

[Act 1998 No 157]



New South Wales

# Children and Young Persons (Care and Protection) Bill 1998

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*  
The *Children and Young Persons Legislation (Repeal and Amendment Bill 1998)* is cognate with this Bill.

## Overview of Bill

The object of this Bill is to provide for the care and protection of, and the provision of services to, children and young persons and establish principles and key responsibilities governing child protection intervention. The Bill gives effect to the principal recommendations of the Community Welfare Legislation review contained in:

- the report entitled *The Government's responsibility for the Care and Protection of Children and Young People: Recommendations for Law Reform*, and
- the *Recommendations for the Reform of Children's Services*.

The Bill creates the office of Children's Guardian and specifies the functions of the Children's Guardian, particularly with respect to the exercise of parental responsibility for children and young persons.

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

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The Bill defines *child*, except in Chapter 13 (Children's employment), as a person who is under the age of 16 years and *young person* as a person who is aged 16 years or above but who is under the age of 18 years.

The Bill, in order to provide consistency with other legislation, such as the *Family Law Act 1975* of the Commonwealth, replaces the expression "guardianship" with the expression "parental responsibility" and "access" with "contact". "Foster care" becomes a type of "out-of-home care".

## Outline of provisions

### **Chapter 1 Preliminary**

Chapter 1 contains clauses 1–6. It sets out the name of the proposed Act, provides for its commencement on a day or days to be appointed by proclamation, provides for the definition of certain words and expressions used in the proposed Act, identifies the children and young persons to whom the proposed Act applies and contains other provisions of a general introductory nature.

### **Chapter 2 Objects, principles and responsibilities**

#### **Part 1 Objects and principles**

Part 1 of Chapter 2 contains clauses 7–10. It sets out the key objects of the proposed Act which are to govern measures for the care and protection of, and the provision of services to, children and young persons and the principles that are to be applied in the administration of the proposed Act. It establishes a principle concerning the participation of children and young persons in decision-making that applies to all persons who exercise functions under the proposed Act.

#### **Part 2 Aboriginal and Torres Strait Islander principles**

Part 2 of Chapter 2 contains clauses 11–14. It makes special provision in relation to matters concerning Aboriginal and Torres Strait Islander children and young persons, including the right of Aboriginal and Torres Strait Islander participation in placement decisions.

### **Part 3 Responsibilities**

Part 3 of Chapter 2 contains clauses 15–19. It sets out the general roles of the Minister and of the Director-General of the Department of Community Services in relation to the care and protection of children and young persons and seeks to ensure the co-ordinated provision of services generally to children and young persons.

## **Chapter 3 Requests for assistance and reports**

### **Part 1 Requests for assistance**

Part 1 of Chapter 3 contains clauses 20–22. It recognises the right of children and young persons and their parents to seek assistance from the Department of Community Services, through the Director-General. It sets out the general nature of the responses that may be made to a request for assistance.

### **Part 2 Reports**

Part 2 of Chapter 3 contains clauses 23–29. It sets out the circumstances in which persons involved in their paid employment with children are obliged to report circumstances in which a child may be at risk of harm. The grounds for mandatory reporting are differentiated from the grounds on which an order for the care and protection of a child or young person in proceedings before the Children's Court may be sought (see clause 71). The Part provides protection from civil and criminal liability for persons who make reports. It also provides for the form of reports and the keeping of records of reports.

### **Part 3 Investigations and assessment**

Part 3 of Chapter 3 contains clauses 30–33. It requires the Director-General to investigate and make an assessment of a report to determine whether a child or young person is at risk of harm. It makes provision for the early recognition of children and young persons as being of Aboriginal or Torres Strait Islander descent. It requires the Director-General to make arrangements with the Ombudsman for the investigation and assessment of a report that contains an allegation of abuse made against a member of the staff of the Department of Community Services.

## **Chapter 4 Children and young persons in need of care and protection**

Chapter 4 contains clauses 34–42. It sets out the range of actions the Director-General may take to ensure the protection of a child or young person who may be in need of care and protection. It establishes principles of intervention to give the Department, through the Director-General, more flexibility in the way in which it responds, so that it can give priority to those children and young persons who are most at risk. It seeks to ensure that children and young persons are protected by using the least intrusive option. It provides a range of measures, such as recourse to alternative dispute resolution and the development of a care plan, that may avoid or reduce the need for Children's Court proceedings.

## **Chapter 5 Children's Court proceedings**

### **Part 1 Emergency protection and assessment**

Part 1 of Chapter 5 contains clauses 43–59. It sets out a range of measures that will enable a prompt response to be made to ensure the care and protection of children and young persons who are at immediate risk of serious harm.

#### **Division 1 Emergency removal**

Division 1 of Part 1 enables the removal of children and young persons from circumstances that cause them to be in immediate need of care and protection. The Director-General is to assume their care and protection and must make prompt application to the Children's Court for an order for their care and protection.

#### **Division 2 Emergency care and protection orders**

Division 2 of Part 1 enables the Children's Court to make orders for the emergency protection of children and young persons who have been removed under Division 1.

#### **Division 3 Other removal authorised by the Children's Court**

Division 3 of Part 1 enables the Children's Court to make an order that will enable the removal of a child or young person who is in immediate need of care and protection.

#### **Division 4 Who has care responsibility?**

Division 4 of Part 1 provides for the care of a child or young person who is removed under the provisions of Part 1.

#### **Division 5 What information must be given following removal?**

Division 5 of Part 1 requires the Director-General to give information concerning the removal of a child or young person to certain persons.

#### **Division 6 Examination and assessment orders**

Division 6 of Part 1 enables the Children's Court to make certain orders for the medical and other examination and assessment of a child or young person who is removed under the provisions of Part 1.

### **Part 2 Care applications**

Part 2 of Chapter 5 contains clauses 60—91. It provides for the making of applications to the Children's Court for an order for the care and protection of a child or young person. It sets out the grounds that must exist for the making of a care and protection order. The range of care and protection orders is more extensive than that provided under the *Children (Care and Protection) Act 1987*. It includes orders for the provision of support services, orders to attend therapeutic or treatment programs, orders for supervision, orders allocating parental responsibility, contact orders and the making of interim orders as well as final orders. The Part provides for the making of care plans and restoration plans. It enables the making of applications for the rescission and variation of care orders and the making of appeals.

### **Chapter 6 Children's Court procedure**

Chapter 6 contains clauses 92—109. It specifies the procedures that are to be followed in proceedings under the proposed Act before the Children's Court. Generally proceedings are not to be conducted in an adversarial manner and with as little formality and legal technicality and form as the circumstances of the case permit. The Children's Court is not bound by the rules of evidence. The Chapter provides for the attendance of the parties to a care application, rights of appearance and legal representation, the appointment of guardians ad litem, the right to be accompanied by support persons, the presentation of the views of siblings, the admissibility of certain evidence and the

examination and cross-examination of witnesses. It also provides for the exclusion of the general public from proceedings and makes it an offence of strict liability to publish the name or other identifying information that might lead to the identification of a child or young person involved in proceedings before the Children's Court.

## **Chapter 7 Support for children and young persons in crisis**

### **Part 1 Serious or persistent conflict**

Part 1 of Chapter 7 contains clauses 110—119. It makes special provision for circumstances where the safety, welfare and well-being of a child or young person is in jeopardy because:

- there is a serious or persistent conflict between the child or young person and his or her parents. or
- the parents are unable to provide adequate supervision for the child or young person.

It sets out the principles that are to apply in the administration of the Part, requests for assistance and the range of responses that may be brought to a request, including alternative dispute resolution and the preparation and adoption of alternative parenting plans.

### **Part 2 Homelessness**

Part 2 of Chapter 7 contains clauses 120—122. It provides for the reporting of the homelessness of children and young persons to the Director-General.

### **Part 3 Compulsory assistance**

Part 3 of Chapter 7 contains clauses 123—133. It regulates the provision of compulsory assistance, which is a form of intensive care and support for a child or young person that is necessary to protect the child or young person from suicide or other life-threatening or self-destructive behaviour. It enables the Children's Court to make a compulsory assistance order of not more than 3 months' duration and sets out the terms that such an order may contain. The Children's Guardian is required to be notified of the making of an order under Part 3 and has the responsibility of monitoring the circumstances of a child or young person who is subject to such an order.

## **Chapter 8 Out-of-home care**

### **Part 1 Introduction**

Part 1 of Chapter 8 contains clauses 134—141. It regulates the provision of accommodation to children and young persons in out-of-home care (previously known as foster care). Placement of children in out-of-home care may only be effected by an accredited body, called a *designated agency*, or the Children's Guardian. The placement may only be made with an accredited person, called an *authorised carer*.

### **Part 2 Out-of-home care under order of Children's Court**

Part 2 of Chapter 8 contains clauses 142—150. It applies if a child is placed in out-of-home care pursuant to an order of the Children's Court.

#### **Division 1 General**

Division 1 of Part 2 includes provisions that confer on an authorised carer a right to certain information concerning a proposed placement, prescribe the extent to which an authorised carer may participate in decisions concerning the safety, welfare and well-being of a child or young person in his or her care, and create an entitlement to indemnity for damage that may be caused by a child or young person while in his or her care.

#### **Division 2 Review of out-of-home care under order of Children's Court**

Division 2 of Part 2 requires the designated agency responsible for the placement of a child or young person with an authorised carer to conduct periodic and other reviews of the placement.

### **Part 3 Voluntary out-of-home care**

Part 3 of Chapter 8 contains clauses 151—156. It applies if a child is placed in out-of-home care otherwise than pursuant to an order of the Children's Court.

#### **Division 1 Voluntary out-of-home care arranged by Director-General**

Division 1 of Part 3 sets out the circumstances in which the Director-General may make temporary care arrangements in respect of a child or young person who is in need of care and protection and provides for the duration, renewal and review of those arrangements.

## **Division 2 Other voluntary care arrangements**

Division 2 of Part 3 provides for the monitoring and review of the placement of children and young persons in voluntary out-of-home care, otherwise than under a temporary care arrangement.

### **Part 4 Daily care and control**

Part 4 of Chapter 8 contains clauses 157 and 158. They set out the care responsibility of an authorised carer and specify the circumstances in which a person having parental responsibility for, or the authorised carer of, a child or young person may restrain the child or young person because, if not restrained, he or she might seriously injure himself or herself or another person or might cause the loss of or damage to any property.

### **Part 5 Arrangements during out-of-home care**

Part 5 of Chapter 8 contains clauses 159—164. It provides for the keeping of records relating to out-of-home care, the payment of allowances for children and young persons in out-of-home care and the rights of children and young persons in out-of-home care.

### **Part 6 Arrangements on leaving out-of-home care**

Part 6 of Chapter 8 contains clauses 165—170. It enables the provision of assistance to persons on leaving out-of-home care, it requires the designated agency having supervisory responsibility for a child or young person to prepare a plan to be implemented when the child or young person leaves out-of-home care and it entitles such a child or young person to have access to, or possession of, personal records relating to him or her.

### **Part 7 Miscellaneous**

Part 7 of Chapter 8 contains clauses 171 and 172. It enables the removal of children and young persons from unauthorised out-of-home care and requires the designated agency having supervisory responsibility for a child or young person who dies while in out-of-home care to immediately cause notice of the death to be given to the child's or young person's parents, the Children's Guardian and the Coroner.



## **Chapter 9 Medical examination and treatment**

### **Part 1 Medical examination of children and young persons in need of care and protection**

Part 1 of Chapter 9 contains clauses 173—175. It enables the medical examination of children who are believed to be in need of care and protection and the provision of emergency medical treatment. It also regulates the carrying out of special medical treatment (as defined in clause 168) on a child.

### **Part 2 Treatment of children and young persons in out-of-home care ordered by the Children's Court**

Part 2 of Chapter 9 contains clauses 176 and 177. It regulates the carrying out of special medical examinations (as defined in clause 169) of children or young persons who reside in out-of-home care in accordance with an order of the Children's Court. It also regulates the provision to such children and young persons of ordinary medical and dental treatment.

## **Chapter 10 Children's Guardian**

### **Part 1 Appointment**

Part 1 of Chapter 10 contains clauses 178 and 179. It provides for the appointment by the Governor of a Children's Guardian and an acting Children's Guardian.

### **Part 2 Functions**

Part 2 of Chapter 10 contains clauses 180—186. It specifies the functions of the Children's Guardian with respect to parental responsibility, the removal of the daily care and control of a child or young person from an authorised carer, the making of applications to the Children's Court for the rescission and variation of orders and the resolution of certain disputes arising in the administration of the proposed Act.

### **Part 3 Reports**

Part 3 of Chapter 10 contains clauses 187—190. It enables the making of annual reports and special reports to Parliament by the Children's Guardian.

## **Chapter 11 Child Death Review Team**

Chapter 11 contains clauses 191—198. It reproduces the former provisions of the *Children (Care and Protection) Act 1987*, as amended by the *Commission for Children and Young People Act 1998*.

## **Chapter 12 Children's services**

### **Part 1 Preliminary**

Part 1 of Chapter 12 contains clauses 199 and 200. It contains definitions for the purposes of the Chapter, including a definition of *children's service*.

### **Part 2 Purpose of Chapter**

Part 2 of Chapter 12 contains clauses 201–203. It sets out the objects of the Chapter and the principles on which the provision of children's services should be based.

### **Part 3 Licensing of children's services**

Part 3 of Chapter 12 contains clauses 204–213. It prevents the provision of certain children's services, and the advertising of children's services, unless the person providing the service has a licence under the Part. It regulates applications for licences, the granting of licences, the conditions to which licences may be subject and the variation, suspension and revocation of licences.

### **Part 4 Matters relating to parents**

Part 4 of Chapter 12 contains clauses 214 and 215. It requires the provision of certain information by licensees to parents of children enrolled for a children's service of the licensee and ensures freedom of contact between parents and their children at any time during which a children's service is being provided to the child.

### **Part 5 Miscellaneous**

Part 5 of Chapter 12 contains clauses 216–220. It contains provisions that enable the exclusion of persons from involvement with a children's service, the termination of illegal children's services and the making of regulations for the purposes of the Chapter.

## **Chapter 13 Children's employment**

Chapter 13 contains clauses 221–226. It reproduces, without amendment, the former provisions of the *Children (Care and Protection) Act 1987*.

## **Chapter 14 Offences involving children and young persons**

Chapter 14 contains clauses 227–231. It creates offences relating to:

- the abuse of children and young persons
- the neglect of children and young persons
- the unauthorised removal of children and young persons from the care and protection of persons into whose care and protection they have been placed under the proposed Act
- the tattooing of children and young persons without the written consent of a parent
- the leaving of children and young persons unsupervised in motor vehicles.

## **Chapter 15 Removal of persons and entry of premises and places**

### **Part 1 Removal of persons**

Part 1 of Chapter 15 contains clauses 232–234. It contains provisions that enable the removal of children and young persons pursuant to certain orders of the Minister or under the authority of a search warrant.

### **Part 2 Entry of premises and places**

Part 2 of Chapter 15 contains clauses 235–237. It contains provisions that enable the entry and inspection of premises for the purposes of the proposed Act, either under the authority granted by a specific provision of the proposed Act or a search warrant.

### **Part 3 Ancillary functions**

Part 3 of Chapter 15 contains clauses 238–244. It specifies the functions that may be carried out in association with the exercise of the functions conferred by or under Parts 1 and 2.

## **Chapter 16 Administrative review**

Chapter 16 contains clause 245. It specifies the decisions made under the proposed Act that are subject to review, via the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, by the Administrative Decisions Tribunal.

## **Chapter 17 Miscellaneous**

Chapter 17 contains clauses 246–265. It makes provision for miscellaneous matters relating to the administration and enforcement of the proposed Act.

## **Schedule 1 Child Death Review Team**

Schedule 1 contains provisions relating to:

- the terms and conditions of appointment of members of the Child Death Review Team
- the procedure at meetings of the Team.

## **Schedule 2 Provisions relating to employers' authorities**

Schedule 2 contains provisions relating to the making of applications for employers' authorities, the determination of applications, the duration of authorities, the terms and conditions of authorities, the variation of authorities and the suspension and revocation of authorities.

## **Schedule 3 Savings, transitional and other provisions**

Schedule 3 contains savings, transitional and other provisions required as a consequence of the enactment of the proposed Act.