NSW Legislative Assembly Hansard

Children and Young Persons (Care and Protection) Miscellaneous Amendments Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 24 October 2006.

Second Reading

Ms REBA MEAGHER (Cabramatta—Minister for Community Services, and Minister for Youth) [10.23 p.m.]: I move:

That this bill be now read a second time.

The Children and Young Persons (Care and Protection) Miscellaneous Amendments Bill 2006 contains a mix of significant and minor reforms to the Children and Young Persons (Care and Protection) Act 1998, which is part of the Government's commitment to protect children's rights and promote their welfare. Key features of the bill are important amendments to improve the protection of children who are at risk of harm by their parents or primary caregivers. By leave I table a document containing statistics referred to in today's *Daily Telegraph*. The information includes 2005 statistics from Childs Deaths and Critical Reports Unit and reports 104 child deaths in 2005.

Document tabled.

The Ombudsman will report on these and other child deaths in his reviewable child deaths report to be released later this year. Some of these tragic deaths may have been prevented by the amendments that the Iemma Government is introducing tonight. Sixteen of these children had been the subject of a prenatal report and 18 had been previously in care or had siblings previously in care. Of these 18 children, nine children had siblings who had been removed or placed in temporary care. Three of these children were in care at the time of their death. Another six of these children were taken into care and restored to their parents. Of these six children, four were subject to Children's Court proceedings and two were subject to temporary care orders.

We in the Iemma Government are setting a new direction in child protection with this landmark bill. Importantly, the bill clarifies that mandatory reporters may make reports before the birth of a child if there are reasonable grounds for suspecting that the child may be at risk of harm upon birth. The bill strengthens the reporting and information sharing requirements by, firstly, amending section 23 to specify that a newly born child is at risk of harm if he or she were the subject of a prenatal report and the birth mother did not successfully engage with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to that prenatal report. Secondly, the bill makes provision, by amending section 248, to enable the exchange of information between the Department of Community Services and hospitals or public health organisations about the parents and or family of an unborn child that has been the subject of a prenatal report. Thirdly, the bill clarifies that the intention of making prenatal reports under section 25 is to provide assistance and support to the expectant mother along with protecting the child upon birth from any risk of harm and that such a child may then be provided with support and protection as envisaged by the Act.

A further key feature central to improving protection for children at risk of harm from parents or caregivers is the introduction of new section 106A into the Act. This provision specifies that in care proceedings the Children's Court shall allow, consider and give weight to evidence that a parent or caregiver has previously had a child removed and not restored to their care, or has been identified by the Coroner or police as a person who may have been involved in causing a reviewable death of a child or young person. This amendment will remove any technical obstruction to the court considering evidence of a parent or carer's past history in relation to the removal of other children. It will require that the court admit and give weight to a parent or caregiver's past history in relation to the removal of other children or involvement in causing a reviewable death of a child or young person.

In care proceedings before the Children's Court and where there has been a history of a parent or caregiver causing harm to a child, the bill places the onus of proof on the parent or caregiver. They must rebut the presumption that, on the balance of probabilities, the child in their current care is not at risk of harm and in need of care and protection either because the previous factors that put a child at risk of harm are now no longer present or because they were not personally involved in causing harm in the previous case. This suite of amendments will go a long way towards strengthening child protection by ensuring that prenatal reports may provide opportunity for support and early intervention to a newly born child as envisaged by the Act. This is by requiring the court to consider and give sufficient weight to similar fact evidence concerning past child abuse or neglect by a parent or caregiver. It is critical that the Children's Court be able to consider all available evidence when ordering preventative and protective measures for children.

A further key feature of the bill is that it proposes to insert a new chapter into the Act to allow for the transfer of

child protection orders, as well as child protection proceedings, between New South Wales and other States and Territories of Australia and between New South Wales and New Zealand. The bill is based on model legislation drafted for the States, Territories and New Zealand for the registration and enforcement of child protection orders, and the transfer of child protection proceedings, from one jurisdiction to another. Most other jurisdictions have implemented the model legislation, and to facilitate national consistency the New South Wales Government is proposing to adopt similar provisions.

The bill is part of a legislative reform package being introduced during 2006 to bring New South Wales into line with other States and jurisdictions. This State has examined experiences elsewhere to try to get the best legislative solution. New South Wales currently has legislation in place which provides for reciprocity between the States and Territories in relation to the transfer of administrative responsibilities for a child or young person under the sole parental responsibility of the State or Territory's Minister or chief executive officer, and the provision of services to such a child or young person without any transfer of administrative responsibilities. Under such arrangements, the current order is simply an order of the original jurisdiction. If a transfer of the order is needed the process is that the receiving jurisdiction must seek a new order in its jurisdiction. When this order is in place the old order in the sending jurisdiction must be discharged.

The amendments in the bill will enable the transfer of child protection orders so that the administering and supervising of New South Wales child protection orders for children and young people living permanently interstate will be simpler. The intended outcomes of the bill will be to enable children and young people who are in need of care and protection and who are subject to child protection orders to be assisted by appropriate authorities if they move interstate, improve the supervision of children and young people who are subject to child protection orders and who move interstate, increase the likelihood that a child protection order is enforceable and has effect under the child welfare law of the State where the child or young person resides, and facilitate child protection matters before the courts being dealt with in a timely and expeditious manner by a court in the appropriate jurisdiction.

The bill provides for the administrative and judicial transfers of child protection orders, as well as the transfer of proceedings. The administrative transfer involves the Director General of the Department of Community Services transferring a child protection order interstate or to New Zealand, provided the receiving State consents to the transfer and there exists an order to the same or similar effect in the receiving State. Depending on the child protection order, the director general may not be able to transfer the order without the consent of a parent to ensure that this administrative arrangement does not disadvantage anyone. The principle of the safety, welfare and wellbeing of the child or young person must be given paramount importance in any decision made.

The bill also emphasises that the child or young person and the family must be encouraged and given adequate opportunity to participate fully in the decision-making process. If opposed to the director general's decision to transfer the order, the child or young person, as well as their parents, will be entitled to seek a review of the decision in the Administrative Decisions Tribunal [ADT]. The bill also allows the director general to apply to the Children's Court for a judicial transfer of the child protection order. The director general can make this application if the order cannot be transferred administratively or if the order to be transferred is not the same or similar to an order in the receiving State but is considered otherwise to be in the best interests of the child or young person.

The bill incorporates an avenue for appeal to the District Court if a party to an application is dissatisfied with a final order of the Children's Court transferring, or refusing to transfer, a child protection order to a participating State. Once a child protection order has been transferred to New South Wales under interstate law, the bill provides for the filing and registration of such orders in the Children's Court. The order is then taken to be an order made by the New South Wales Children's Court. The bill establishes a process for transferring child protection proceedings which depends on the application of the director general and the receiving State consenting to the transfer. The bill deals with the difficulty of legally transferring confidential information relating to a New South Wales order that is required by another State to perform duties or exercise powers under the child welfare or interstate laws of that State.

The bill enables the transfer of this necessary information for the benefit of the child or young person. These amendments will address the operational inconsistency that has existed in handling interstate transfer of child protection orders, both internally and in dealing with requests and referrals to other jurisdictions. The bill has been developed to provide the practical machinery for co-operation between New South Wales and New Zealand and the other States and Territories of Australia to protect children by eliminating the current jurisdictional barriers to transferring child protection orders or child protection proceedings. The bill will undoubtedly lead to more efficient and effective outcomes for children, young people and families who move interstate when the New South Wales Department of Community Services has an involvement.

Another significant area of amendment proposed in the bill relates to the disclosure of information to parents concerning the out-of-home care placement of their child. Some carers in out-of-home care have expressed concern that the Act may allow certain identifying information to be provided to parents about the out-of-home care placement of their children. Their concerns are that information may be given to parents and significant

others without adequate consultation or there will be an avenue for review of an agency's decision to provide that information.

By omitting section 148 and inserting sections 149B to 149K, the bill specifically addresses these concerns by establishing a clear and transparent process for providing high-level identification information to parents. This includes an opportunity for carer consent, participation in decision making by all relevant parties, and a review mechanism through the Administrative Decisions Tribunal. Further, it is proposed that the Children's Guardian will establish guidelines in relation to disclosure of information which are to be met by the designated agency when releasing information to the parents of the child or young person in out-of-home care. When a carer does not consent to the release of high-level identification information, the bill proposes that the designated agency that made the decision to release the information will be required to apply to the ADT for a review of the decision on behalf of the carer.

This approach is designed to relieve the authorised carer of the burden of costs or to remove any perceived barrier associated with making an application for administrative law review of the decision. However, in the event that the authorised carer would rather independently apply to the ADT, the bill confirms that in the alternative the authorised carer may make an application to the ADT without relying upon the assistance of the designated agency. The provisions are informed by, and are the outcome of, extensive consultation with the Foster Care Association, the Association of Child Welfare Agencies, the Children's Guardian, the Aboriginal Child, Family and Community Care State Secretariat (New South Wales) Incorporated, the CREATE Foundation, the Legal Aid Commission and the Children's Court. They aim to balance the concerns of foster carers and the needs of the child or young person to retain links with their birth family.

Some consequential amendments to improve the workability of these proposals are also set out in the bill. The remaining provisions of the bill consist of proposed miscellaneous amendments to the Act. The bill establishes that a child or young person for whom the Minister has parental responsibility or for whom the director general has care responsibility and who has been refused bail in relation to criminal proceedings or has been sentenced to a control order may be accommodated at a juvenile detention centre. The intention of this amendment to section 246 is to make clear that the current prohibition on accommodating a child or young person who is under the care responsibility of the director general or the parental responsibility of the Minister in premises with persons who have committed offences or who are on remand does not apply to children and young persons who have committed offences themselves or are refused bail in respect of a criminal offence.

The bill also stipulates that if a child or young person is detained by police on a warrant issued for his or her attendance at court, the child or young person in this instance cannot be held in a juvenile justice centre pending his or her appearance in court. The intention of this provision is to prevent detention in a juvenile justice centre where a warrant has been issued merely for the purpose of court attendance. Children and young people will only be protected from risk of harm when community members, practitioners and agencies take action on their behalf by making a report to the Department of Community Services. However, protecting a child or young person from risk of harm does not end in a phone call. The bill proposes to makes it clear that the requirement to make a report does not prevent the reporter from responding to the needs of the child, nor does it discharge any other obligations in respect of the child.

This amendment to section 29 arises from experience whereby some persons who make reports under the Act are of the view that no other assistance or support is to be provided after they have reported a matter to the department. This can arise from a misplaced concern about interfering with a child protection investigation. Making a report does not override the existing duty of care a person has in relation to the child or young person the subject of the report. The amendment will clarify that reporters may still have an ongoing responsibility to respond to the needs of the child after the matter has been reported to the department.

The Act does not currently set out with sufficient clarity the two distinct models for legal representation of children and young people under the Act. Older children and young people, subject to a rebuttable presumption, can be represented by a direct representative to whom instructions are given. To dispel any confusion in the use of the term "legal representative" in section 99 of the Act, the bill provides that the term "direct legal representative" be used only for legal representatives that act directly on the instructions of a child or young person capable of giving proper legal instructions. This is distinguished from an "independent legal representative" who acts as a "separate representative" if the child or young person is not capable of giving proper legal instructions. Currently in parts of section 99 there is no distinction between the two roles under the general umbrella of "legal representative". The bill remedies this and makes clear the distinction between an independent legal representative and a direct legal representative.

The bill also raises the age at which a child is presumed capable of giving proper legal instructions to his or her legal representative from 10 to 12 years. It is accepted that children of any age are capable of holding and expressing strong views as to the outcome they desire in care proceedings. However, there is clear evidence based on child development that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise. These children are unable to provide adequate instructions

on these issues, placing legal representatives acting on direct instructions from a child in a difficult position. The bill therefore establishes a presumption that a child who is 12 years of age or less is not capable of giving proper instructions to his or her legal representative and, in such circumstances, an independent legal representative may be appointed for the child. However, the Children's Court may make an order to the contrary, appointing a direct legal representative, if evidence is adduced that the child is capable of giving proper instructions.

The bill removes the exemption from licensing for children services operating on Department of Health premises. There has been an increase in children's services connected with health services, so there is a greater need to ensure that these services are providing consistent and quality care for children. The Department of Health has recommended that formal children's services operating on hospital premises should be licensed to ensure that these services are meeting the standard of care required by the Children's Services Regulation 2004.

It is not the intention of the bill that informal child-minding services run in connection with hospitals, or recreational or commercial facilities where the parents are visiting or using the service, be licensed. Therefore, a specific provision has been included in section 200 (2) (d) to make clear that this type of service is excluded from the meaning of "children's service", and may continue to operate without a licence. The bill also amends the definition of "home based children's service" in section 199 to clarify that the person providing care at the home based children's service must be the holder of a licence. This is to prevent inappropriate people, who have not been subject to the relevant checks, providing care in home based children's services.

To provide certainty as to the time limit for commencement of a prosecution, the bill provides that the prosecution of an offence under the Act—other than an offence in relation to children's services—is to be commenced within six months of the director general becoming aware of the alleged offence. This amendment is proposed because the director general will often not become aware of an offence until a file audit is completed, and by that time the existing limitation of six months may have elapsed. The bill also facilitates the conduct of proceedings before the Children's Court by amending section 69. This is to make clear that the established practice of the Children's Court to make interim care orders, without, in the first instance, making a determination that a child is in need of care and protection, is procedurally the correct approach if the court is satisfied it is in the best interests of the safety, welfare and wellbeing of the child or young person to do so.

The bill also clarifies that the Children's Court may issue a warrant to secure the attendance of birth parents or adoptive parents who no longer hold parental responsibility in care proceedings before the court. The proposed amendment to section 96 seeks to address concerns raised by the Children's Court that their current powers to issue warrants may arguably be interpreted to only apply to the limited circumstances of parents who hold parental responsibility at the time the warrant is issued. The amendment puts beyond doubt that warrants may be issued by the Children's Court to facilitate attendance in proceedings to any parent, including parents that do not have parental responsibility for the child or young person.

This bill is the result of extensive review. These reforms will contribute to improving and strengthening the Act and reflect this Government's commitment to securing the safety, welfare and wellbeing of children and young people in New South Wales as well as those who travel across State and Territory borders. I thank everyone who has been involved in the development and construction of the bill. I commend the bill to the House.