

New right to review a decision
not to authorise a carer

Background

- Family is Culture Report (2019) reviewed a number of issues affecting potential Aboriginal carers and made a number of recommendations
- Recommendation 94: The NSW Government should ensure that the NSW Civil and Administrative Tribunal has jurisdiction to review a decision not to authorise a carer
- Recommendation 94 reflected the Report's conclusion that 2015 amendments to remove this right of review should be reversed to ensure complete and effective options for reviewing decisions about carer authorisation

References: Family is Culture Report pp 303-304

Background

- The authorisation of authorised carers, including applications, assessment, suspension and cancellation, is governed by the Children and Young Persons (Care and Protection) Regulation 2022
- Reg 18 provides that a designated agency is to determine an application for authorisation as a carer by either approving and authorising the applicant as a carer, or refusing the application
- The central criterion is that the applicant is “capable and suitable to be an authorised carer”

References: s 137, Children and Young Persons (Care and Protection) Act 1998; Div 2, Children and Young Persons (Care and Protection) Regulation 2022

Reviewable decisions – s 245

- Section 245 of the Children and Young Persons (Care and Protection) Act 1998 stipulates the decisions under the Act which are reviewable
- If a decision is reviewable, a person may apply to the NSW Civil and Administrative Tribunal (NCAT) for review of the decision in the its administrative review jurisdiction
- The administrative review jurisdiction permits review ‘on the merits’
- There are a number of key procedural rights which attach to reviewable decisions:
 - Right to reasons
 - Right to internal review (normally required before application to NCAT)

References: Parts 2 & 3 Administrative Decisions Review Act 1997; Part 5 Community Services (Complaints, Reviews and Monitoring) Act 1993; s 30 Civil and Administrative Tribunal Act 2013; s 245 Children and Young Persons (Care and Protection) Act 1998

Current s 245

245 Decisions that are administratively reviewable by Civil and Administrative Tribunal

- (1) Each of the following decisions made under or for the purposes of this Act or the regulations is an administratively reviewable decision for the purposes of section 28(1)(a) of the Community Services (Complaints, Reviews and Monitoring) Act 1993 –
 - (a) a decision of the relevant decision-maker to suspend a person's authorisation as an authorised carer or to impose conditions on a person's authorisation,
 - (a1) a decision of the relevant decision-maker to cancel a person's authorisation as an authorised carer, other than a decision to cancel an authorisation granted on a provisional basis or a decision to cancel an authorisation on the occurrence of an event prescribed under section 137(2)(e)

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Key amendment to s 245

245 Decisions that are administratively reviewable by Civil and Administrative Tribunal

- (1) Each of the following decisions made under or for the purposes of this Act or the regulations is an administratively reviewable decision for the purposes of section 28(1)(a) of the Community Services (Complaints, Reviews and Monitoring) Act 1993 –
 - (a) a decision of the relevant decision-maker not to authorise a person as an authorised carer, other than the following decisions –
 - (i) a decision not to authorise a person as a residential care worker;
 - (ii) a decision not to authorise a person who –
 - (A) has been granted an authorisation as an authorised carer on a provisional basis, and
 - (B) had not, at the time the authorisation took effect, made an application but was taken under the regulations to have made an application,

Note – See the Children and Young Persons (Care and Protection) Regulation 2022, section 21(2)

Key amendment to s 245

- The purpose of new s 245(1) is to give effect to Recommendation 94 of the Family is Culture Report
- It confers a right to review of a decision not to authorise as an authorised carer (subject to exceptions) by NCAT
- Its purpose is to ensure the transparency and accountability of decisions about who can be an authorised carer, in light of concerns that Aboriginal people are disadvantaged by current carer authorisation processes and the impact on cultural rights and the ability of Aboriginal children to be care for by Aboriginal people
- Commencement by proclamation

References: Second reading speech for the Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022, Legislative Council Hansard 13 October 2022; s 2(a) Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022

Implications for practice

- Advising clients of their rights – to review, but also very importantly procedural rights (notice, reasons, internal review)
- Assisting clients to access rights
- Systemic advocacy – new changes take time to bed down
- Consideration of relevance when Children's Court proceedings on foot compared to other options such as joinder – unlikely to be preferred option?