into such deaths and requires deaths to be notified (see Schedule 2).

Schedule 1 [30] inserts proposed Part 6 which sets out the Ombudsman's functions relating to reviewable deaths.

Proposed section 35 applies the proposed Part to the deaths of children in care, deaths of children about whom (or about whose siblings) notifications have been made within the 2 year period before death, children whose deaths are or may be due to abuse or neglect or that occur in suspicious circumstances, deaths of children in detention centres, correctional centres and lock-ups, deaths of persons who are in residential care provided by a service provider and authorised or funded under the *Disability Services Act 1993*, deaths of persons in residential centres for handicapped persons and deaths of persons who are in a target group within the meaning of the *Disability Services Act 1993* who receive assistance (of a kind prescribed by the regulations) to live independently in the community.

Proposed section 36 confers on the Ombudsman the functions of monitoring and reviewing reviewable deaths, formulating recommendations to prevent or reduce deaths, establishing a register of reviewable deaths and undertaking research.

Proposed section 37 requires the Registrar of Births, Deaths and Marriages, the Director-General of the Department of Ageing, Disability and Home Care and the State Coroner to notify the Ombudsman if notified of certain deaths.

Proposed section 38 imposes a duty on service providers, relevant Ministers for service providers and other persons, including the State Coroner and the Commissioner for Children and Young People, to provide the Ombudsman with

access to records relating to reviewable deaths and copies of such records. The duty extends to records that the person or body concerned may require other persons to produce.

Proposed section 39 enables the Ombudsman to provide information obtained under the proposed Part to certain persons.

Proposed section 40 protects persons who provide information under the proposed Part.

Proposed section 41 enables the Ombudsman to establish advisory committees for the purpose of assisting the Ombudsman in the exercise of functions under the proposed Part.

Proposed section 42 enables the Ombudsman to use powers under the Ombudsman Act, relating to the holding of investigations, obtaining information, holding inquiries, entering premises, obtaining expert assistance and consultation for the purpose of exercising powers under the proposed Part. The proposed section also applies certain protections under the Ombudsman Act but removes protections relating to legal professional privilege that would otherwise apply.

Proposed section 43 requires the Ombudsman to report annually on the Ombudsman's work and activities under the proposed Part. The report (without limiting other matters that may be included) must include a report about data collected about reviewable deaths, recommendations made and information about the implementation of previous recommendations. The Ombudsman may also make a report to service providers or other appropriate persons or bodies.

Community Services Review Council

Schedule 1 [31] repeals provisions establishing the Community Services Review Council.

Other amendments

Schedule 1 [2] omits an unnecessary word.

Schedule 1 [3] expands the objects of the Principal Act to include facilitating awareness of the objects, principles and provisions of community welfare legislation and providing for independent monitoring of community services and programs.

Schedule 1 [6] updates a definition.

Schedule 1 [7] omits unnecessary definitions.

Schedule 1 [8] includes certain licensed organisations as service providers.

Schedule 1 [9] makes an authorised carer or designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*, and a proprietor or an occupier of premises used as a residential centre for handicapped persons, service providers for the purposes of the Principal Act.

Schedule 1 [10] makes it clear that notes included in the Principal Act do not form part of that Act.

Schedule 1 [11] excludes the Ombudsman from the requirement to determine issues, or make recommendations under the Principal Act, that do not conflict with resources appropriated by Parliament for community services, the allocation of resources by Government agencies in accordance with Government policy or Government policy.

Schedule 1 [12] and [20] omit unnecessary references to a Minister's title.

Schedule 1 [15], [16], [25] and [26] make amendments consequential on the insertion of the definition of *relevant Minister* by **Schedule 1 [5]**.

Schedule 1 [28], [33] and [34] update references.

Schedule 1 [29], [46], [47] and [49] renumber provisions.

Schedule 1 [36] excludes an authorised carer within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* from the categories of decision makers who must record reasons for decisions and provide written reasons for decisions.

Schedule 1 [39] extends the protection of a complainant against retribution to the situation where a person takes action against another person because another person has made a complaint, proposes to bring or brings proceedings before the Administrative Decisions Tribunal or provided or proposed to provide information.

Schedule 1 [48] confers on the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission power to review the operation of the Principal Act 5 years after the date of assent to the proposed Act.

Schedule 1 [50] and [51] insert savings and transitional provisions. The provisions enable regulations to be made and make provision with respect to the former Community Services Commission, its staff, the former Commissioner for Community Services and other matters.

Schedule 2 Amendment of Coroners Act 1980

Additional Deputy State Coroner

Schedule 2 [1] enables an additional Deputy State Coroner to be appointed.

Reviewable deaths

Schedule 2 [2] requires the death of certain persons to be reported to the coroner or a police officer. The category of deaths concerned is the same as reviewable deaths under the Principal Act (that is, deaths of children in care, deaths of children about whom (or about whose siblings) notifications have been made within a 2 year period before death, deaths of children that are or may be due to abuse or neglect or that occur in suspicious circumstances, deaths of persons who are in residential care provided by a service provider and authorised or funded under the *Disability Services Act 1993*, deaths of persons in residential centres for handicapped persons and deaths of persons who are in a target group within the meaning of the *Disability Services Act 1993* who receive assistance (of a kind prescribed by the regulations) to live independently in the community). A police officer to whom such a death is reported must report the death to a coroner or assistant coroner as soon as possible.

Schedule 2 [3] requires the State Coroner to provide to the Ombudsman all relevant information about a death that has been reported to the coroner and that appears to the State Coroner to involve a death of a kind in respect of which the State Coroner or Deputy State Coroner has exclusive jurisdiction to hold an inquest under proposed section 13AB (which relates to reviewable deaths). The information must be provided at the end of the inquest or if an inquest is not held.

Schedule 2 [5] prohibits a medical practitioner from giving a death certificate for a person if of the opinion that the circumstances were such that it is a reviewable death in respect of which the State Coroner or a Deputy State Coroner has exclusive jurisdiction to hold an inquest. **Schedule 2 [4], [6] and [7]** make consequential amendments.

Schedule 2 [8] inserts proposed section 13AB. The proposed section confers on the State Coroner or a Deputy State Coroner jurisdiction to hold an inquest into the death or suspected death of a person if it appears to the coroner that the person was, or that there is reasonable cause to suspect the person was, a specified person. The kinds of persons specified are the kinds of persons whose deaths are reviewable deaths under the Principal Act. **Schedule 2 [9]** makes a consequential amendment.

Savings and transitional provisions

Schedule 2 [10] and [11] insert savings and transitional provisions. The provisions enable regulations to be made and make provision with respect to the application of provisions inserted by the proposed Act.

Schedule 3 Amendment of Ombudsman Act 1974

Outside employment

Schedule 3 [1] and [4] enable the Ombudsman (with the approval of the Minister) or a Deputy Ombudsman or an Assistant Ombudsman (with the approval of the Ombudsman) to engage in paid duties outside his or her office. Currently, the office of the Ombudsman, Deputy Ombudsman or Assistant Ombudsman is automatically vacated if such employment is engaged in.

Additional appointments

Schedule 3 [2] enables the Ombudsman to appoint more than one Deputy Ombudsman and requires the Ombudsman to appoint a Deputy Ombudsman as the Community Services Commissioner for the purposes of the Principal Act. **Schedule 3 [3], [5], [7], [13] and [14]** make consequential amendments.

Schedule 3 [6] enables the Ombudsman to appoint a person to act in the absence of a Deputy Ombudsman or Assistant Ombudsman.

Other amendments

Schedule 3 [8] extends the Ombudsman's power to obtain expert assistance in relation to all of the functions of the Ombudsman, rather than functions under the Ombudsman Act.

Schedule 3 [9] and 3 [10] apply the provisions of the Ombudsman Act enabling an appeal to the Supreme Court to determine whether the Ombudsman has jurisdiction to conduct an investigation or proposed investigation to functions exercised under any other Act. The amendments also set out persons who may make an application in the case of a community services complaint.

Schedule 3 [11] enables the Ombudsman to refer a legal question arising out of a decision of a service provider or a provider of a visitable service that the Ombudsman is investigating to the Administrative Decisions Tribunal.

Schedule 3 [12] makes it an offence, without reasonable excuse, to refuse or wilfully fail to comply with any lawful requirement of the Ombudsman or an officer of the Ombudsman under other Acts in addition to the Ombudsman Act.

Schedule 3 [15] and [17] insert savings and transitional provisions. The provisions enable regulations to be made.

Schedule 3 [16] makes an amendment consequential on the amendments to complaints procedures under the Principal Act.

Schedule 4 Amendment of other Acts

Schedule 4.1, 4.2 [4], 4.3 [3], 4.5 and 4.10 update references to provisions of the Principal Act as a consequence of amendments made by Schedule 1 to the proposed Act.

Schedule 4.2 [1] prohibits the Children's Guardian from investigating reviewable deaths and from investigating or resolving a dispute that is the subject of a community services complaint.

Schedule 4.2 [3] and 4.3 [2] prohibit the Child Death Review Team from exercising functions with respect to reviewable deaths. **Schedule 4.2 [2] and 4.3 [1]** make consequential amendments.

Schedule 4.4 [1] and 4.6 make amendments as a result of the appointment of more than one Deputy Ombudsman.

Schedule 4.4 [2], 4.7, 4.8, 4.9 and 4.11 omit references to the Community Services Commission.