

Review of the Children (Care And Protection) Act 1987 (NSW)

Child protection law is in a constant state of flux. Almost all States and Territories in Australia have passed new laws in recent years. The Northern Territory's *Community Welfare Act* dates from 1983. The Australian Capital Territory passed its *Children's Services Ordinance* in 1986. In New South Wales, the *Children (Care and Protection) Act* was passed in 1987, following more than a decade of discussion and the enactment of one Act which was never brought into force.¹ Victoria passed its *Children and Young Persons Act* in 1989, while in New Zealand, a major debate on child welfare law in a society which is seeking to reconcile the interests of Maori and non-Maori people led to the enactment of the *Children, Young Persons and Their Families Act* in 1989. This introduced a number of new ideas concerning child protection and juvenile justice. South Australia passed the *Children's Protection Act* in 1993 and new Bills are currently being drafted in Queensland, Tasmania and Western Australia.

Even though the New South Wales legislation is comparatively young by the standards of the law in Tasmania, Queensland and Western Australia, it is, nonetheless, under review once again. The State Government announced the review in September 1994. It comprises not only the *Children (Care and Protection) Act* but also the *Community Welfare Act 1987* which is an "umbrella" Act for the community welfare legislation which was passed in that year. Already, an Issues Paper has been released on the *Community Welfare Act*, and a discussion paper is currently being prepared on the *Children (Care and Protection) Act*.

The review is intended to be comprehensive. The *Children (Care and Protection) Act* covers not only child protection law, but also child care centres, substitute care, children's employment and a range of other matters. While many parts of the Act are working well, much has changed even since 1987, which makes a review of the law necessary. One of the key issues which is emerging in the 1990s in New South Wales is how to shift the emphasis in child protection work from a narrow focus on the investigation of incidents of child abuse, to an approach which is based upon prevention and early intervention, in which government departments and non-government agencies together provide a range of services to meet the needs of families in crisis or difficulty while ensuring the safety and protection of children. In the main these are issues of practice and resourcing, but the legislation also has a part to play. A major issue for the review is to consider what obligations the government should have in responding to notifications of child abuse or neglect, and what standards of practice should be expected of it. This issue is tied up with the definition of child abuse and the appropriate threshold for statutory intervention. It also raises issues concerning mandatory reporting and the role of other government departments in child protection work.

Another issue of general importance concerns children's rights. The United Nations Convention on the Rights of the Child was passed in 1989 and Australia is a signatory. The Convention is relevant to the subject matter of the Acts under review in many ways, not least in its emphasis upon listening carefully to the voice of the child on all matters in which his or her welfare is in issue.

1 *Community Welfare Act 1982.*

Substitute care is another important area for the review. A key element of the *Children (Care and Protection) Act 1987*'s provisions on substitute care was that there should be Boards of Review which would periodically examine the position of children in substitute care. This was never brought into force, leaving the position of such children largely unregulated by statutory provisions. The role of boards of review has now been taken over at least partially by the Community Services Commission under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*, which has the duty of monitoring the position of children in substitute care. However, it does not have the role of engaging in systematic review of each case, and issues remain about how children's welfare in substitute care can best be promoted and monitored. Issues concerning substitute care also arise from the Usher Report² which recommended that the government should withdraw from direct service provision in substitute care and should contract out to non-government agencies. This committee also recommended certain other reforms for which legislation would be necessary.

Another issue affecting substitute care is that of the language of custody and access. The assumption of parental rights which is involved when children are made wards of the State takes as its premise that the bundle of rights which parents have is contained within the legal concepts of "custody" and "guardianship". Custody and guardianship derive their meaning from the *Family Law Act 1975* (Cth). If the Family Law Reform Bill is passed by the Federal Parliament, the language of parental rights will be swept away to be replaced with the concept of parental responsibility. No longer will the terms "custody", "access" and "guardianship" be used. Instead, courts will be empowered to make residence orders and contact orders, while both parents retain parental responsibility. A question for New South Wales, if this is passed, is how to translate this into child welfare law given that the State law will need to take as its starting place the rights, powers and duties that parents have under the *Family Law Act* as the natural parents of the child. Another issue is whether the law should empower the courts to make decisions about access (or "contact") to children in alternative care. At present, the Children's Court is only able to make orders for interim access pending adjudication of the care application. If an order is made placing the child under the guardianship of the Minister, access is a matter for administrative decision. A right of appeal lies to the Community Services Appeals Tribunal, but neither the *Community Services (Complaints, Appeals and Monitoring) Act 1993* nor the *Children (Care and Protection) Act* offer any guidance on how these difficult access decisions should be made.

In all the issues raised in the review, New South Wales will look closely at the experience of other jurisdictions which have attempted new approaches to child protection law, especially elsewhere in Australia and also in New Zealand. The last decade of law reform has seen many new ideas tried out in one jurisdiction or another. New Zealand in particular, has attracted a lot of attention by its "Family Group Conferences", which are used to determine the outcome when a child is deemed to be in need of care and protection. This approach owes much to the Maori community which criticised an earlier Children and Young Persons Bill as being too monocultural in its outlook, with too much of a focus on the nuclear family. The idea that the members of the extended family, in negotiation with the child protection authorities, should be the primary decision makers, was a bold innovation which leaves the court to play a role only where the Family Group Conference can-

2 *Ministerial Review Committee: Review of Substitute Care Services in NSW* (1992). The Committee was chaired by Father John Usher.

not reach an agreement. South Australia has largely followed the New Zealand model, and Family Group Conferences have been used elsewhere without a statutory base.

The review is being undertaken by a project team within the Department of Community Services. It has an Advisory Reference Group consisting of representatives of a number of government departments and peak community groups. A working party has also been established to assist in preparing the discussion paper on the *Children (Care and Protection) Act*. Submissions are invited on any matter concerning the legislation, and may be sent to the Legislative Review Unit, Department of Community Services, Locked Bag 28, Ashfield, NSW 2131.

Patrick Parkinson

Associate Professor of Law, University of Sydney, Review Chairperson