

Child Welfare Amendment Bill 2001

Explanatory Notes

Background

Western Australia's existing child welfare laws are outdated and in much need of an overhaul. Modern child welfare legislation is under development to replace the *Child Welfare Act 1947*. Delays in finalising new legislation has resulted in the need, as an interim measure, to make a number of urgent amendments to the *Child Welfare Act 1947*.

The major part of the Bill implements a national agreement between the Governments of Western Australia, other Australian States and Territories and New Zealand, for the efficient transfer of child protection orders and proceedings for children who move between jurisdictions.

In October 1996, the Australian and New Zealand Community Services Minister's Council agreed that New Zealand and the States and Territories of Australia should develop model legislation that addressed cross-jurisdictional issues in child protection. By way of example, this might be required when the foster family of a child under the guardianship of the department needs to move interstate. Or, in some cases, the best placement for a child under guardianship may be with extended family members who live in another State.

The Community Services Ministers' Council endorsed the model legislation in 1999 and agreed that each State, Territory and New Zealand would amend their respective child welfare laws to implement the reciprocal legislation.

A uniform Protocol to provide practical guidelines for the transfer of child protection orders and proceedings has also been implemented. The Protocol outlines a process for States that wish to transfer or accept the transfer of a child protection order or proceeding. The Protocol emphasises the need for the careful planning of transfers and co-operation between the States.

The reciprocal legislation is designed to allow the efficient transfer of children under the legal protection of one state to the legal protection of another state. It recognises that a child's welfare and protection is best managed by the jurisdiction where the child is living.

Most States and New Zealand have already implemented, or are close to implementing, the reciprocal legislation.

Clause Notes

Clause 1: Short Title

Short title of Act.

Clause 2: Commencement

The Act comes into operation on the day on which it receives the Royal Assent.

Clause 3: The Act amended

The amendments proposed throughout the Act are amendments to the *Child Welfare Act 1947*.

Clause 4: Part 1 heading inserted

Clause 4 inserts a heading “Part 1 – Preliminary” before section 1.

Clause 5: Section 3A inserted

Clause 5 inserts a new section 3A to ensure that the interests of a child are given paramount consideration. Western Australia is the only state in Australia that does not reflect this principle in child welfare legislation. The clause will ensure consistency throughout Australian jurisdictions. It will provide legal guidance to the Children’s Court and practitioners in Western Australia when considering child protection matters, including those relating to interstate transfer of orders and proceedings.

Clause 6: Section 4 amended

Clause 6 amends section 4(1) by omitting the current definition of “near relative” and “parent” and inserting new definitions. The current definition of “parent” does not include a father who has never been married to the child’s mother. This means that the unmarried father of a child who is the subject of child protection court proceedings is not recognised as a party in the proceedings and can not give evidence unless called as a witness. The new definition of “parent” removes the current discrimination against unmarried fathers. The definition of “near relative” is consequently amended.

Clause 7: Section 10C inserted

Clause 7 inserts a new section 10C to provide for exchange of information between the Director General of the Department for Community Development and a “corresponding authority” or a “public authority”. The new clause provides a definition of “corresponding authority” and “public authority”. The clause identifies the type of information that can be exchanged by providing a definition of “relevant information”. The clause will enable increased flexibility for departmental officers when requesting information, relating to the protection and welfare of children, from other Government agencies. There is no mandatory requirement to provide the information requested however, the requested agency may comply with the information request despite any other written law to the contrary.

The development of Protocols for the exchange of information with other Government agencies is planned to address practice issues.

Clause 8: Section 66A amended

Clause 8 amends section 66A (“Reciprocity between States as to care of wards and children under control of Department”) as a consequence of clause 10, which inserts a new Part VIIIA (Transfer of child protection orders and proceedings).

Clause 9: Sections 67 and 68 inserted

Clause 9 inserts two new sections which make provision for a departmental officer or a police officer to apply to the Children’s Court for a warrant to apprehend a child who has been committed to the care of the Director General and unlawfully removed. The provision also covers children who have been apprehended by the Department as being in need of care and protection, where the court proceedings have not yet been finalised. Warrant provisions are important to assist officers in apprehending children who may have run away or been unlawfully taken. Such provisions are currently not available in the *Child Welfare Act 1947*. The provision has jurisdiction within Western Australia. In addition, it will also allow for the return of children who have been removed from Western Australia when used in association with Commonwealth legislation (*Service and Execution of Process Act 1992*).

The new section 68 details the procedures to be followed when applying for a warrant. The provision provides for urgent and geographically isolated situations whereby a warrant can be sought using telephone, fax, email and radio.

Clause 10: Part VIIIA Inserted

Clause 10 inserts new Part VIIIA (Transfer of child protection orders and proceedings).

Clause 10: Inserts section 120A. – Purpose of Part

Section 120A sets out the purpose of the Part.

Clause 10: Inserts section 120B. – Interpretation

Section 120B sets out the definitions of the Part. The definitions include the meaning of “child protection order”, “child protection proceeding”, “child welfare law”, “Children’s Court”, “clerk of the court”, “home order”, “interim order”, “interstate law”, “interstate officer”, “participating State”, “sending State”, “State” and “working day”.

Clause 10: Inserts section 120C. – When Director-General may transfer order

Section 120C provides for the Director General to administratively transfer a child protection order interstate if certain requirements are satisfied, including the requirement for the relevant interstate officer to consent to the proposed transfer.

In addition, it must be possible to make a child protection order in the receiving State, which has the same, or similar effect, as the Western Australian child protection order. If the Director General decides to transfer a child protection order, he or she must indicate the period for which the order is to remain in force in the receiving State. The period of time can not be greater than if the order had not been transferred.

Clause 10: Inserts section 120D. – Director-General to have regard to certain matters

Section 120D requires the Director General to have regard to certain matters when deciding whether or not to transfer a child protection order to another State. The matters include having regard to which child protection department would be best able to administer the child protection order and the desirability of a child protection order being an order under the child welfare law of the State where the child resides.

Clause 10: Inserts section 120E. – Notification of decision to transfer

Section 120E provides that the Director General must, as soon as practicable but within 3 working days, make all reasonable efforts to inform the child’s parents, the child (who has reached 10 years of age) and any other person (who has a direct interest in the care, welfare or development of the child), of the decision to transfer the child protection order. The Director General must indicate the date of the decision and that if any person wishes to make a judicial review application in relation to the decision, they must do so and give notice of the review application to the Director General within 21 days after the day of the decision.

Clause 10: Inserts section 120F. – Limited period for review of decision

Section 120F provides that there is a limited period for reviewing a decision to administratively transfer a child protection order. The reason for restricting the time period for a judicial review is to limit the amount of time that the child must wait before the order can be transferred interstate.

In developing the reciprocal legislation, the participating States recognised that,

- it is inappropriate to transfer and register a child protection order in the receiving State before any review or appeal is heard and completed in the sending State, therefore no transfer should occur until after the expiration of the appeal period;
- it is in a child's best interests to resolve transfer procedures quickly so as to limit the period of time that the child must wait in uncertainty before a transfer decision becomes final. Since the transfer is ineffective until the appeal period has expired, the judicial review period should be shortened without option for extension.

Clause 10: Inserts section 120G. – When court may transfer order

Section 120G provides for the Children's Court to order transfer of child protection orders on application of the Director General, provided that the orders are not subject to appeal, the appeal period has expired and the relevant interstate officer has consented to the transfer in writing.

Clause 10: Inserts section 120H. – Service of application

Section 120H identifies who must be given a copy of an application by the Director General for the judicial transfer of a child protection order.

Clause 10: Inserts section 120I. – Court to have regard to certain matters

Section 120I sets out the matters that the Children's Court must have regard to when determining whether to transfer a child protection order to another State. The matters include consideration of whether the Director General or an interstate officer is in the better position to exercise powers and responsibilities under a child protection order, and the desirability of a child protection order being an order under the child welfare law of the State where the child resides.

Clause 10: Inserts 120J. – Type of order

Section 120J provides for the Children’s Court to determine what the transferred order would become in the receiving State. Unlike administrative transfers, the Children’s Court may specify an order, if in the best interests of the child to do so, which is different to the order that exists at the time of the transfer application. The following are examples of situations when this is likely to occur;

- the sending State may have an order that is not available in the receiving State;
- transferring the order interstate may mean that a different order is appropriate;
- circumstances may have changed since the original order was made and the transferred order should be a different type of order.

The Children’s Court is required to determine the period for which the transferred order should operate in the receiving State. The period of the transferred order is not to be longer than the maximum period possible for an order of that type which could be made in the receiving State.

Clause 10: Inserts section 120K. – Court shall consider report from the Director-General

Section 120K requires the Court to consider a report from the Director General, in relation to the child, before making a transfer order.

Clause 10: Inserts section 120L. – Appeals

Section 120L outlines the process for appeal of a Children’s Court decision to transfer a child protection order or the refusal to transfer an order. Appeals are to the Supreme Court. The process provides for a short period of 10 days during which an appeal may be lodged and requires a hearing to proceed expeditiously.

Clause 10: Inserts section 120M. – When court may make order under this Division

Section 120M indicates when the Children’s Court can order the transfer of a child protection proceedings to the Children’s Court of a participating State. The order can only be made if the Director General applies for the transfer and the relevant interstate officer has consented in writing to the transfer. The Children’s Court has no power to review a decision made by the interstate officer not to consent to a transfer.

Clause 10: Inserts section 120N. – Service of application

Section 120N identifies who must be served with a copy of an application by the Director General for the judicial transfer of a child protection proceeding.

Clause 10: Inserts section 120O. – Court to have regard to certain matters

Section 120O identifies the matters that the Children's Court must have regard to, when deciding whether to transfer a child protection proceeding to another State. The matters include;

- whether any other proceedings relating to the child are pending, or have previously been heard and determined, under the child welfare law in the participating State;
- the place where any of the matters giving rise to the proceeding in the Court arose; and
- the place of residence, or likely place of residence, of the child, his or her parents and any other people who are significant to the child.

The section also requires the Director General to inform the Court if the Director General is aware that a child is subject to certain sentencing orders or criminal proceedings.

Clause 10: Inserts clause 120P. – Interim order

Section 120P provides for the Children's Court to grant an interim order if the Court has made a decision to transfer a child protection proceeding. An interim order may release the child into a person's care subject to any conditions that the Court considers appropriate. An interim order may also give responsibility for the supervision of the child to an interstate officer or another person in the receiving State. If the Court transferred a child protection proceeding, it would most likely also grant an interim order to clarify the respective rights and responsibilities of the parties in relation to the care of the child. An interim order remains in force as specified by the Court for a period up to 30 days.

Clause 10: Inserts clause 120Q. – Appeals

Section 120Q outlines the process for appeal of a Children's Court decision to transfer a child protection proceeding or the refusal to transfer a proceeding. Appeals are to the Supreme Court. The process provides for a short period of 10 days during which an appeal may be lodged and requires a hearing to proceed expeditiously.

Clause 10: Inserts 120R. – Filing of interstate orders in the court

Section 120R provides directions for the Director General to file interstate documents in the Children's Court, including interim orders, relating to the transfer of child protection orders and proceedings to Western Australia.

Clause 10: Inserts 120S. – Registration of interstate orders

Section 120S provides for the clerk of the Children's Court to register interstate child protection orders and proceedings that are transferred to Western Australia. The registration is to occur following the filing of documents by the Director General under section 120 R.

Clause 10: Inserts 120T. – Notification by clerk of court

Section 120T requires that the clerk of the Western Australian Children's Court must immediately notify the interstate officer and the interstate Children's Court when the Western Australian Children's Court registers or revokes orders relating to the transfer of child protection orders and proceedings to Western Australia. This provision will enable the interstate officer and the interstate Children's Court to know the date when the transferred order is registered in Western Australia and therefore, when their local order no longer applies.

Clause 10: Inserts 120U. – Effect of registration

Section 120U provides for the effect of registering an interstate child protection order or interim order or the transfer of a child protection proceeding to Western Australia. Such registered orders are to be treated as if they occurred under the *Child Welfare Act 1947* on the day of registration.

Clause 10: Inserts 120V. – Revocation of registration

Section 120V provides for the revocation of the registration of any document filed under section 120S. The circumstances in which registration of interstate orders may be revoked are limited to situations where the transfer order was subject to review, appeal or stay, or the time for such a review, appeal or stay had not expired in the sending State. Later re-registration of a transfer order is possible even though revocation has occurred.

Clause 10: Inserts 120W. – Effect of registration of transferred order

Section 120W provides for the effect of the interstate registration of a Western Australian child protection order that has been transferred. Registration of the order interstate revokes the Western Australian order. Under corresponding interstate legislation, the registration will result in there being a child protection order in the receiving State, which will be regarded as an order of that State.

If the interstate registration of the order were revoked, the Western Australian order would be revived as if it had not been transferred.

Clause 10: Inserts 120X. – Transfer of court file

Section 120X provides for the Western Australian Children's Court to transfer the court documents interstate to the receiving State where the Children's Court has transferred a child protection order or proceeding; and where the transfer is not subject to any review, appeal or stay and the time for seeking a review, appeal or stay has expired.

Clause 10: Inserts 120Y. – Hearing and determination of transferred proceeding

Section 120Y enables the Children's Court in Western Australia to not be bound by any finding made in proceedings in the sending State. However, the Court may have regard to the transcript of, or any evidence heard in, such proceedings.

Clause 10: Inserts 120Z. – Disclosure of information

Section 120Z enables the Director General to disclose to an interstate officer such information as the Director General considers is necessary for the interstate officer to perform his or her child welfare duties and responsibilities. If the Director General receives information from an interstate officer, that information is to be treated as if given directly to the Director General instead of to an interstate officer.

Clause 10: Inserts 120ZA. – Discretion of Director-General to consent to transfer

Section 120ZA enables the Director General to consent, or refuse to consent, to the transfer of a child protection order or proceeding to Western Australia. Transfer of child protection orders and proceedings can not occur without agreement by both the receiving State and sending State.

Clause 10: Inserts 120ZB. – Evidence of consent of relevant interstate officer

Section 120ZB relates to the evidential effect of certain documents or copies of documents that purport to be written by an interstate officer or his or her delegate.