

Children and Young Persons (Miscellaneous Amendments) Bill

EXPLANATORY MEMORANDUM

Clause 1 states the purpose of the Bill.

Clause 2 provides for the commencement of the Bill.

Clause 3 states that the “**Children and Young Person’s Act 1989**” (“the Act”) is the Principal Act.

Clause 4 inserts a new definition of “sentencing order” into section 3 (1) of the Act in order to make it consistent with the **Magistrates’ Court Act 1989**. The new definition allows for appeals from sentencing orders imposed other than on the initial finding of guilt. For example, a sentencing order imposed after a finding of breach of a sentencing order.

Clause 5 inserts a new section 3 (5) into the Act to make it clear that the Children’s Court has jurisdiction to hear applications for matters such as extensions, variations, revocations and breach of protection orders, even though the initial protection order was made by the County or Supreme Court.

Clause 6 amends section 7 of the Act to enable the Secretary to the Department of Health and Community Services to delegate to a senior executive officer the power to make authorisations under particular provisions of the Act. The clause also clarifies two other matters:

Clause 6 (c) (i) provides that the Secretary can make an authorisation to the position of “person in charge of an approved community service” as opposed to a named person. This prevents the need for a new authorisation every time the person in charge of a community service alters.

Clause 6 (c) (ii) clarifies the fact that the authorisation under section 112 (2) is only to enable persons in charge of certain community services to approve persons as suitable to have custody and guardianship of children. The person in charge of a community service cannot be authorised to bring permanent care applications.

Clause 7 inserts a new sub-section (1A) into section 25 to give the Court the power to require an undertaking that the child will appear or that the parent will produce the child when the hearing of a proceeding in the Family Division resumes after an adjournment.

Clause 8 inserts a new sub-section (2A) into section 43 of the Act to make it clear that the Secretary and certain representatives of the Secretary do not commit an offence under section 43 when they have access to a report to which the Division applies.

Clause 9 amends section 48 of the Act to make it clear that at the end of an interim protection order the Department must automatically prepare and submit a disposition report to the Court.

Clause 10 amends section 61 of the Act to enable the power to inspect a community service to be delegated to an officer or employee of the Department under section 7 (1) of the Act like any other power or function of the Secretary.

Clause 11 amends section 64 of the Act. The main amendments are to:

- amend the definition of post-secondary education in section 64 (1F). This is a consequential amendment resulting from the repeal of the **Post-Secondary Education Act 1978** and the introduction of the **Tertiary Education Act 1993**.
- give a court power to grant leave for evidence to be admitted, which identifies a person as a notifier, or evidence that a particular matter forms part of a notification to the Department.

Under section 64 (3) (c) of the Act there is no power for the Court to grant leave for the evidence to be admitted.

New sections (3A) and (3B) provide that evidence which could identify a person who made a notification as the notifier, or disclose that a particular matter is contained in a notification, is inadmissible in any proceeding unless the notifier consents in writing to the admission of that evidence or unless the Court grants leave. Accordingly, a question, the answer to which, might lead to the identification of a person as a notifier or would reveal that a particular matter was contained in a notification, must not be asked. If the question is asked, the person is entitled to refuse to answer.

New section (3c) details the circumstances in which a court may grant leave for such evidence to be admissible without consent.

For proceedings in the Children’s Court or arising out of the Children’s Court (such as appeals in the County Court), the Court can only grant leave if the evidence is necessary to ensure the safety and well-being of the child. For other proceedings the Court or tribunal must be satisfied that it is in the interests of justice that the evidence be given. This exception is drafted broadly because of the wide ranging nature of the proceedings to which this exception may be relevant. Evidence as to the identity of a notifier or as to the subject matter of a notification may be relevant in criminal proceedings, coronial inquests, disciplinary proceedings and so forth.

There are circumstances where the person has not consented but the evidence is necessary to the interests of justice or to protect the safety and well being of the child and the importance of the evidence outweighs the public interest in protecting the identity of the notifier. Although it is rare that the identity of a notifier or the fact that a particular matter forms part of a notification is necessary evidence, a blanket prohibition is too restrictive.

Clause 12 contains consequential amendments to section 69 of the Act resulting from the amendments to interim accommodation orders and interim protection orders.

Clause 13 substitutes a new Division 4 of Part 3 into the Act. Division 4 relates to interim accommodation orders.

The main amendments are to:

- enable the Court to make an interim accommodation order at any time after a protection application is filed with the registrar. This is to not only enable an interim accommodation order to be made the first time the matter comes to the attention of the Court, but also allow such an order to be made at any other time whilst the protection application is before the Court.

- enable the Court to make an interim accommodation order when a hearing in the Family Division is adjourned.
- clarify the power of a court to make an interim accommodation order during a contested interim accommodation hearing. Where such a hearing is to run for more than one day, the Court must be able to make an interim accommodation order that will apply until the matter resumes on the next sitting day.
- give the County or Supreme Court the power to make an interim accommodation order after the hearing of an appeal has commenced.
- give the Court the power to extend an interim accommodation order. Under section 75, certain interim accommodation orders only continue for a period of 21 days. Some interim accommodation orders are also made for shorter periods of time, for example, when a contested proceeding is adjourned and the Court wishes to make an order overnight or until the resumption of the hearing. New section 78 makes it clear that the Court can extend the order, if necessary, for a further period of up to 21 days. As such, interim accommodation orders can continue in relation to the child until the protection application is determined.
- make it clear that an application for variation of an interim accommodation order only applies to the conditions of an interim accommodation order.
- enable an application for breach of an interim accommodation order to proceed by notice as well as by the taking of a child into safe custody. The current provision in the Act is anomalous in that it does not allow this to occur.
- enable the Court to make a new interim accommodation order where the child is living in conditions which are unsatisfactory in terms of the safety and well being of the child even if there has not been a breach of the existing order. There may be occasions where the conditions of an order have been complied with however a parent may continue to physically abuse the child. The Court will be able to make a new order even though the conditions of the existing order have been complied with.

Section 80A on new interim accommodation orders is not intended to limit the power of the Court to make further orders when an initial interim accommodation order has been made by a bail justice or by the Court on an adjournment of the proceeding.

Clause 14 amends section 87 of the Act to provide that the need to protect children from harm and protect their rights and to promote their welfare are the paramount considerations to which the Court must have regard in considering whether to make a protection order.

Clause 15 provides for the form of service of an application for variation or revocation of an undertaking or condition of an undertaking.

Clause 16 amends section 95 of the Act by providing that a supervision order continues in force until the application for breach of a supervision order is determined by the Court. This enables the Court to make a new order upon a finding of breach if it is satisfied that the child is still in need of protection, even if the old supervision order would have expired prior to or during the hearing, apart from this section. This allows the Court

to deal with the matter before it and avoids the need for a further protection application to be filed.

Clause 16 (3) and (4) establish that the Court can make another supervision order after there has been a finding of breach of a supervision order. If the Court proceeds to make a further supervision order, the combination of the supervision orders cannot exceed an aggregate period of two years.

Clauses 17 and 18 amend sections 100 and 107 of the Act to provide the matters to which the Court must have regard in considering whether to extend an order of custody or guardianship to the Secretary. These are the same criteria as contained in other sections of the Act regarding extensions.

Clause 19 amends the provisions relating to interim protection orders. It provides that the Court must make it a condition of an interim protection order that the parent or person with whom the child is living must produce the child before the Court at the time of the making of the protection order. It also clarifies the fact that the Court can make the final protection order, even if the interim protection order has expired.

Clause 20 inserts a new section 110A into the Act which enables the Court to vary or revoke an interim protection order.

Clause 21 amends sections of the Act in which there should be a reference to the person with whom the child is living as well as a reference to the child's parents.

Clause 22 amends section 116 of the Act to provide that an appeal does not operate as a stay of an order made by the Court unless the Court so orders. The clause also specifies some additional sections of the Act which apply to the County Court when it hears a matter on appeal from the Children's Court. These are sections which may not otherwise apply.

This provision is not intended in any way to limit the application of section 86 of the **Magistrates' Court Act 1989**. For example, the County Court, if hearing an appeal under the Family Division, is obliged to consider the evidence on the balance of probabilities, even though section 82 (1) (c) of the Act is not specifically mentioned in section 116.

Clause 23 amends section 124 of the Act so that it also applies to children for whom the Secretary can exercise rights of custody under the **Adoption Act 1984**. It also amends the section to provide for children who may be under the guardianship of the Secretary pursuant to the **Adoption of Children Act 1964**.

Clauses 24, 25 and 26 amend the provisions of the Act relating to probation orders and youth supervision orders to enable them to operate until a person's nineteenth birthday. The clauses also amend the term of imprisonment that must be available before a probation order or youth supervision order can be made. This reflects amendments to the **Sentencing Act 1991**.

Clause 27 makes a number of amendments to section 169 of the Act. The most significant of these is to enable youth attendance orders to extend beyond a person's eighteenth birthday in keeping with the amendments in clauses 24, 25 and 26.

Clause 28 makes consequential amendments to various sections because of the extension of certain orders beyond a child's eighteenth birthday. These amendments are

necessary as the definition of “child” in the Act is such that the term child cannot be used when referring to someone over the age of eighteen years.

Clause 29 amends section 194 in relation to bail to make it clear that bail can be granted on the adjournment of a breach proceeding.

Clause 30 amends the provisions relating to appeals from the Criminal Division. These are consequential amendments resulting from the amendments contained in clauses 24–27 which provide that probation orders, youth supervision orders and youth attendance orders can continue until a person’s nineteenth birthday. This is necessary so that appeals can be heard even though the person is, by the time of the appeal, over the age of eighteen. These changes are not intended in any way to limit the application of the Magistrates’ Court Act.

Clause 31 amends section 265 of the Act to make it clear that if a person fails to appear or produce the child on the resumption of a hearing, having given an undertaking to do so, the Court can issue a warrant for the purpose of having the child brought before the Court for the resumption of the hearing. This is not intended to limit any other power the Court may have to issue a warrant.

Clause 32 amends section 270 of the Act to make it an offence for any drugs to be in a detention centre without the permission of the Secretary.

Clause 33 makes consequential amendments to section 271 of the Act. This is necessary because of the amendments to interim accommodation orders and interim protection orders.

Clause 34 amends section 271 of the Act. The purpose of this amendment is to clarify the fact that the Secretary or a delegate of the Secretary can consent to medical treatment in relation to children who are the subject of particular orders. The clause also clarifies that only the Secretary or a senior executive officer can authorise someone who is not an officer or employee of the Department to consent to medical treatment. For example, a person who has daily care and control of a child who is the subject of a custody to Secretary order may be authorised to consent to medical treatment in the circumstances outlined in the section.

Clause 35 inserts a new section 279A into the Act.

The purpose of the new section is to prevent the Supreme Court entertaining an action, over which the Children’s Court has exclusive jurisdiction as a result of amendments contained in this Bill.

Clause 36 makes consequential amendments to the regulation-making power.

Clause 37 makes various amendments to the transitional provisions.

Schedule 3 of the Act provided for the transition of orders made prior to the commencement of the Children and Young Persons Act (under the **Community Services Act 1970** and the **Children’s Court Act 1974**) so that any existing orders were, on the commencement of the relevant provisions of the Children and Young Persons Act, treated as orders under the new Act. This was necessary to avoid having some orders in existence which continued to be subject to the old legislation. For example, most orders made by the Children’s Court under the old legislation admitting children to the care of the Department became “guardianship to the Secretary orders” under the Children and Young Persons Act.

Some orders, such as those made by the County Court on appeal, were inadvertently missed by the scope of the existing transitional provisions. These amendments pick up those orders that should have been brought under the Children and Young Persons Act.

The amendments do not invalidate any orders that are currently in existence but provide that they are now to operate as though they are orders made under the Children and Young Persons Act. This will mean that there are not two systems of order operating side by side. It will also be preferable for those who are still the subject of old orders as they will now come under the stricter requirements and protections of the Children and Young Persons Act.

Clause 38 contains statute law revision amendments.

Clause 39 amends the **Community Services Act 1970**.

Clause 39 (1) makes it clear that the power to make authorisations can only be delegated to a senior executive officer.

Clause 39 (2) amends section 13A of the **Community Services Act 1970** to make it clear that the Secretary only has to be consulted about the extension of a child care agreement if the child has been in the care of the service provider for six months.

Clause 40 makes consequential amendments to the **Children and Young Persons (Amendment) Act 1992**. The most significant amendment is clause 40 (3) which provides for pre-hearing conferences under section 82A of the Act to operate until 30 June 1995 rather than 14 June 1994.