

Children and Young Persons (Care and Protection) Amendment Act 2018 No 81

[2018-81]



New South Wales

Status Information

Currency of version

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Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Repeal**

This Act was repealed by sec 30C of the [Interpretation Act 1987 No 15](#) with effect from 5.2.2019.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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Children and Young Persons (Care and Protection) Amendment Act 2018 No 81



New South Wales

An Act to amend the *Children and Young Persons (Care and Protection) Act 1998* and the *Adoption Act 2000* to make further provision in relation to the care and protection of, and the provision of services to, children and young persons; and for other purposes.

1 Name of Act

This Act is the *Children and Young Persons (Care and Protection) Amendment Act 2018*.

2 Commencement

This Act commences 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

[1] Section 3 Definitions

Insert “(including as applied by section 38 (4))” after “section 79B (1A)” in the definition of *prospective guardian* in section 3 (1).

[2] Section 16 General role of the Secretary

Insert “(including the provision of prioritised access to support services to children and young persons at risk of significant harm and to their families)” after “families” in section 16 (3) (a).

[3] Section 16 (3) (c)

Insert at the end of section 16 (3) (b):

, and

- (c) to co-ordinate the early provision of alternative dispute resolution processes for children and young persons at risk of significant harm and their families who wish to participate in those processes.

Note—

Section 37 (1A) requires the Secretary, on determining that a child or young person is at risk of significant harm, to offer these processes to the family of the child or young person (subject to certain exceptions) before seeking care orders.

[4] Section 17 Secretary's request for services from other agencies

Insert at the end of the section:

- (2) Without limiting the generality of subsection (1), the Secretary may request a government department or agency, or a non-government agency in receipt of government funding, to provide prioritised access to services to a child or young person who is at risk of significant harm and to his or her family.

[5] Section 18 Obligation to co-operate

Insert after section 18 (2):

- (3) To avoid doubt, a reference in subsection (1) to the responsibilities and functions of a department or agency includes, in the case of its provision of health services:
 - (a) its responsibilities under the Medicare Principles and Commitments (adopted under section 68 of the *Health Services Act 1997*) in the provision of public hospital services, and
 - (b) its functions in clinical decision-making.

[6] Section 22 Secretary's response to requests for assistance

Insert after the first paragraph of the note to the section:

If the Secretary determines that a child or young person is at risk of significant harm, the Secretary must offer alternative dispute resolution processes to the family of the child or young person (subject to certain exceptions) before seeking care orders.

[7] Section 22, note

Insert before the last paragraph:

The Secretary may request government departments or agencies, or non-government agencies in receipt of government funding, to provide prioritised access to services to children or young persons who are at risk of significant harm and to their families.

[8] Section 27 Mandatory reporting

Insert after section 27 (3):

(4) In this section:

children's services means either or both of the following (subject to the regulations):

- (a) an education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)*,
- (b) a State regulated education and care service within the meaning of the *Children (Education and Care Services) Supplementary Provisions Act 2011*.

[9] Section 30 Secretary's investigations and assessment

Insert after the first paragraph of the note to the section:

Under section 17 (2), the Secretary may request government departments or agencies, or non-government agencies in receipt of government funding, to provide prioritised access to services to children or young persons who are at risk of significant harm and to their families.

[10] Section 34 Taking of action by Secretary

Insert after section 34 (2) (a):

- (a1) offering alternative dispute resolution processes to the family of the child or young person as referred to in section 37,

Note—

Section 37 (1A) requires the Secretary, on determining that a child or young person is at risk of significant harm, to offer these processes to the family of the child or young person (subject to certain exceptions) before seeking care orders.

[11] Section 37 Alternative dispute resolution by Secretary

Omit "is to consider" from section 37 (1). Insert instead "must consider".

[12] Section 37 (1A)-(1D)

Insert after section 37 (1):

- (1A) If the Secretary determines that a child or young person is at risk of significant harm, the Secretary must offer alternative dispute resolution processes to the family of the child or young person before seeking care orders from the Children's Court.
- (1B) Subsection (1A) does not apply in relation to the family of a child or young person if the Secretary forms the opinion on reasonable grounds that their participation in alternative dispute resolution processes would not be appropriate due to exceptional circumstances.

- (1C) If the Secretary becomes aware of criminal proceedings or a police investigation that may be compromised if alternative dispute resolution processes are offered under subsection (1A), the Secretary:
- (a) must seek the advice of the Commissioner of Police as to the likely effect of the processes, and
 - (b) is not required to offer the processes if the Secretary determines that it is not appropriate to do so after taking the advice into account.
- (1D) Subsection (1A) does not affect the Secretary's obligation under section 34 (1) and is subject to sections 35 (1) and 36.

[13] Section 38 Development and enforcement of care plans

Omit section 38 (2A). Insert instead:

- (2A) If the Children's Court is satisfied of the matters set out in subsection (2B), the Court may make an order referred to in subsection (2):
- (a) without the need for a care application under Part 2 of Chapter 5, and
 - (b) without the need to be satisfied of the existence of any of the grounds under section 71, and
 - (c) in the case of a proposed guardianship order, without the need to be satisfied of the existence of the ground under section 79A (3) (a).
- (2B) The matters of which the Children's Court must be satisfied for the purposes of subsection (2A) are as follows:
- (a) the proposed order will not contravene the principles of this Act,
 - (b) the parties to the care plan understand its provisions and have freely entered into it,
 - (c) in the case of a party other than the Secretary, the party has received independent legal advice concerning the provisions to which the proposed order will give effect and the nature and effect of the proposed order.

Note—

Section 98 provides that in proceedings with respect to a child or young person, the child or young person (among others) may appear in person or be legally represented.

[14] Section 38 (4) and (5)

Insert after section 38 (3):

- (4) Section 79B (1A) and (8) (b) and (c) apply to the Secretary in seeking a guardianship order to give effect to a care plan pursuant to this section in the same way as they apply to the Secretary in making an application, and to an applicant, for a guardianship order.
- (5) Section 79B (9) and (10) apply to a care plan referred to in subsection (4).

[15] Section 39A

Insert after the heading to Part 4 of Chapter 4:

39A Care responsibility on death of guardian or carer with full parental responsibility

- (1) On the Secretary becoming aware of the death of a relevant guardian or carer of a child or young person, the care responsibility for the child or young person vests in the Secretary until:
 - (a) the expiry of 21 days after the day on which the Secretary first became aware of the death, or
 - (b) an order is made by a court of competent jurisdiction, that allocates parental responsibility for the child or young person,whichever occurs first.
- (2) Without limiting any other action the Secretary may take under this Act, the Secretary is, while having the care responsibility for the child or young person, to make any investigations and assessment that the Secretary considers necessary to determine the most appropriate care arrangements for the child or young person.
- (3) The Secretary may delegate the Secretary's care responsibility for the child or young person to a relative or kin of the child or young person, an authorised carer or a person approved by the Children's Guardian.
- (4) Despite subsection (3), the Secretary may delegate the Secretary's care responsibility for the child or young person on an interim basis to a person other than a person specified in subsection (3) but must use his or her best endeavours to delegate that responsibility to a person so specified as soon as is reasonably practicable.
- (5) The exercise of the care responsibility by a person to whom it is delegated under this section is subject to any direction given to the person by the Secretary.
- (6) In this section:

relevant guardian or carer of a child or young person means:

- (a) a person who was the sole guardian or (in the case of a guardianship order allocating parental responsibility jointly to more than one person) the surviving guardian, of the child or young person, immediately before the death of the person, or
- (b) a person who held, solely, all aspects of parental responsibility for the child or young person pursuant to an order under section 79 (1) (f) or (in the case of an order allocating parental responsibility jointly to more than one person) the surviving person who held that parental responsibility, immediately before the death of the person.

[16] Section 61 Applications for care orders

Insert before section 61 (2A) (a):

- (a1) the application is for a variation of an interim order under section 90AA, or

[17] Section 61, note

Insert after the first paragraph:

Section 37 (1A) requires the Secretary, on determining that a child or young person is at risk of significant harm, to offer alternative dispute resolution processes to the family of the child or young person (subject to certain exceptions) before seeking care orders.

[18] Section 72 Determination as to care and protection

Insert “section 39A (Care responsibility on death of guardian or carer with full parental responsibility),” after “made under” in section 72 (1) (b).

[19] Sections 74 (1) and 75 (4)

Insert “, or a proposed guardianship order by consent pursuant to section 38” after “guardianship order” wherever occurring.

[20] Section 79 Order (other than guardianship order) allocating parental responsibility

Insert after section 79 (8):

- (9) The maximum period for which an order under subsection (1) (b) may allocate all aspects of parental responsibility to the Minister following the Court’s approval of a permanency plan involving restoration, guardianship or adoption, is 24 months.
- (10) Subsection (9) does not apply if the Children’s Court is satisfied that there are special circumstances that warrant the allocation being for a longer period.

[21] Section 82 Report on suitability of arrangements concerning parental responsibility

Omit section 82 (3). Insert instead:

- (3) If, after considering the report, the Children’s Court is not satisfied that proper arrangements have been made for the care and protection of the child or young person concerned, the Court may, on its own motion, conduct a review of progress in implementing the care plan (a **progress review**) and re-list the matter for that purpose.
- (3A) Before conducting a progress review, and within 30 days of receiving the report, the Children’s Court:
- (a) is to give notice of the progress review to each party to the relevant proceedings, and
 - (b) may invite the party to give evidence and make submissions at the progress review, in relation to the progress in implementing the care plan, including progress towards the achievement of a permanent placement.

Note—

Section 98 provides that in proceedings with respect to a child or young person, the child or young person (among others) may appear in person or be legally represented.

[22] Section 82 (5)

Omit the subsection.

[23] Section 83 Preparation of permanency plan

Insert “within a reasonable period” after “his or her parents” in section 83 (1).

[24] Section 83 (2), (3) and (5)

Insert “within a reasonable period” after “of restoration”.

[25] Section 83 (5A)

Omit “or not there is a realistic possibility of restoration”.

Insert instead “to accept the Secretary’s assessment of whether or not there is a realistic possibility of restoration within a reasonable period”.

[26] Section 83 (7) (b)

Insert “within a reasonable period,” after “of restoration”.

[27] Section 83 (8A)

Insert after section 83 (8):

(8A) A **reasonable period** for the purposes of this section must not exceed 24 months.

[28] Section 86 Contact orders

Insert after section 86 (7):

(8) Subsection (6) does not apply to a contact order concerning a child or young person who is the subject of a guardianship order if the Children's Court is satisfied that a contact order of more than 12 months duration (for example, a contact order for the duration of the guardianship order) is in the best interests of the child or young person.

[29] Section 90 Rescission and variation of care orders

Omit section 90 (2A). Insert instead:

(2A) Before granting leave to make an application to vary or rescind the care order, the Children's Court must consider the matters set out in subsections (2B) and (2C).

(2B) The primary considerations are as follows:

- (a) the views of the child or young person and the weight to be given to those views, having regard to the maturity of the child or young person and his or her capacity to express his or her views,
- (b) the length of time for which the child or young person has been in the care of the present carer and the stability of present care arrangements,
- (c) if the Children's Court considers that the 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 the best interests of the child or young person.

(2C) Additional considerations are as follows:

- (a) the age of the child or young person,
- (b) the nature of the application,
- (c) the plans for the child or young person,
- (d) whether the applicant has an arguable case,

(e) matters concerning the care and protection of the child or young person that are identified in:

(i) a report under section 82, or

(ii) a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150.

(2D) The Children's Court may dismiss an application for leave under this section if it is satisfied that the application is frivolous, vexatious or an abuse of process.

(2E) Without limiting subsection (2D), the Children's Court may dismiss an application for leave under this section if it is satisfied that:

(a) the application has no reasonable prospect of success, and

(b) the applicant has previously made a series of applications for leave under this section that the Court has dismissed.

[30] Section 90 (3)

Renumber the subsection as subsection (1AA) and insert after section 90 (1).

[31] Section 90 (4)

Omit "(3) (e)". Insert instead "(1AA) (e)".

[32] Section 90 (6) (b) and (c)

Omit the paragraphs. Insert instead:

(b) the views of the child or young person and the weight to be given to those views,

(c) the length of time the child or young person has been in the care of the present caregivers and the stability of present care arrangements,

[33] Section 90 (9)

Insert after section 90 (8):

(9) This section does not apply to an application to vary an interim care order.

Note—

Section 90AA provides for applications to vary interim care orders.

[34] Section 90AA

Insert after section 90:

90AA Variation of interim care orders

- (1) A party to care proceedings before the Children’s Court may make an application to vary an interim care order.

Note—

Section 98 provides that in proceedings with respect to a child or young person, the child or young person (among others) may appear in person or be legally represented.

- (2) The Children’s Court may, by order, vary an interim care order if satisfied on an application made pursuant to subsection (1) that it is appropriate to do so.

[35] Section 105 Publication of names and identifying information

Insert after section 105 (1):

- (1AA) 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 must not be published or broadcast in any form that may be accessible by a person in New South Wales, 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 (however expressed).

Note—

Identifying the child or young person as being or having been a foster child or a ward of the State, or as being or having been in foster care or under the parental responsibility of the Minister, or in the care of an authorised carer, are all examples of identifying the child or young person as being or having been in out-of-home care.

[36] Section 105 (1A), (2) and (3) (a)

Insert “or (1AA)” after “subsection (1)” wherever occurring.

[37] Section 105 (3)

Insert “or (1AA)” after “Subsection (1)”.

[38] Section 105 (3) (a1)

Insert after section 105 (3) (a):

- (a1) the publication by the Coroner’s Court of its findings in an inquest concerning the suspected death of a child or young person that include the name of a child or young person, or

[39] Section 105 (3) (b) (iiia)

Insert after section 105 (3) (b) (iii):

- (iia) in the case of a child or young person whose suspected death is the subject of an inquest by the Coroner's Court—with the consent of the Coroner's Court if that Court considers that the publication or broadcasting would be in the public interest, or

[40] Section 135 Definition and types of "out-of-home care"

Omit section 135 (3) (b) (iii). Insert instead:

- (iii) it is care in respect of which the Secretary is providing support under section 153, or

[41] Section 136 Restriction on who may provide statutory out-of-home care

Omit "6 months" from section 136 (3). Insert instead "12 months".

[42] Chapter 8, Part 3, Division 2, heading

Omit "arrangements".

[43] Section 153

Omit the section. Insert instead:

153 Operation of other supported out-of-home care

- (1) The Secretary may provide support in respect of the residential care and control of a child or young person that is provided:
 - (a) by a relative or kin who has, by virtue of a relevant court order, parental responsibility for the child or young person, and
 - (b) at a place other than the usual home of the child or young person.

- (2) In this section:

relevant court order means:

- (a) an order of the Children's Court, or
- (b) 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.

[44] Section 155

Omit the section. Insert instead:

155 Reports and reviews of supported out-of-home care

- (1) This section applies in relation to a child or young person in respect of whom supported out-of-home care is provided under section 153.
- (2) The authorised carer of the child or young person must submit a self-assessment report to the designated agency having supervisory responsibility for the child or young person, at least once in every period of 12 months that the child or young person is placed in the supported out-of-home care with the authorised carer.
- (3) The self-assessment report is to address any matters that may be required by the designated agency (including verification that the child or young person resides with the authorised carer and of the need for on-going provision of support).
- (4) The designated agency must conduct a review concerning the child or young person:
 - (a) if the authorised carer dies, within 21 days after the death, and
 - (b) before a planned change of placement, and
 - (c) within 21 days after an unplanned change of placement.
- (5) A review, in considering the needs of the child or young person, is to have regard to the following:
 - (a) the legal status of the child or young person,
 - (b) the issues that need to be addressed while the child or young person is in supported out-of-home care, what is to be done and who is to undertake responsibility,
 - (c) the responsibilities of all parties concerning care,
 - (d) any special requirements of the child or young person relating to culture, language, religion or disability,
 - (e) the appropriateness of making a care application.
- (6) At the conclusion of a review, the designated agency is to determine:
 - (a) whether restoration of the child or young person to family care is possible and, if not, how the parenting needs of the child or young person are to be met, and
 - (b) whether a care application should be made to provide for the reallocation of parental responsibility in relation to the child or young person.

[45] Section 161 Financial assistance for children and young persons in out-of-home care

Insert “or kin” after “relative” in section 161 (4) (a).

[46] Section 172A Secretary to report annually on deaths of children and young persons

Insert “the Secretary has care responsibility under section 39A or” after “for whom” in paragraph (e) of the definition of **reportable death** in section 172A (2).

[47] Section 227 Child and young person abuse

Insert “, or imprisonment for 2 years, or both” after “200 penalty units”.

[48] Section 228 Neglect of children and young persons

Insert “, or imprisonment for 2 years, or both” after “200 penalty units”.

[49] Section 245A Object and principles of Chapter

Insert “(including, where applicable, prioritised access to services to children and young persons at risk of significant harm and to their families)” after “families” in section 245A (2) (c).

[50] Sections 245C (1) (a) and 245D (2) (a)

Insert “(including, where applicable, to provide prioritised access to any service to a child or young person or class of children or young persons at risk of significant harm)” after “young persons” wherever occurring.

[51] Section 245E Co-ordination of services

Insert “(including, where applicable, in relation to provision of prioritised access to appropriate services to children or young persons at risk of significant harm)” after “young persons” where secondly occurring.

[52] Schedule 3 Savings, transitional and other provisions

Insert after clause 1 (3):

- (4) Without limiting subclauses (1) and (2), regulations made for the purposes of this clause may amend this Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

[53] Schedule 3

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Provisions consequent on enactment of [Children and](#)

Young Persons (Care and Protection) Amendment Act 2018

Definition

In this Part:

amending Act means the *Children and Young Persons (Care and Protection) Amendment Act 2018*.

Alternative dispute resolution processes

To avoid doubt, section 37 (1A), as inserted by the amending Act, applies only in relation to determinations made by the Secretary on or after the commencement of that provision.

Guardianship orders by consent

To avoid doubt, section 38, as amended by the amending Act, does not apply in relation to a care plan entered into before the commencement of the amendments.

Short term orders allocating parental responsibility to Minister

Section 79 (9) and (10), as inserted by the amending Act, extend to apply in relation to an application for an order under section 79 (1) (b) that was pending (but not finally determined) immediately before the commencement of those provisions.

Court review of progress in implementing care plan

Section 82 (3) and (3A), as inserted by the amending Act, apply only in relation to a report ordered by the Children's Court under section 82 (1) after the commencement of the provisions.

Preparation of permanency plans

Section 83, as amended by the amending Act, applies to assessments or findings under that section occurring on or after the commencement of those amendments irrespective of whether the proceedings before the Children's Court to which they relate were pending (but not finally determined) immediately before that commencement.

Contact orders for duration of guardianship order

Section 86 (8), as inserted by the amending Act:

- (a) applies irrespective of whether a guardianship order was made before or after the commencement of that subsection, and
- (b) extends to a contact order made on an application that was pending (but not

finally determined) immediately before that commencement.

Pending applications for leave to apply to vary or rescind a care order

An application for leave under section 90 (1) that was pending before the commencement of the amendments made to section 90 by the amending Act is to continue to be dealt with under section 90 as in force immediately before that commencement.

Applications for variation of interim care orders

Section 90AA, as inserted by the amending Act, extends to proceedings before the Children's Court that were pending (but not finally determined) immediately before the commencement of the section.

Publication of names and identifying material

- (1) Section 105 (1AA), as inserted by the amending Act, applies to publishing or broadcasting the name of the child or young person, irrespective of whether the child or young person was placed under the parental responsibility of the Minister or entered the out-of-home care before or after the commencement of the provision.
- (2) Section 105 (3) (a1) and (b) (iiia), as inserted by the amending Act, apply to publishing or broadcasting the name of a child or young person, irrespective of whether the inquest concerning his or her suspected death was held before or after the commencement of those provisions.

Extended period for living with parents before restoration date

Section 136, as amended by the amending Act, extends to a child or young person who was placed in statutory out-of-home care, or for whom a relevant care plan or permanency plan was approved by the Children's Court, before the commencement of the amendment.

Supported out-of-home care arrangements not supported by a court order

- (1) The Secretary may continue to support an arrangement referred to in section 153 (3), as in force immediately before the substitution of section 153 by the amending Act, as if section 153 had not been substituted. While so supported, the arrangement continues to be a supported out-of-home care arrangement for the purposes of the Act.
- (2) Section 155, as in force immediately before its substitution by the amending Act, continues to apply to the arrangement as if the section had not been substituted.

Schedule 2 Amendment of Adoption Act 2000 No 75

[1] Section 67 When can Court dispense with consent of person other than the child?

Insert “or the guardians” after “carers” where firstly occurring in section 67 (1) (d).

[2] Section 67 (1) (d) (i) and (ii)

Insert “or guardians” after “carers” wherever occurring.

[3] Section 67 (3)

Insert after section 67 (2):

(3) In this section:

guardian has the same meaning as in section 79A (1) of the *Children and Young Persons (Care and Protection) Act 1998*.

[4] Schedule 3 Savings, transitional and other provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Children and Young Persons (Care and Protection) Amendment Act 2018

Definition

In this Part:

amending Act means the *Children and Young Persons (Care and Protection) Amendment Act 2018*.

When can Court dispense with consent of person other than the child?

Section 67, as amended by the amending Act, extends to proceedings on an application for an adoption order, that was made but not finally determined before the commencement of the amendments.