

Legislative Council

Tuesday, 1st December 2009

STATUTES AMENDMENT (CHILDREN'S PROTECTION) BILL

The Hon. A. BRESSINGTON: I move:

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Line 30 [clause 12, inserted section 99AAAC(2)(c)(ii)(B)]—Delete 'and' and substitute:

or

After line 30 [clause 12, inserted section 99AAC(2)(c)]—After subparagraph (ii) insert:

(iii)the Court is otherwise satisfied that it is not in the best interests of the child for the child to reside with the defendant; and

I will also speak to amendment No. 2 as it is consequential.

These amendments, while short and simple, significantly reform the proposed child protection restraining orders, specifically what an applicant must demonstrate to the court to warrant an order being issued. Presently, the bill requires, on the balance of probabilities, the applicant—generally the parents—to demonstrate that the person harbouring a child has committed an offence of a prescribed kind in the past 10 years, has been subject to another child protection restraining order, is sexually active with the child or is exposing the child to illicit substances, and that the making of an order is appropriate in the circumstances.

While it is suspected that these criteria would have applied in most cases I have encountered, as has been highlighted by the Hon. Stephen Wade in his second reading contribution, these are narrow criteria and will not apply to all cases of a child being harboured against their parent's will and reasonable parental authority. Furthermore, even if a parent suspects that their child is being taken advantage of sexually, or is being provided with illicit substances, it is unlikely that they alone will be able to gather enough evidence to successfully satisfy the court of that fact.

Parents are not able to conduct police-style investigations, yet the bill presently expects them to. In effect, the present threshold requires parents to procure a Families SA or preferably a police investigation in order to have sufficient evidence to accompany an application for a child protection restraining order. However, as I recounted in my second reading contribution, both these services have previously conveyed to constituents that their child is not a priority and have refused to intervene. This is not uncommon.

While giving parents the power to initiate an application for a child protection restraining order and be the applicant in proceedings is a progressive yet long-overdue step, it is of no value if parents are not given a reasonable prospect of success. While retaining the present criteria, my amendment lowers the threshold to simply satisfying the court that it is not in the best interests of the child to continue residing with the defendant. If a parent can show that the person harbouring their child is allowing the child to truant from school, to consume cigarettes and alcohol, or simply to live

lawlessly, why would we deny them the right to protect their child? However, the minister when addressing my amendments in summing up at the second reading disagreed, stating:

Her amendments — meaning mine — would allow a parent to apply for a child protection restraining order against anyone with whom their runaway child was living, even if that person is genuinely caring for and not exploiting the child, as long as the parent thinks the arrangement is not in the best interests of the child, for example, because the parent thinks the child is not doing enough homework or is allowed too much freedom or simply because the parent thinks it would be better for the child to live at a home, despite the plain fact that the child is unhappy there.

This simply is not an accurate reflection of my amendments. Yes, the threshold is to be lowered to the best interests of the child, but this will not be for a parent to determine but for the court to assess. The court will also be asked to decide in each case whether it is appropriate to issue an order. Both these tests are well known to the court and, particularly the former, appear regularly in government bills. To suggest that a court, when it has this discretion available to it, would grant a child protection restraining order when a child is not doing enough homework or is allowed too much freedom is ludicrous and is a slight on the judiciary.

The minister has, in arguing against my amendments, undermined the test of the best interests of the child, which is to my understanding the basis of the Children's Protection Act 1993, as is spelt out in the act's objects and principles. In fact, my amendment, unlike the government's position, is entirely consistent with the objects, which read:

The objects of this Act are:

- (a) to ensure that all children are safe from harm; and
- (b) to ensure as far as practicable that all children are cared for in a way that allows them to reach their full potential; and
- (c) to promote caring attitudes and responses towards children among all sections of the community so that the need for appropriate nurture, care and protection (including protection of the child's cultural identity) is understood, risks to a child's wellbeing are quickly identified, and any necessary support, protection or care is promptly provided; and
- (d) to recognise the family as a primary means of providing for the nurture, care and protection of children and to accord a high priority to supporting and assisting the family to carry out its responsibilities to its children.

How the minister can argue against my amendment when the objects of the act give such priority to assisting families to carry out their responsibilities beggars belief. In arguing to restrict child protection restraining orders only to the extreme end of child harbouring cases—that is, cases in which it can be proven (and I repeat 'can be proven') that a child is being sexually exploited or has been procured to drug run—the government is ignoring that there are many other cases in which children are presently being harboured against their best interests and against their parents' will and reasonable parental authority.

In my second reading contribution, I raised as an example one such case in which the bill in its present form would offer no relief. While the parents suspected that their 14 year old daughter was having sexual intercourse and being provided with drugs by the

man who was harbouring her against her will, this could not be proven. Despite numerous attempts, the parents were unable to raise the interests of either Families SA—

The CHAIRMAN: I remind the Hon. Ms Bressington to speak to the amendments—

The Hon. A. BRESSINGTON: I am.

The CHAIRMAN: —rather than the second reading speech.

The Hon. A. BRESSINGTON: I am. I am speaking to both of my amendments at once.

The CHAIRMAN: You are going on a bit about the second reading speech. It is late in the night, and I remind the honourable member to support her amendment.

The Hon. A. BRESSINGTON: I understand, Mr Chairman, and all I am doing is responding to the comments which the minister has made about these amendments and which are quite inaccurate. I am trying to clear that up so that members can vote in a well-informed way.

The CHAIRMAN: Carry on.

The Hon. A. BRESSINGTON: Parents were unable to raise the interest of either Families SA or police and have their suspicions investigated. Short of the daughter co-operating in an application for a child protection restraining order, which would not have occurred (and I doubt ever would), these parents under the present criteria will not be able to access a child protection restraining order. It is important that members understand that parents now have to provide a burden of proof that is relevant to the criminal law act, not relevant to the child protection act, which is 'reasonable suspicion'.

All I am asking is that these amendments in this child protection bill lower the threshold to 'reasonable suspicion' and give parents the authority to protect their own children. It is interesting that the Attorney-General, when we discussed this with him originally, supported these two amendments and, for some strange reason, then withdrew his support without any explanation. I commend these amendments to the committee, and I hope that other members have a very clear understanding of what they will do.

The Hon. G.E. GAGO: The government is opposing amendments Nos 1 and 2. Although we acknowledge the Hon. Ann Bressington's concern about the issues that pertain to these sections, we believe that these can be achieved in other ways.

An honourable member interjecting:

The Hon. G.E. GAGO: I am happy to go on and talk to that. There were some questions in relation to these amendments about what was agreed to. I put on the record that I am told that the Attorney-General indicated he would support the amendments if they were to take a certain form, and I am advised that the Attorney-General's office had a number of interactions with the Hon. Ms Bressington's staff in an attempt to negotiate the amendments into a practical form to which both parties could agree.

I am not in a position to know how much of these discussions were communicated to the honourable member. Ultimately, an agreeable position could not be achieved on these amendments despite the government's efforts. However, the opportunity remains

even now for the honourable member to take up the improvements to her proposals suggested by the Attorney-General. I will go on now to speak specifically to the amendments.

These amendments will make it a ground for restraint that residing with the defendant is not otherwise the best interests of the child—that is, otherwise than the child being at risk of sexual abuse or exposure to drug activity.

I will repeat what I said in reply about the main reasons for opposing these amendments and then mention some additional reasons. In my reply, I said that the bill was designed to meet a particular problem that Commissioner Mullighan identified in his Inquiry into Children in State Care: the exploitation of children who run away from home or care by predatory adults who get the child to sell or make drugs, or use the child for commercial or personal sexual purposes in return for drugs and shelter. There is no evidence that these children are at risk of any other kind of abuse, unless that abuse is secondary to the sexual or drug-related abuse.

It appears that the Hon. Ms Bressington is trying to use this restraining order procedure to give parents a new legal means of controlling their children and one that is not afforded by any other Australian jurisdiction. Her amendments would allow a parent to apply for a child protection restraining order against anyone with whom their runaway child is living, even if that person is genuinely caring for and not exploiting the child, as long as the parent thinks the arrangement is not in the best interests of the child—for example, because the parent thinks the child is not doing enough homework or is allowed too much freedom, or simply because the parent thinks it would be better for the child to live at home, despite the plain fact that the child is unhappy there, as with many of these cases.

Most of these children have long histories—and I note that honourable members are aware of this—of running away from home, and this is usually because there are intractable problems in their relationship with their own family. It will not help the situation to allow parents to drag people who are genuinely caring for these children before the courts as if they were predators, in an attempt to force the child to come home. A law like this may well deter people from helping runaway children and put those children at even greater risk of exploitation. The government is not prepared to expand the scope of the bill to this extent.

Another reason for opposing amendments Nos 1 and 2 under clause 12 of the bill: if the ground for applying for restraint is that living or having contact with a defendant puts the child at risk of sexual abuse or exposure to drug activity. New section 99AAC(3) will require the court to make the best interests of the child a primary consideration when determining whether to make a restraining order and, if so, what its terms should be. It then sets out how the court will determine those best interests. However, these criteria are for circumstances where residing with the defendant will allegedly expose the child to sexual abuse or drug activity and not, as the Hon. Ms Bressington's amendment would allow, for circumstances where the child's living arrangements put the child at no such risk. Let us apply the criteria of new section 99AAC(3) to this scenario. A parent does not like the fact that his or her child has gone to live with a relative—let's say an aunt—and will not return home. The aunt—

The Hon. A. Bressington: Let's say a paedophile down the road.

The Hon. G.E. GAGO: The honourable member interjects and mentions a paedophile. The legislation already clearly deals with that.

The Hon. A. Bressington: Only if they've been convicted.

The Hon. G.E. GAGO: No, I am advised that the honourable member is incorrect. It not only deals with this when they have been convicted, but I will finish my statement and come back to that. Let us go back to the scenario where a child is staying with an aunt. The aunt has always had a good relationship with the child and has been someone to whom the child has turned before in moments of stress. The aunt has never done anything to harm the child. There is no suggestion that the aunt is exploiting the child; nevertheless, the parent applies for a child protection restraining order, saying that living with the aunt is not in the child's best interests, and asserting that it is in the child's best interests to live at home with the parent. In this case, the prior criminal record of the aunt and the pattern of the aunt's behaviour towards this child, or other children, and any other apparent justification for that behaviour, has little relevance if it can be shown that the aunt is genuinely concerned about this particular child's welfare.

These criteria are highly relevant when determining the best interests of a child who is living with an alleged sexual predator or drug supplier but not necessarily when determining the child's best interests at large, and certainly not when the child is not alleged to be at risk of a particular kind of harm. These amendments will give this legislation a peculiar effect and will invite an abuse of process.

In summary, applications for child protection restraining orders should not be made unless the child is at real risk of some kind of harm. They should not be made simply to achieve the parents' perhaps unrealistic ideas about the best interests of the child, when the child's welfare is not otherwise being compromised by his or her chosen living arrangement. Amendments Nos 1 and 2 would allow such applications to be made—and possibly to be granted—and the government opposes them.

Regarding the statement that proof of a conviction was required, I am advised that there is no need for proof of a conviction before a restraining order is made. Section 99AAC(2)(c)(ii) provides that a restraining order can be made if the court is satisfied that, as a consequence of the child's contact or residence with the defendant, the child is at risk of sexual abuse or engaging in or being exposed to drugs, etc. In fact, the honourable member is incorrect when she says that there is a requirement for proof of conviction. I am advised that that is not so.

The Hon. S.G. WADE: I am very disappointed to hear the minister reiterate, in the committee stage, the same misrepresentation of the Hon. Ann Bressington's amendment that she proffered at the end of the second reading stage. In fact, she used almost exactly the same words.

I would have thought that she would have done the council the courtesy of responding to the objections the Hon. Ann Bressington made at the time, which is that her provision does not depend on the subjective view of the parent; it is a determination by the court. In fact, all the minister needed to do was to read the amendment where proposed paragraph (iii) provides that the court is otherwise satisfied that it is not in the best interests of the child. It is not a matter for the parent to make a judgment.

I am reminded by the Hon. Ann Bressington in her comments (where she reminded us about the objects of the Child Protection Act) of recent discussions in this council. The minister very strongly and passionately put forward the intervention orders legislation recently, and that was a bill that quite clearly was—

The CHAIRMAN: I remind honourable members that I am not going to allow second reading speeches. Speak to the amendment.

The Hon. S.G. WADE: This is about the amendment. When I made my second reading contribution there was no amendment so I was not able to talk about this issue.

The CHAIRMAN: You should indicate to the chamber whether you support the amendment and the reasons why.

The Hon. S.G. WADE: One of the reasons is that I think we have seen in the debate in the intervention orders legislation, and in the amendments to the Child Protection Act, that the whole point of protective legislation is that sometimes it needs to be drawn more broadly to make sure that it protects vulnerable people. The Hon. Ann Bressington is putting before us that we should have provisions in this legislation to reflect the objects and that we should focus on the best interests of the child.

For me it is not enough to say, 'Okay, as long as there is no sexual abuse that is okay, and as long as there are no drugs involved that is okay.' What if there is serious criminal activity? What if the gang of 49 is harbouring this child and this government is saying to us, 'Well, that's okay. Commissioner Mullighan didn't mention that. It doesn't involve sex and it doesn't involve drugs so it must be okay.'

I am strongly of the view that this government needs to take seriously the objects of this legislation and accept that we need to stand up for the best interests of the child. The Hon. Ann Bressington's amendments may not be perfect, but they sound an awful lot better than what the government is offering us.

The Hon. D.G.E. HOOD: I think I said in my second reading speech that this is a very good bill, but I think this amendment improves it. The key point that needs to be made here, which I think the Hon. Stephen Wade was trying to make, is that this amendment, if passed, really cannot be abused by parents. The government's comments were to the effect that it opposes it because it expands the possibility of being abused, or used, by parents for the wrong reasons.

However, to me the amendment is extremely clear. It provides that the court needs to be satisfied, so ultimately it is up to the court. Yes, it is possible that some ill-meaning parents could seek to misuse this provision, but ultimately that will be a matter determined by the courts. When we are dealing with the protection of children, I think it is in the interests of everyone that we have the lowest possible threshold, within reason, in order to ensure the safety of that child. This is an eminently sensible amendment, and for that reason we will be supporting it.

The Hon. G.E. GAGO: In relation to those comments, obviously what we are talking about here is parents' potential to abuse the process, and I have outlined that. In relation to the focus not being on the best interests of the child, it is just outrageous. We have a bill in front of us, which, under section 99AAC(3), quite clearly provides:

In considering whether or not to make a restraining order under this section and in considering the terms of the restraining order, the court's primary consideration must be the best interests of the child...

To suggest that the bill before us does not primarily focus on the interests of the child is outrageous.

The Hon. DAVID WINDERLICH: I briefly indicate that I will be supporting the amendment; it makes sense to me. It is important not to be starry eyed about the role that families can play and how parents can go too far in wanting to protect their children or in seeking to harm them. That does happen. We know that most abuse occurs within the home.

On the other hand, the alternative of government care is also extremely flawed. We need no better illustration than the recent forgotten Australians apology and last year the apology to the stolen generations. As has been pointed out by other speakers, this is not giving parents power: it is giving parents the ability to take the issue to the magistrate, who will, in fact, determine the merits of the application. A safeguard is built in, and I think it is a sensible additional preventive measure and a way of giving parents some sort of influence over what is happening to their children while building in a safeguard.

Amendments carried.

The Hon. A. BRESSINGTON: I move:

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Lines 17 to 25 [clause 12, inserted section 99AAC(5)(b)]—

Delete paragraph (b)

After line 29 [clause 12, inserted section 99AAC]—After subsection (5) insert:

- (5a) If the Court has made a restraining order under this section, the Court may also, subject to any current proceedings before, or orders of, the Family Court of Australia or the Youth Court, make orders providing for the temporary placement of the child (pending, if necessary, proceedings before either of those courts)—
 - (a) subject to paragraphs (b) and (c), into the custody of a guardian of the child; or
 - (b) if the court is not satisfied that placement of the child with a guardian is in the best interests of the child, or if such a placement is not possible or appropriate—into the custody of such other person as the court directs; or
 - (c) if the court is not satisfied that placement of the child with a guardian or some other person is in the best interests of the child, or if such a placement is not possible or appropriate—into the custody of the minister (for a period not exceeding 28 days) and the care of such person as the Chief Executive, or the Chief Executive's nominee, directs.

I move amendment No. 3 and also amendment No. 4 as it is consequential. These amendments seek to achieve two things. First, the amendments provide the court with a preference list for safe temporary placement options if the court elects to make such an order. First preference is given, of course, to the child's parents or legal guardians.

In the majority of cases I have encountered teens have not run away because of abuse at home, but rather because they have been lured by peers (who, too often, are older than the child), lifestyle, drug use and because of rebellion and the excitement of having no rules with which they must comply.

While there is, of course, a breakdown in the relationship between the parents and the child because of the child's decisions and actions, all the parents I have encountered desperately want their child to return home and simply be safe. If, however, a parent or guardian is unavailable or it is inappropriate for a child to be placed back into the family home, then the second preferred placement option is with such other persons as the court thinks appropriate. This is, of course, intended to be another family member—say, a grandparent or auntie—or a close family friend known and trusted by the child. It goes without saying that a random person in the street will not be considered appropriate by the court.

If neither a parent nor another person is available or appropriate, my amendment then provides for the minister to be granted temporary custody of the child for a period of no longer than 28 days. I have included a 28 day limitation upon ministerial guardianship with good reason for I have no desire to create a backdoor method by which the minister may be awarded enduring custody of a child. There is already a mechanism available to the minister in the Children's Protection Act 1993 for a guardianship order. I have a lot more to read, but—

The Hon. R.I. Lucas: Hear, hear!

The Hon. A. BRESSINGTON: Well, not a lot more, but I actually will not persist with this. I have predetermined indications for support, so I will leave those amendments in the hands of the committee.

The Hon. G.E. GAGO: The government is indicating support for these two amendments.

The Hon. S.G. WADE: The opposition will also be supporting the amendments.

The Hon. D.G.E. HOOD: As will Family First.

Amendments carried.

The Hon. S.G. WADE: I ask the minister: could an order prohibit contact with the child?

The Hon. G.E. GAGO: I have been advised the answer is yes.

The Hon. S.G. WADE: The second reading explanation stated:

The order can impose whatever restraints the court thinks necessary to protect the child from apprehended risk, including restraint on any form of contact or proximity or on being in a particular place.

In clause 12, new subsection (5)(c) provides that it may include any consequential or ancillary orders that the court thinks appropriate. Could this include prohibiting the defendant from taking up residence with another child other than the subject child?

The Hon. G.E. GAGO: I have been advised that this is quite a wide power but it really only pertains to the child in question. We are trying to protect the child in question. However, if a court thinks that it is necessary to stop a defendant having contact with any other person in order to protect the particular child, it could, for instance, make such an order. However, it is considered that would be highly unlikely, and it is hard to imagine that occurring.

The Hon. S.G. WADE: In relation to clause 12(7), the definitional clause, the reference to 'guardian' includes the statement 'any other person who stands in loco parentis to the child and has done so for a significant length of time'. I am wondering

what the breadth of that in loco parentis element might be and what is envisaged might come under that element.

The Hon. G.E. GAGO: We do not know what breadth might be applied by a court. We are happy to provide the honourable member with that information when we are able to provide it.

The Hon. S.G. WADE: So, very briefly, it is conceivable that a teacher, youth worker or mentor might take that role.

The Hon. G.E. GAGO: I am advised that it is most unlikely. It would be only if they were assuming a parental role.

Clause passed.

Remaining clauses (13 to 19) and title passed.

Bill reported with amendments.

Bill read a third time and passed.