

## Summary of amendments contained in the *Children and Young Persons (Care and Protection) Amendment Act 2018*

Amendment	Sections	Summary of amendment
<b>Service provision</b>	Sections 17(2) and 18(3)	<ul style="list-style-type: none"> <li>• FACS may request an agency or funded NGO to provide prioritised access to services to a child or young person who is at risk of significant harm.</li> <li>• Providers of health services will continue to use their best endeavours to comply with a request, consistent with clinical presentation and need. The responsibilities and functions of a department or agency who provides health services have been clarified.</li> </ul>
<b>Meaning of 'children's services'</b>	Section 27(4)	<ul style="list-style-type: none"> <li>• The reference to 'children's services' in the mandatory reporter provisions will be consistent with the definitions provided in the <i>Children (Education and Care Services) National Law (NSW)</i> and <i>Children (Education and Care Services) Supplementary Provisions Act 2011</i>.</li> </ul>
<b>Care Plans by consent - Guardianship orders by consent</b>	Section 38(2A), (2B)	<ul style="list-style-type: none"> <li>• The amendment aims to make it clear that the Court may make a guardianship order by consent without the need to make a finding that there is no realistic possibility of restoration under s 79A(3).</li> <li>• All parties must receive independent legal advice (formerly independent advice) where the Court has been requested to consider making an order that allocates parental responsibility or aspects of parental responsibility to any person other than the parents of the child or young person.</li> <li>• Legal representation for a child or young person under section 98 has been referenced in a Notation.</li> <li>• The legislative protections relating to probity checks and documentation have been maintained.</li> <li>• The Court must also be satisfied that             <ol style="list-style-type: none"> <li>a) the proposed order will not contravene the principles of the Act and</li> <li>b) the parties to the care plan understand its provisions and have freely entered into it.</li> </ol> </li> <li>• The Court is not required to be satisfied that the child or young person is in need of care and protection pursuant to s71.</li> <li>• Registry staff have been directed to list any s 38 Care Plan where an order is sought by the Court. This is to ensure that the Court can be satisfied of the requirements under the Act including the requirement to ensure that, where it is required, the parties to the care plan have received independent legal advice.</li> <li>• A Practice Note will be issued shortly in relation to these matters.</li> <li>• <i>Transitional provision</i> – Amendments do not apply to care plan entered into before commencement.</li> </ul>
<b>Alternative Dispute Resolution (ADR)</b>	Sections 37(1A), (1B), (1C)	<ul style="list-style-type: none"> <li>• FACS must offer the family of a child or young person ADR before seeking care orders from the Children's Court, if the Secretary determines the child or young person is at risk of significant harm.</li> <li>• Family Group Conferencing will be the primary ADR process used prior to legal proceedings being commenced.</li> <li>• Dispute Resolution Conferences conducted by Children's Registrars will continue to be primary ADR process used once legal proceedings have been commenced to allow legal representation throughout the ADR process and ensure that the child representative is involved in the ADR process.</li> </ul>

Amendment	Sections	Summary of amendment
		<ul style="list-style-type: none"> <li>• Exception to the mandatory offer of ADR where participation in ADR processes is not appropriate due to exceptional circumstances.</li> <li>• Where the Secretary becomes aware of criminal proceedings or a police investigation, the Secretary must seek advice from Police and is not required to offer ADR processes if of the opinion that it is not appropriate to do so, after taking Police advice into account.</li> <li>• <i>Transitional provision</i> – amendment only applies to determinations made by the Secretary on or after commencement.</li> </ul>
<b>Care responsibility on death of guardian or carer with full parental responsibility</b>	Section 39A	<ul style="list-style-type: none"> <li>• Care responsibility will vest in the Secretary upon the Secretary becoming aware of the death, for a maximum period of 21 days.</li> <li>• This will allow FACS time to conduct assessments and make any relevant Court applications concerning the care arrangements for the child or young person.</li> <li>• The Bill includes an ancillary power of delegation from the Secretary to support the amendment.</li> <li>• The death is a reportable death for the purposes of section 172A(2).</li> </ul>
<b>Dispensing with consent to adoptions by guardians</b>	Section 67(1)(d), <i>Adoption Act 2000</i>	<ul style="list-style-type: none"> <li>• Currently, the Supreme Court may dispense with the requirement for consent of a person to a child’s adoption if an application has been made for the adoption of the child by their authorised carers if the child has established a stable relationship with those carers, the adoption of the child by those carers will promote the child’s welfare, and in the case of an Aboriginal child, alternatives to placement for adoption have been considered. This has been extended to application for adoption by guardians.</li> </ul>
<b>Shorter term court orders</b>	Section 79(9), (10)	<ul style="list-style-type: none"> <li>• Where the Children’s Court approves a permanency plan involving restoration, guardianship or adoption, the maximum period for which an order may be made allocating all aspects of parental responsibility to the Minister is 24 months, unless the Children’s Court is satisfied that special circumstances exist.</li> <li>• This amendment is intended to emphasise the cascading permanent placement principles of restoration, guardianship and adoption, and the use of shorter term court orders to achieve those ends.</li> <li>• <i>Transitional provision</i> – Amendment applies to proceedings pending immediately before commencement.</li> </ul>
<b>Section 82 reports</b>	Section 82(3), (3A)	<ul style="list-style-type: none"> <li>• Where the Children’s Court is not satisfied that proper arrangements have been made for the care and protection of the child or young person, the Court may re-list the matter for a progress review.</li> <li>• At this progress review the parties may provide evidence and make submissions to the Court in relation to their efforts to implement the care plan.</li> <li>• The power to invite parties to make an application for leave under section 90 has been removed.</li> </ul> <p><i>Transitional provision</i> – Amendment only applies to reports ordered after commencement.</p>
<b>New test of realistic possibility of</b>	Section 83 (2), (3), (5), (5A),	<ul style="list-style-type: none"> <li>• FACS must assess, and the Children’s Court must expressly find, there is a realistic possibility of restoration “within a reasonable period”, not exceeding 24 months.</li> </ul>

Amendment	Sections	Summary of amendment
restoration	(7)(b), (8A)	<ul style="list-style-type: none"> <li>• The new test is intended to facilitate shorter term court orders being made, by overcoming the point-in-time assessment of whether there is a realistic possibility of restoration at the time an order is being made.</li> <li>• <i>Transitional provision</i> – Amendment applies to assessments or findings occurring on or after commencement</li> </ul>
Contact orders for the life of a guardianship order	Section 86(8)	<ul style="list-style-type: none"> <li>• The Children’s Court may make contact orders for more than 12 months, where a guardianship order is made, and it is in the best interests of the child or young person to make the order.</li> <li>• The option to vary the contact order by a contact variation agreement is still available.</li> </ul> <p><i>Transitional provision</i> – amendment applies irrespective of whether a guardianship order was made before or after the commencement of the section and includes pending applications.</p>
Section 90 – primary and additional considerations for leave factors	Section 90(2A), (2B), (2C)	<ul style="list-style-type: none"> <li>• The Bill introduces a new, two-tiered approach for the Children’s Court’s consideration of an application for leave to vary or rescind a care order.</li> <li>• The Court will be required to have regard to primary considerations and additional considerations, where they are relevant.</li> <li>• The primary considerations are: <ul style="list-style-type: none"> <li>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</li> <li>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</li> <li>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.</li> </ul> </li> <li>• The additional considerations are: <ul style="list-style-type: none"> <li>a) the age of the child or young person,</li> <li>b) the nature of the application,</li> <li>c) the plans for the child or young person,</li> <li>d) whether the applicant has an arguable case</li> <li>e) matters concerning the care and protection of the child as identified in a s82 report or a report of the Children’s Guardian under s85A or s150.</li> </ul> </li> </ul> <p><i>Transitional provision</i> – amendment does not apply to applications for leave that were pending before commencement.</p>
Section 90 - Summary dismissal power	Section 90 (2D), (2E)	<ul style="list-style-type: none"> <li>• The Children’s Court may dismiss an application for leave to vary or rescind care orders under section 90 in the following circumstances: <ul style="list-style-type: none"> <li>• If the Court is satisfied that the application is frivolous, vexatious or an abuse of process, or</li> <li>• If the Court is satisfied that the application has no reasonable prospect of success, and the applicant has previously made a series of applications for leave that the Court has dismissed.</li> </ul> </li> </ul> <p><i>Transitional provision</i> – amendment does not apply to applications for leave that were pending before commencement.</p>

Amendment	Sections	Summary of amendment
<b>Varying interim care orders</b>	Section 90AA	<ul style="list-style-type: none"> <li>• All parties may apply to vary an interim care order without the need to make an application under s90 (confirming the position under re Mary [2014] NSW ChC 7).</li> <li>• The Children’s court may vary an interim care order if satisfied on an application made to it, that it is appropriate to do so.</li> <li>• A form of application is being prepared but the President does not at this stage plan to require the parties to file a written application by way of Practice Note.</li> <li>• <i>Transitional provision</i> – Amendment applies to proceedings pending immediately before commencement.</li> </ul>
<b>Publication of names and identifying information</b>	Section 105(1AA), (3)	<ul style="list-style-type: none"> <li>• Prohibition against publication of information identifying that a child or young person is under the parental responsibility of the Minister or in OOHC has been broadened.</li> <li>• Exceptions have been introduced to allow for the Coroner to publish their findings and to allow them to consent to the publication of the identity of a child or young person whose suspected death is the subject of an inquest if it is in the public interest.</li> </ul> <p><i>Transitional provision</i> – applies retrospectively.</p>
<b>Removing supported OOHC arrangements that are unsupported by a Court order</b>	Sections 135, 153, 155, 161	<ul style="list-style-type: none"> <li>• The Secretary may provide support to relatives or kin who have, pursuant to a relevant court order, been allocated parental responsibility for the child or young person.</li> <li>• Amendments have been made to the provisions that relate to the review of supported care placements that are supported by a Court order to provide that a self-assessment by the carer is required annually.</li> </ul>
<b>Restoration timeframes</b>	Section 136(3)	<ul style="list-style-type: none"> <li>• Where the Children’s Court has determined that there is a realistic possibility of restoration and has endorsed a permanency plan that proposes restoration at some future date, FACS can restore children to the care of their parents within <b>12 months</b> (previously six months) of that date.</li> </ul> <p><i>Transitional provision</i> – applies retrospectively.</p>
<b>Stronger penalty options</b>	Sections 227, 228	<ul style="list-style-type: none"> <li>• The Bill amends the abuse and neglect offences in the Care Act, to include a term of imprisonment of up to two years in addition to, or as an alternative to, the monetary penalties currently available.</li> </ul>