



NSW Legislative Council Hansard

Children and Young Persons (Care and Protection) Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 5 September 2006.

Second Reading

The Hon. TONY KELLY (Minister for Justice, Minister for Juvenile Justice, Minister for Emergency Services, Minister for Lands, and Minister for Rural Affairs) [3.09 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

This bill proposes a number of minor or miscellaneous amendments to the Children and Young Persons (Care and Protection) Act 1998.

These legislative amendments aim to further benefit the children, young persons and families that the Department works with and to make the Act more workable for individuals and agencies operating under it.

The reforms in the Bill aim to reinforce a legislative framework which:

- ensures high quality children's services are provided in NSW in particular by providing for the regulation of out-of-school-hours care services;
- supports the Children's Court by strengthening and clarifying
- its existing functions;
- protects and clarifies the rights of children and young persons to legal representation;
- strengthens the protection for reporters;
- clarifies provisions for the benefit of children and young persons in out of home care.

The amendments confirm the Government's strong commitment to valuing children and protecting them.

Ensuring quality children's services and out-of-school-hours care services

The Government recognises that quality children's services are an important and critical issue for many families in NSW. Parents have a right to expect that the regulatory framework for children's services will ensure that children using these services are cared for in an environment that provides for the child's safety, welfare and well-being.

An important law reform introduced by the bill is the regulation of out-of-school-hours care services.

Currently in NSW there are some 1,500 out-of-school-hours care services providing care for over 37,000 children each year. Most of these services are community based. Quality improvement and funding of out-of-school-hours care services is primarily the responsibility of the Commonwealth. In more recent times, however, the Commonwealth has placed the onus on states and territories to regulate out-of-school-hours and other child care services.

The NSW Government recognises that these services make a vital contribution to balancing work and family responsibilities for many families in NSW. We welcome the Commonwealth's expansion of out-of-school-hours care places, noting, with some disappointment, delays in delivering these much needed places. However, as child care services play an increasingly vital role for working families, the Commonwealth is refusing to recognise the escalating cost of regulation to states. NSW spends around \$5.5 million every year regulating child care services.

This is of concern to NSW and we will be calling for a fairer distribution of the burden of child care regulation at the Community and Disability Services Ministerial Council in July.

The NSW Government has developed a model of regulation which will help strengthen the safety of child care services in NSW. It is a model of regulation which will balance the need for appropriate service standards with the need to maintain flexibility and viability for these much needed services.

The bill introduces a new chapter in the Children and Young Persons (Care and Protection) Act 1998—chapter 12A—which provides for the establishment of a regulatory framework for out-of-school-hours care services. The

bill provides a broad definition of out-of-school-hours care services that includes:

- attendance by school aged children;
- attendance by children that are enrolled in a school but are not yet attending school;
- attendance by school attending children being cared for during school holidays;

The bill provides for regulations which may, when made, prescribe the requirements that an out-of-school-hours care service in NSW will need to meet. While the specifics of a regulation are yet to be finalised, this Government is strongly committed to consultation in this regard.

These include:

- compliance with minimum standards;
- registration of people providing out-of-school-hours care services;
- probity checks;
- variation, suspension and revocation of registration.

The bill also makes other amendments in relation to children's services.

The bill amends section 208 by allowing for two authorised supervisors to be named on a children's service licence. At any given time however, only one authorised supervisor will have the overall responsibility for the service. This amendment will allow for job sharing by allowing for two authorised supervisors, improving both employment and recruitment opportunities.

The bill extends the application of current provisions for probity checks to all persons over 14 years residing at the home of the family day carer or home based carer.

This package of reforms for children's services strengthens the Act in small but significant areas and provides for regulation of out-of-school-hours care. It continues the Government's strong commitment to the vital area of children's services in NSW.

Supporting the Children's Court by strengthening and clarifying its existing functions

In order to facilitate the conduct of the Children's Court, the bill contains amendments to chapter 5 of the Act—which relates to the Children's Court proceedings.

The bill identifies the workload and pressure placed on the Children's Court and aims to address the associated problems this has caused.

For instance, while the Director General may comply with the requirements of the legislation to file an application for an extension to an emergency care and protection order before the order expires, there may be no control over when the application may be heard—due to commitments and workload of the Children's Court. This can mean that the order can expire before the application is heard and children and young people may have to be returned to situations that place them at risk of harm because of a legal technicality.

The bill rectifies this situation by amending section 46 to make it clear that if an application for an extension of an emergency care and protection order is filed prior to expiry of that order, the order will remain in force until the Children's Court determines whether the order should be extended. The proposed amendment preserves the character of an emergency care and protection order as having a limited lifespan and at the same time accommodates difficulties created by the workload of the Children's Court.

In certain cases it may not be known at the time of filing the care application, what kind of final care orders should be sought for the child or young person. This becomes more apparent as proceedings progress and particularly after assessments are conducted. An amendment to section 61 provides that applications for care orders can be varied before the court makes a finding that the child or young person is in need of care and protection.

Section 71 of the Act concerns consideration of whether a child or young person's basic physical, psychological, or educational needs are not being met or are likely not to be met as a ground for whether the child or young person is in need of care and protection. The bill proposes that this section also apply to primary care givers.

Currently the section applies only to parents and does not recognise situations where children or young persons are living in out-of-home care with grandparents or other extended family. The amendment will ensure that should such arrangements fail to meet the child or young person's basic needs, then it is open to the court to find the child or young person to be in need of care and protection.

The Children's Court has held that the phrase "the Minister or another person jointly" in section 79 of the Act

prevents the making of an order allocating parental responsibility to the Minister for Community Services and grandparents jointly. The bill remedies this limitation by establishing that orders can be made which allocate parental responsibility to the Minister and to two other people jointly.

The bill ensures that a child who exhibits sexually abusive behaviour and has not been criminally convicted for such behaviour is not prevented from accessing a court ordered therapeutic program relating to the sexually abusive behaviour.

To avoid unnecessarily complicated arguments before the court about evidentiary matters, the bill spells out that the civil standard of proof—which is "on the balance of probabilities"—applies to all proceedings under the Act.

The bill affirms a well accepted legal principle, that where the Children's Court determines that the rules of evidence are to apply—section 93 of the Act—leave may be granted to a party to withdraw material or file new or amended material that complies with the rules of evidence.

In the interests of procedural fairness, the bill provides that a person making an application for rescission or variation of care orders under section 90, an alternative parenting plan under section 116 or a sole parental responsibility application under section 149, has to notify such persons as the Children's Court may specify about the applications. This will ensure that the Director General or other affected parties are kept informed of any applications that they may need to respond to.

The bill raises the maximum penalty that can be imposed under the Act from 100 to 200 penalty units or a maximum of \$22,000 when proceedings are taken in a Local Court. There are 17 offences in the Act which carry a maximum penalty of 200 units, however section 259 currently only allows 100 penalty units to be imposed when an offence under the Act or the regulation is taken before a Local Court. This effectively halves the maximum penalty that can be imposed for these offences.

A further important feature of the bill is the strengthening of our legal processes to protect the safety, wellbeing and welfare of children during care proceedings.

A new measure introduced by the bill into section 64 of the Act is the conferral of discretion on the Children's Court to control information released to a child or young person by ordering the Director General or a parent not to show or tell the child or young person of the application or any particular information in it.

Such an order may only be made if the court is of the opinion that psychological or other harm is likely to be caused to the child or young person, or it is considered otherwise detrimental to the safety, welfare and wellbeing of the child or young person to notify the child or young person of the care application or information concerned. This discretionary power must not be exercised by the court unless these anticipated effects on the child or young person outweigh the prejudicial effect of the child or young person being unaware of the application or information.

In the 1999 Supreme Court case of *Waters v. Pacific Publications*, the court commented that the prohibition on the publications of proceedings is limited to matters before the court. This limits the protection that should be afforded to children and young persons involved in care proceedings who may be further victimised by the publicity surrounding the reasons for their coming into care.

The bill remedies this limitation by imposing a prohibition on the publication of names and identifying information in relation to a child or young person involved in care proceedings from before any proceedings have commenced, until the subject child or young person is 25 years of age or dies before reaching that age.

This amendment reflects similar provisions in the Children (Criminal Proceedings) Act 1987 in relation to children's criminal proceedings.

By amendment to section 104 and 105 of the Act, the bill extends the general prohibition on the publication of identifying information and names of children and young persons who are involved in care proceedings, to out of court proceedings, such as counselling and preliminary conferences connected to the care proceedings. This amendment furthers the protection of children and young persons before the Children's Court to non-court proceedings.

Protecting and clarifying the rights of children and young persons to legal representation

The bill also makes a number of amendments to the model of legal representation of children and young persons before the Children's Court.

The bill raises the age at which a child will be presumed to be capable of providing legal instructions to a legal representative from 10 to 12 years of age (section 99(3)). This reform is informed by well accepted child development research and the experiences of child representatives that most 10 and 11 year olds have

considerable difficulty in understanding the legal ramifications of their instructions and are unable to provide adequate instructions regarding the many complex matters that are dealt with in the care jurisdiction.

I am pleased to announce that the Legal Aid Commission, the Children's Court and the Attorney General's Department support these particular reforms.

The bill recognises that attending the Children's Court and listening to proceedings about traumatic family matters can be very stressful for a child or young person and in some cases may even lead to further abuse of the child. Amendments to section 99(3) of the Act address this concern by providing that a child or young person is not required to attend court solely to provide legal instructions, unless otherwise required to attend by the court.

To assist in preventing delays in court proceedings, the bill requires the court to consider the appointment a Guardian ad Litem at a much earlier stage of the proceedings than is currently the case. The proposal seeks for the court to turn its mind to the question of competency at the same time as the court is considering a person's capacity to adequately represent him or herself (section 98).

Strengthening the protection for reporters

The legislation currently provides a range of protections to persons who make reports to the department concerning children, including the protection of the reporter. The bill extends the current protections to the person who first drew attention to the risk of harm posed to the child or young person but did not make the report, by amendment to section 29 of the Act.

For example, a manager or a schoolteacher may supply information which is then forwarded to someone else who makes the actual report to the department. It is not clear in these cases who "caused" the report to be made and whether the protection under the Act would extend to the person who first drew attention of the risk of harm posed to the child or young person.

The bill also provides necessary clarification that statutory bodies, such as the Commission for Children and Young People, who subsequently obtain a report that it is suspected a child is at risk of harm, will be required to maintain the confidentiality of the reporter.

There are other instances under the Act where people can make reports to the department, such as a report of homelessness, and therefore the bill ensures that these people are also afforded the current protection given to reporters under section 29 of the Act.

These amendments are essential in encouraging the community to continue reporting children and young people who are at risk of harm.

Clarifying provisions for the benefit of children and young persons in out-of-home care

The bill clarifies provisions in the Act for the benefit of children and young persons who reside in out-of-home care.

A key feature of the bill is that it streamlines processes for a child or young person who is leaving or who has left out-of-home care and who wishes to access original documents and personal information.

The amendment to section 168 provides that a request for personal information and records by a child or young person who is leaving or who has left out-of-home care can be made orally or in writing. In addition to seeking information held by a designated care agency or authorised carer, the amendments provide that, a child or young person can make a request to the Director General, when he or she was in the parental responsibility of the Minister, to obtain records that the department may hold.

The Bill establishes that a child or young person's entitlement to original documents held on their file—such as a birth certificate, school records, medical reports—under section 169 of the Act, overrides the prohibition on releasing original documents in the State Records Act 1998. This amendment will give ownership of original and personally significant documents to their subject, rather than the State.

The Bill updates existing provisions in the Act and adopts the recommendation of the NSW Law Reform Commission, concerning consent to medical treatment of persons 16 years of age and older. It is acknowledged that the current prohibition on foster carers consenting to minor dental treatment for a child or young person that is not urgent is unduly restrictive. The Bill removes this restriction by allowing authorised carers to consent to dental treatment for a child or young person, involving minor surgery, such as root canal work and tooth extraction.

The Bill makes clear that the obligation to provide accommodation for a child or young person in out-of-home

care rests with the Minister, only if the Minister has sole parental responsibility for a child or young person or parental responsibility in relation to residence (section 164).

Section 164 has at times been misinterpreted to mean that the Minister is responsible for the provision of accommodation when the Minister only has partial parental responsibility which does not include residence for the child or young person.

This amendment is in recognition that, in some circumstances, joint responsibility is simply not tenable. However, this does not mean that children and young people in the joint responsibility of the Minister and another person are precluded from other forms of assistance and support.

The Bill amends section 165 of the Act to allow guidelines to be published for the granting of assistance to a child or young person leaving out-of-home care.

Consequential amendments

Other consequential amendments in the Bill include:

- better locating section 47 to Chapter 5, Part 2 in the Act to make it clear that an order prohibiting action is applicable to all care proceedings.
- amending section 256, to ensure consistency with the Children's Court Rules 2000, so that a document can be served upon a legal practitioner who has lodged an address for service.
- amending section 142 by inserting a reference to a 'young person' after "child" so as to make clear that Part 2 of Chapter 8 of the Act—out-of-home care by order of Children's Court—applies to young persons as well as children.

These amendments have been sought by stakeholders and consulted on extensively.

They strengthen the Act and respond to the expressed needs of practitioners, individuals and agencies. More importantly they enable the Act to better meet its primary objectives: the care and protection of, and provision of services to, children.

I thank all those involved in the development and construction of the Bill and I commend the Bill to the House.