



NSW Legislative Council Hansard

Child Protection (International Measures) Bill

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CHILD PROTECTION (INTERNATIONAL MEASURES) BILL

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Second Reading

The Hon. JOHN DELLA BOSCA (Minister for Finance, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, and Vice-President of the Executive Council) [2.43 p.m.]: I move:

That this bill be now read a second time.

As the second reading speech was delivered in the other House, I seek leave to incorporate it in *Hansard*.

Leave granted.

This bill will implement the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children in New South Wales. This convention is more generally known as the Child Protection Convention. The Child Protection Convention is one of a number of Hague conventions, including conventions on adoption and child abduction, which aim to ensure the safety and wellbeing of children in the twenty-first century world in which national borders are more open than they have ever been before. The measures proposed in the bill will be of significant benefit to Australian families, and in particular to children who are the subject of international child protection litigation. Australia ratified the Child Protection Convention on 1 August 2003 with the support of all States and Territories.

Since 2003 the convention's international child protection measures have been administered in Australia through the Commonwealth Family Law Act 1975. It has always been the intention that each State and Territory would also put in place its own legislation to implement these measures in its jurisdiction. The bill will put in place jurisdictional laws in relation to children who cross international borders where parenting orders or child protection concerns exist for the children. It will also establish a framework for co-operation between Child Protection Convention countries to ensure the protection of children.

The Child Protection Convention confirms in its preamble that the best interests of the child are to be a primary consideration. This reflects the same guiding principle of the 1989 United Nations Convention on the Rights of the Child. The fundamental purpose of the bill is to strengthen our ability to protect New South Wales children. During the last part of the twentieth century, the opening up of national borders, ease of travel, and breaking down of cultural barriers have brought many advantages but, sadly, have also increased risks for children. Trafficking and exploitation of children, displacement through war, terrorism, civil disturbance and natural disasters have become major problems.

Children can be victims in broken relationships between transnational families with disputes over custody, relocation, contact and the potential of international parental abduction, just as can occur for children who never leave this State. The legislation will enhance the protection of children and their property. It does this by determining which country's laws are to be applied in particular circumstances, while allowing for emergency protection measures to occur wherever the child is present. The absence of agreed rules at an international level has led to authorities in one country failing to act because they assume authorities in another country will take, or have taken, responsibility for the child. The New South Wales legislation seeks to overcome these difficulties and simplify the process of resolving international child protection cases without losing sight of the best interests of the child.

The objectives of the bill are to determine which country has jurisdiction in decision making to protect the child in order to eliminate potential conflicts of jurisdiction between authorities in different countries, determine which law is to be applied, determine the law applicable to the parental responsibility, provide for recognition and enforcement of protection measures, and establish co-operation between the authorities of New South Wales and other Child Protection Convention countries in the interests of protecting children.

After ratification of the Child Protection Convention by Australia in August 2003, the Commonwealth Government passed legislation to enable the Family Court to register and enforce child protection orders in

Australia from convention countries. Built into the Commonwealth legislation were roll-back provisions which provide that once State legislation is enacted, that legislation will prevail. This recognises that child protection matters are traditionally State responsibilities and more properly dealt with in State-based specialist children's courts.

The mechanism for those with parental responsibility to register orders in the Family Court in relation to family issues such as residence, maintenance and contact will be maintained as part of a flexible response, because they are accepted as Federal responsibilities. The New South Wales legislation will, in common with the Federal and other state legislation, clarify responsibilities and eliminate conflict in jurisdiction between Australian courts and foreign courts in child protection cases. It is based on the model Queensland legislation. The model legislation was approved by all the parliamentary counsels around Australia, the Standing Committee of Attorneys General and the Community Services Ministers' Committee.

The bill's enactment will ensure that the key benefits of the Child Protection Convention are enshrined in New South Wales legislation. These include clarification of responsibilities and the elimination of conflict in jurisdiction between New South Wales and overseas courts in child protection cases, the recognition and enforcement of foreign orders in New South Wales, ensuring recognition and enforcement abroad of New South Wales protection orders and other measures of protection where appropriate, and providing mechanisms for authorities in New South Wales and other countries to co-operate in relation to protective measures for a New South Wales child abroad or in relation to a child returning to another country who is subject to a New South Wales protective measure.

As with legislation in the other States, it will define the role of the New South Wales Central Authority under the Child Protection Convention. This role will be to find solutions for the protection of particular children; assist in implementing measures whether made here or elsewhere which are directed at protecting children; give consideration to initiating action in New South Wales, at the request of a competent authority of another country if a response is required in New South Wales; exchange information, subject to confidentiality and privacy laws; provide information on laws and services; help locate children; provide reports on the situation of particular children; and apply to the Children's Court or Family Court as appropriate for orders in response to requests from competent authorities of Child Protection Convention countries to transfer or receive jurisdiction, or take measures directed at protecting the person of a child.

The New South Wales legislation substantially replicates the Queensland model legislation and expands on the Queensland provisions on two minor points. First, the bill defines the term "interested person" in relation to a child who is the subject of a "measure of proceedings". Whereas the model legislation leaves this term undefined, the bill provides that an interested person means the child, or a parent, or a grandparent of the child, or any other person concerned with the care, welfare or development of the child. Any of these people may apply to be joined as a party to proceedings arising from an application to exercise the court's jurisdiction in relation to the child or to refuse recognition of a foreign measure. An interested person may also take proceedings in a New South Wales court to enforce a registered foreign measure. The inclusion of this definition makes it clear who can be involved in proceedings relating to a child and is equivalent to those people who can seek a variation of a care order under section 90 of the Children and Young Persons (Care and Protection) Act 1998.

Second, the bill will provide a mechanism whereby the Director-General of the Department of Community Services can obtain relevant information necessary to prepare a report required by the Child Protection Convention on the consultations undertaken prior to child being placed in foster care in a convention country. The Child Protection Convention requires that these consultations occur with the competent authority in the convention country. The measures in the bill will overcome jurisdictional confusion that has arisen. Normally, State child welfare laws gain priority over family law orders but, according to the rules of the Child Protection Convention, if a New South Wales care order conflicts with a foreign child protection order registered under the family law amendments, the Family Court order prevails.

By permitting registration in the State Children's Court the usual order of priorities can be maintained. The bill mirrors the Queensland model legislation in that it empowers the Children's Court to supplement foreign personal child protection measures with domestic care orders. The recognition of a foreign protection measure without modification may not necessarily ensure the safety, welfare and wellbeing of the child or young person due to different circumstances in this State. In some circumstances it may be appropriate only to recognise and register part, rather than the whole, of a foreign child personal protection measure. Once jurisdiction requirements have been satisfied, the bill gives to the Children's Court the full range of orders as if the original order has been made in this State. This will not only advantage the child but should assist in streamlining processes within the court and enhance familiarity with the operation of the legislation.

To give an example that has arisen in this State: A child arrived here subject to care orders made in the country of his birth. He was brought by the person exercising guardianship, who came for business purposes. The care orders required that the child reside in an institution while remaining in this person's guardianship. In the country of origin this was appropriate because there were child-centric institutions there. In this State we

do not deliver services to children in that way and the implementation of those foreign orders, without modification, would have led to the child being placed in an adult psychiatric institution. There was no simple and effective way both to recognise the intent of the orders made in the child's country of birth and to provide appropriate services in this State. The bill will address this gap in our laws.

To better adapt the obligations of the Child Protection Convention for this State the bill brings into effect legislation mirroring that of other States, and legislation that has been jointly agreed to by the Commonwealth and the other States. While the Commonwealth will remain the key central authority for Australia in terms of being the primary recipient of international communication from foreign central authorities, the Department of Community Services will be the central authority in New South Wales. The department will be responsible for taking action in this State on behalf of children. At present the impact of this legislation in New South Wales will be small.

In general, international child protection cases arise infrequently. As well, while 18 countries have signed the Child Protection Convention, only eight, including Australia, have both signed and ratified it, and two have acceded. While information is not definite from all other countries, the best current estimate is that 27 countries will join in this arrangement in the near future. As more countries ratify the Child Protection Convention its benefits will be enjoyed by an increasing number of children in an era of increasing mobility across national borders. For children entitled to the benefits of the Child Protection Convention it is anticipated that New South Wales may be called upon to assist Child Protection Convention countries by providing a report on the circumstances of a foreign child located in New South Wales, or to provide the necessary protection services for a child subject to an order recognised in New South Wales.

The bill specifies the jurisdiction of courts and child protection authorities. The general order under the Child Protection Convention is that the country in which the child is habitually resident retains jurisdiction over the child's person and property. Generally, a New South Wales child protection authority may exercise jurisdiction only for a New South Wales person or protection measure in relation to a child who is present and habitually resident in New South Wales; or a child who is in New South Wales and habitually resident in a Child Protection Convention country where the measure is either urgent or provisional; or there is a request or agreement that New South Wales assume jurisdiction. Additionally, a New South Wales authority may exercise jurisdiction if a child is present in a Child Protection Convention country and is habitually resident in New South Wales or is wrongfully removed from Australia, or if New South Wales is requested to assume jurisdiction.

Other additional circumstances where New South Wales may exercise jurisdiction are where the Child Protection Convention country agrees; or a child is present in New South Wales and is a refugee minor living in the community; or if the child is habitually resident in New South Wales but at the moment is present in a non-Child Protection Convention country; or is habitually resident in a non-Child Protection Convention country but is an Australian citizen; or is present in New South Wales and is habitually resident in a non-Child Protection Convention country. New South Wales child protection authorities may accept or reject a request to assume jurisdiction. The bill also sets out the circumstances under which a New South Wales authority may exercise jurisdiction for a New South Wales property protection measure in relation to a child. In those cases the Public Trustee will be appointed as guardian of a child's property should that be necessary under a property protection order.

The bill provides for the recognition and enforcement of foreign protection orders. These are not automatic. On receipt of a foreign measure a New South Wales authority has several courses of action open to it. These are laid down in the legislation. The grounds for refusing to recognise a foreign person or protection order are also spelled out and provide New South Wales authorities with the discretion to meet their obligations. These grounds include: that the Child Protection Convention country lacked jurisdiction for taking the measure; that the Child Protection Convention country acted contrary to the fundamental principles of New South Wales law when it took the measure; that recognition of the measure is contrary to public policy in New South Wales; that there would be no appropriate way of enforcing the measure; that the measure is incompatible with a later measure in the country where the child habitually resides; and that the measure places the child in care in New South Wales but the Child Protection Convention country has no consent from New South Wales authorities.

These measures are likely to affect only a small number of children in the short term but the legislation provides a framework that is likely to benefit an increasing number of children and so, I believe, will become vital to ensuring the safety and protection of New South Wales children wherever they might be in the world, and of other children who are in New South Wales and need protection. I commend the bill to the House.