

Appendix 3: Legislation

Child protection legislation

Commonwealth

Family Law Act 1975

New South Wales

Children and Young Persons (Care and Protection) Act 1998

Victoria

Children and Young Persons Act 1989

Queensland

Child Protection Act 1999

Health Act 1937

Western Australia

Child Welfare Act 1947

Community Services Act 1972

South Australia

Family and Community Services Act 1972

Children's Protection Act 1993

Tasmania

Children, Young Persons and Their Families Act 1997

Alcohol and Drug Dependency Act 1968

Australian Capital Territory

Children and Young People Act 1999

Northern Territory

Community Welfare Act 1983

Legislative definition of 'in need of care and protection'

For a child to be placed under an order, a court needs to determine whether the child is in need of care and/or protection. Each State and Territory has legislation defining 'in need of care and protection'.

New South Wales

Prior to 18 December 2000 in New South Wales, a child was defined under section 10, subsection (1) in the *Children (Care and Protection) Act 1987* as being in need of care if:

- (a) adequate provision was not being made, or was not likely to be made, for the child's care; or
- (b) the child was being, or was likely to be, abused; or
- (c) there was a substantial and presently irretrievable breakdown in the relationship between the child and one or more of the child's parents.

Section 10, subsection (2) of the Act also stated that a child who was residing in a non-government children's home was in need of care if (without limiting the generality of subsection (1)):

- (a) the child had been residing in the home for a period of 12 months or more; and
- (b) there had been no substantial contact during that period between the child and:
 - (i) any of the child's parents; or
 - (ii) any person in whose care the child was immediately before the child began residing in the home.

Section 10, subsection (3) of the Act stated that a child was in need of care if (without limiting the generality of subsection (1)):

- (a) the child was under the age of 6 months; and
- (b) the child was in the care of a person who is fostering the child in contravention of Section 42 (which deals with unauthorised fostering); and
- (c) it appeared that the person may continue to foster the child in contravention of that section.

From 18 December 2000 in New South Wales, a child or young person must be found under section 71, *Children and Young Persons (Care and Protection) Act 1998* to be in need of care and protection by reason of any of the following:

- (a) lack of, or serious difficulties with, parental care;
- (b) physical or sexual abuse or ill-treatment;
- (c) the child or young persons' basic physical, psychological or educational needs may not be met;
- (d) possible serious developmental impairment or serious psychological harm arising from the child or young person's domestic environment;
- (e) sexually abusive behaviour by a child under 14 years of age; or
- (f) pre-existing order of another jurisdiction.

Victoria

In Victoria, section 63 of the *Children and Young Persons Act 1989* indicates that a child is in need of protection if any of the following grounds exist:

- (a) the child has been abandoned and after reasonable inquiries the parent(s) cannot be found, and no other suitable person can be found who is willing and able to care for the child;
- (b) the child's parent(s) are dead or incapacitated and there is no other suitable person willing and able to care for the child;
- (c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury or sexual abuse, and the child's parent(s) have not protected, or are unlikely to protect, the child from harm of that type;
- (d) the child has suffered, or is likely to suffer, emotional or psychological harm of such kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parent(s) have not protected, or are unlikely to protect, the child from harm of that type;
- (e) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parent(s) have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange, or allow the provision of, basic care or effective medical, surgical or other remedial care.

Queensland

In Queensland, sections 9 and 10 of the *Child Protection Act 1999* (introduced in March 2000) define a child 'in need of protection' as a child who:

- (a) has suffered harm, is suffering harm or has an unacceptable risk of suffering harm; and
- (b) does not have a parent able and willing to protect the child from harm.

'Parent' is defined broadly to include persons 'having or exercising parental responsibility for the child' and includes a person who, under Aboriginal or Torres Strait Islander tradition or custom, is regarded as a parent of the child.

'Harm' is defined as 'any detrimental effect of significant nature on the child'.

Western Australia

In Western Australia, a 'child in need of care and protection' is defined in the *Child Welfare Act 1947* to include a child who:

- (a) has no sufficient means of subsistence apparent to the court and whose near relatives are, in the opinion of the court, in indigent circumstances or are otherwise unable or unwilling to support the child, or are dead, or are unknown, or cannot be found, or are out of the jurisdiction, or are in the custody of the law; or
- (b) has been placed in a subsidised facility and whose near relatives have not contributed regularly towards the maintenance of the child; or
- (c) associates or dwells with any person who has been convicted of vagrancy, or is known to the police as of bad repute, or who has been or is reputed to be a thief or habitually under the influence of alcohol or drugs; or
- (d) is under the guardianship or in the custody of a person whom the court considers is unfit to have that guardianship or custody; or
- (e) is not being maintained properly or at all by a near relative, or is deserted; or

- (f) is found in a place where any drug or prohibited plant is used and is in the opinion of the court in need of care and protection by reason thereof; or
- (g) being under the age of 14 years is employed or engaged in any circus, travelling show, acrobatic entertainment, or exhibition by which his life, health, welfare or safety is likely to be lost, prejudiced or endangered; or
- (h) is unlawfully engaged in street trading; or
- (i) is ill-treated, or suffers injuries apparently resulting from ill-treatment; or
- (j) lives under conditions which indicate that the child is lapsing or likely to lapse into a career of vice or crime; or
- (k) is living under such conditions, or is found in such circumstances, or behaves in such a manner, as to indicate that the mental, physical or moral welfare of the child is likely to be in jeopardy.

South Australia

In South Australia, under the *Children's Protection Act 1993*, an application may be made to the Youth Court when the Minister is of the opinion that:

- (a) the child is at risk and an order should be made to secure the child's care and protection; or
- (b) disruption of existing arrangements for the child would be likely to cause the child psychological injury and it would be in the best interest of the child for the arrangement to be the subject of a care and protection order.

For the purposes of the Act, a child is at risk if:

- (a) the child has been, or is being, abused or neglected; or
- (b) a person with whom the child resides (whether a guardian of the child or not):
 - (i) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; or
 - (ii) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person; or
- (c) the guardians of the child:
 - (i) are unable to maintain the child, or are unable to exercise adequate supervision and control over the child; or
 - (ii) are unwilling to maintain the child, or are unwilling to exercise adequate supervision and control over the child; or
 - (iii) are dead, have abandoned the child, or cannot, after reasonable inquiry, be found; or
- (d) the child is of compulsory school age but has been persistently absent from school without satisfactory explanation of the absence; or
- (e) the child is under 15 years of age and of no fixed address.

The *Children's Protection Act 1993* also covers the practice of female genital mutilation. For the purposes of the Act the following definitions of female genital mutilation are used:

Under section 26A(1) female genital mutilation means:

- (a) clitoridectomy; or
- (b) excision of any other part of the female genital organs; or

- (c) a procedure to narrow or close the vaginal opening; or
- (d) any other mutilation of the female genital organs, but does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose.

Under section 26B(1) on the protection of children at risk of genital mutilation, if the court is satisfied that there are reasonable grounds to suspect that the child may be at risk of female genital mutilation, the court may make orders for the protection of the child: for example, preventing a person from taking the child from the State, or requiring that the child's passport be held by the court for a period specified in the order or until further order, or providing for periodic examination of the child to ensure that the child is not subject to female genital mutilation.

Part 5 of the Children's Protection Act also states that family care meetings should be convened in respect of the child if the Minister believes that a child is at risk and that arrangements should be made to secure the child's care and protection. The Minister cannot make an application for an order granting custody of the child or placing the child under guardianship before a family care meeting has been held unless satisfied that:

- (a) it has not been possible to hold a meeting despite reasonable endeavours to do so; or
- (b) an order should be made without delay; or
- (c) the guardians of the child consent to the making of the application; or
- (d) there is another good reason to do so.

The department will consider taking court action for a care and protection order only when no other intervention can safely protect a child who is at risk by definition of the Act. There are powers which the Youth Court may exercise when it finds that a child is in need of care and protection.

New care and protection orders tend to be for no longer than 12 months, although a second or subsequent order can be granted to complete a reunification process. The child may then be placed under the guardianship of the Minister or such other person or persons the court thinks appropriate, until 18 years of age.

Tasmania

In Tasmania, *The Children, Young Persons and Their Families Act 1997* defines abuse or neglect as:

- (a) sexual abuse; or
- (b) physical or emotional injury or other abuse, or neglect, to the extent that:
 - (i) the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or
 - (ii) the injured, abused or neglected person's physical or psychological development is in jeopardy.

The Act provides the following definition of a child at risk:

- (a) the child has been, is being, or is likely to be, abused or neglected; or
- (b) any person with whom the child resides or who has frequent contact with the child (whether the person is or is not a guardian of the child):
 - (i) has threatened to kill or abuse or neglect the child and there is a reasonable likelihood of the threat being carried out; or

- (ii) has killed or abused or neglected some other child or an adult and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person; or
- (c) the guardians of the child are:
 - (i) unable to maintain the child; or
 - (ii) unable to exercise adequate supervision and control over the child; or
 - (iii) unwilling to maintain the child; or
 - (iv) unwilling to exercise adequate supervision and control over the child; or
 - (v) dead, have abandoned the child or cannot be found after reasonable inquiry; or
 - (vi) are unwilling or unable to prevent the child from suffering abuse or neglect; or
- (d) the child is under 16 years of age and does not, without lawful excuse, attend school regularly.

Child and Family Services staff make a decision about whether a child is at risk or not through a process of gathering, confirming and analysing information, using their expertise and, where necessary, that of other professional people.

Australian Capital Territory

In the Australian Capital Territory a new Act, *the Children and Young People Act 1999*, was introduced in May 2000. This Act states that a child is in need of care and protection if:

- (a) he or she has been, is being or is likely to be, abused or neglected; and
- (b) no-one with parental responsibility for the child or young person is willing and able to protect him or her from suffering the abuse or neglect.

Abuse in relation to a child or young person means:

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) emotional abuse (including psychological abuse) if the child or young person:
 - (i) has suffered, is suffering or is likely to suffer in a way that has caused, is causing or is likely to cause significant harm to his or her wellbeing or development; or
 - (ii) has been, is being or is likely to be exposed to conduct that is a domestic violence offence within the meaning of the *Domestic Violence Act 1986* and that has caused, is causing or is likely to cause significant harm to his or her wellbeing or development.

Neglect of a child or young person means a failure to provide the child or young person with a necessity of life that has caused, is causing or is likely to cause the child or young person significant harm to his or her wellbeing or development. Necessities include food, shelter, clothing and medical care.

Without limiting the above, a child or young person is also in need of care and protection in any of the following circumstances:

- (a) if a person with whom the child or young person lives or is likely to live:
 - (i) has threatened to kill or injure the child or young person and there is a real possibility of the threat being carried out; or
 - (ii) has killed, abused or neglected a child or young person and there is a real possibility of the person killing, abusing or neglecting the relevant child or young person;

and no-one with parental responsibility is willing and able to protect the child or young person;

- (b) no-one with the parental responsibility for the child or young person (other than the chief executive) is willing and able to provide him or her with adequate care and protection;
- (c) if there is serious, persistent conflict between the child or young person and the people with parental responsibility for him or her (other than the chief executive) to such an extent that the care and protection of the child or young person is, or is likely to be, seriously disrupted;
- (d) the people with parental responsibility for the child or young person (other than the chief executive) are:
 - (i) dead, have abandoned him or her or cannot be found after reasonable enquiry; or
 - (ii) unwilling or unable to keep him or her from engaging in self-damaging behaviour; or
 - (iii) sexually or financially exploiting the child or young person or unwilling or unable to keep him or her from being sexually or financially exploited; or
- (e) the child or young person is the subject of a child protection order in a State that is not being complied with.

Action taken by ACT Family Services in relation to a report (notification) is at the discretion of the Chief Executive as per section 161 of the Act.

The Act reflects an increased emphasis on family support and prevention services to assist children, young people and their families.

Northern Territory

In the Northern Territory, section 4(2) of the *Community Welfare Act 1983* states that a child is in need of care where:

- (a) the parents, guardian/person having the custody have abandoned the child and cannot, after reasonable enquiry, be found; or
- (b) the parents, guardian/person having the custody are unwilling or unable to maintain the child; or
- (c) the child has suffered maltreatment; or
- (d) the child is not subject to effective control and is engaging in conduct which constitutes a serious danger to his or her health or safety; or
- (e) being excused from criminal responsibility under section 38 of the Criminal Code (being under 10 years of age), the child has persistently engaged in conduct which is so harmful or potentially harmful to the general welfare of the community, measured by commonly accepted community standards, as to warrant action under this Act for the maintenance of those standards.

For the purpose of the *Community Welfare Act 1983*, a child shall be taken to have suffered maltreatment where he or she has/is suffered or are at substantial risk of suffering and of the following:

- (a) a physical injury causing temporary or permanent disfigurement or serious pain or impairment of a bodily function or the normal reserve or flexibility of a bodily function, inflicted or allowed to be inflicted by a parent, guardian or person having the

custody of the child, or where there is substantial risk of the child suffering such an injury or impairment;

- (b) serious emotional or intellectual impairment evident by severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which the child belongs, whether a result of physical surroundings, nutritional or other deprivation, or the emotional or social environment in which the child is living, or where there is a substantial risk that such surroundings, deprivation or environment will cause such emotional or intellectual impairment;
- (c) serious physical impairment evidenced by severe bodily malfunctioning, whether a result of the child's physical surroundings, nutritional or other deprivation, or the emotional or social environment in which the child is living, or where there is a substantial risk that such surroundings, deprivation or environment will cause such impairment;
- (d) sexual abuse or exploitation, and the child's parents, guardians or persons having custody of the child are unable or unwilling to protect him or her from such abuse or exploitation; or
- (e) female genital mutilation, where a female child shall be taken to have suffered female genital mutilation where she:
 - (i) has been subjected, or there is substantial risk that she will be subjected, to female genital mutilation, as defined in section 186A of the Criminal Code; or
 - (ii) has been taken, or there is substantial risk that she will be taken, from the Territory with the intention of having female genital mutilation performed on her.