SECTION 106A – A REVOLUTION FOR RE-INVENTING THE WHEEL?

A paper by Robert J McLachlan, solicitor, at the Legal Aid Commission Conference on 4 August 2007

1. On the 1 January 2007 the provisions of Section 106A became operative. Given the narrow compass of this paper it is perhaps appropriate to quote the section in full.

106A Admissibility of Certain Other Evidence

(1) The Children's Court must admit in proceedings before it any evidence adduced that a parent or primary care-giver of a child or young person the subject of care application:-

(a) is a person:

(i) from whose care and protection a child or young person was previously removed by a Court under this Act or the Children (Care and Protection) Act 1987, or by a Court of another jurisdiction under an Act of that jurisdiction, and

(ii) to whose care and protection the child or young person has not been restored, or

(b) is a person who has been named or otherwise identified by the coroner or a police officer (whether by use of the term "person of interest" or otherwise) as a person who may have been involved in causing a reviewable death of a child or young person.

(2) Evidence adduced under subsection (1) is prima facie evidence that the child or young person the subject of the care application is in need of care and protection.

(3) A parent or primary care-giver in respect of whom evidence referred to in subsection (1) has been adduced may rebut the prima facie evidence referred to in subsection (2) by satisfying the Children's Court that, on the balance of probabilities:

(a) the circumstances that gave rise to the previous removal of the child or young person concerned no longer exist, or

(b) the parent or primary care-giver concerned was not involved in causing the relevant reviewable death of the child or young person,

as the case may require.

(4) *This section has effect despite Section 93 and despite anything to the contrary in the Evidence Act 1995.*

(5) *In this section, reviewable death of a child or young person means a death of a child or young person that is reviewable by the Ombudsman under Part 6 of the Community Services (Complaint, Reviews and Monitoring) Act 1993.*

2. The section raises a number of unusual but not unknown evidentiary changes to the existing legislation. It is suggested it does the following:-

   (a) Upon establishment of certain facts identified in sub-section 1 it provides that there is prima facie evidence for a finding that the child is in need of care and protection under Section 71(1) and 72.

   (b) It alters the onus in respect of proof otherwise contained in the Act (see Section 93(4)) by placing that onus on the parent or primary care giver to show that intervening acts between the matters on which evidence has been adduced to give rise to the rebuttable presumption.

3. It is appropriate in considering exactly what the intent behind the section is to have reference to the Second Reading Speech of the Minister. Such Speech assists in defining the purpose and intent of the amending legislation and to assist the way in which it should be interpreted and applied by the Courts. See Section 32 Interpretation Act[1].

4. The Second Reading Speech of the Minister in respect of the amending legislation which introduced Section 106A was given by Minister Meagher on the 24 October 2006. The Minister said this about the intent and purpose behind the Section 106A:-

   "A further key feature central to improving protection for children at risk of harm from parents or care givers 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 care giver 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 a 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 care giver'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 care giver causing harm to a child, the bill places the onus of proof on the parent or care giver. 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 because the previous factors that put a child at risk of harm are 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 pre-natal 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 care giver. It is critical that the Children's Court be able to consider all available evidence when ordering preventative and protective measures for children."

5. It therefore appears that Parliament intended to overcome what was thought to be an anomaly in allowing the Department to adduce evidence on prior parenting practices that may give rise to a finding of likelihood. The writer is unaware of any particular cases which caused the amendment to be made it appears it was more an anecdotal statement prepared by Officers of the Department of Community Services to assist in the explanation for the drafting and promulgation of the section.

6. The first thing that should be said about the Minister's statement is that, with the greatest of respect, it is wrong. It is suggested that the clear law in respect of past conduct of parents is that reliable and relevant evidence touching upon their care for not only the children the subject of the proceedings but earlier children who are not the subject of these proceedings is clearly admissible. On two occasions the Court of Appeal under preceding legislation but dealing with this wider issue has made it clear that the position is thus. See Whale –v- Tonkins[2] and In the Appeal of Chantelle White[3].

7. In Whale –v- Tonkins the Court's Judgment was delivered by Hutley JA who said as follows:-

> "When the Court is enquiring whether the child is under incompetent or improper guardianship, though it has to find that existing at a certain date, it is no way concerned with events close to that date; It is concerned with all the evidence which is relevant, that is, evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. The enquiry may cover years."

8. It is suggested that the practice of the Children's Court has been to allow such "historical" evidence to be adduced by the Director General subject to doing so via the best evidence available and taking into account the comments in R –v- DOCS[4]. You might remember in that case the Supreme Court was considering the appropriateness or otherwise of the admission

into evidence and reliance by the Court where the source of the information generalised in kind was identified as coming from "the Police" and "other people". In reference to that evidence the Court said "I would have taken the view that no Court should have placed reliance on statements of the nature of those contained in paragraph 8 and it accepted in extraordinary circumstances where there was a reasonable explanation given for doing so no report in those terms should ever be put before a Court. I say that notwithstanding the terms of Section 93 of the Act."

9. While the writer has been engaged in cases where the Children's Court has excluded historical evidence for failure to meet the basic requirements of reliability or relevance he is not aware of cases where that evidence has been excluded simply because it was "old" or "historical". If such a case had occurred then it is suggested that the Trial Magistrate would have fallen into appeallable error in light of the principles referred to above.

10. Regrettably, notwithstanding what appeared to be a clear misstatement of the law the relevant legislation has been passed with the intent referred to in the Second Reading Speech.

11. To the extent that the question is posed by the topic of this paper it is suggested that the section is not a revolution but is in effect a re-inventing of the wheel. However, it is a wheel which gives great power to the Director General because of the establishment of a rebuttable presumption.

12. The section, however, raises a number of other issues which are still being played out before the Courts in which this paper seeks to comment upon and invite dialogue and views from other practitioners.

13. The first issue is, what is the linkage between Section 106A(2) and Section 71(1). Section 71(1) identifies the grounds upon which a Court can make a finding. They are multi-faceted and allow findings to be made on proven facts giving rise to the ground or on historical matters upon which a real possibility of future conduct can be properly inferred.

14. Section 106A is an evidentiary aid that requires the Court to give prima facie weight to evidence adduced in accordance with the section. It is an evidentiary aid. It does not, however, purport to create a new sub-section to the grounds upon which a finding can be made.

15. Is there a conflict? Does it create a new ground which overrides or encompasses all the ground under Section 71(1)? Is there a need to link the evidence adduced and admitted

under Section 106A to a specific ground that may otherwise be pleaded by the Director General.

16. Thus far it is the writer's experience that Courts have tended to proceed by simply using 106A as a basis of a finding once the formalities have been adduced. It is arguable that whilst it is an evidentiary aid giving rise to a rebuttable presumption it fails to link to one of the grounds and that there is an obligation which is not overcome by the terms of Section 106A on the Director General to prove the ground or grounds that are pleaded.

17. Whilst it is acknowledged that the width of each of the grounds may mean that this is more theoretical than practical in its implications, it is yet another anomaly in the drafting both in the original legislation and amendments to it which creates some degree of uncertainty and lack of clarity. Undoubtedly it is a matter that may be agitated in the not too distant future either before the Children's Court or in another place.

18. The next issue is what does Section 106A(1) require the Director General to do. The current practice of the Director General, in those cases where it seeks to rely upon the section, is to briefly plead certain factual events of the kind contained in sub-section (a).

19. Some suggestion has been made that sub-section (1) simply allows the adducing of evidence that identifies the bear bones of the sub-sections referred to. It is the writer's suggestion that that interpretation fails to give proper effect to the words that precede those sub-sections in 106(1) that "the Children's Court must admit in proceedings before it "any evidence"".

20. It suggested that the use of the word "any" gives a wide rather than a narrow interpretation of the type and nature of evidence that may be adduced. Whilst the practice currently appears to be to just simply identify the facts and provide short documentary evidence in support the writer can see no proper basis for the contention that the Director General is limited as to the ambit of evidence that may be adduced in support of the sub-sections referred to.

21. Sub-section 3 clearly is a reversal of onus upon the parents. The writer would query whether the practical effect of sub-section (3) alters in fact what was an evidentiary obligation that would have rested upon a parent where there is a significant prior history of poor parenting of either the subject children in the proceedings or other children whom the parent cared for.

22. If there is credible evidence to suggest that that parent failed to appropriately care and there were proceedings that may have either removed permanently or temporarily those children then common sense would require, in new proceedings, for that parent to identify factors that would distance themselves from the adverse inferences that would arise from such facts.

23. It suggested that in effect while the legislation appears to have created a new obligation on a parent in practice and reality such an obligation existed in any event.

24. Whilst there may be cases where section 3(b) would be applicable, it is suggested that the majority of cases that will come before the Court will fall within the potential ambit of section 3(a). I am not aware of any decision thus far testing the interpretation or ambit of the sub-section and therefore what follows must be viewed as the writer's own speculative interpretation of what may be required.

25. Firstly, it appears to the writer that there is a potential anomaly between the rebutting provision under sub-section 3 and the prima facie presumption under sub-section 1.

26. Sub-section 1 appears to require two facets to be established namely:-

    (a) That a child has been removed under relevant care legislation be it the 1987 Act or indeed the Child Welfare Act (although perhaps that will be less likely). It is also clear that the section was dealing with removal under care legislation. Does it apply to the Family Law Act where children are not removed but made by order of that Court to be placed in another parent or other person's care. It is arguable that the nature of the legislation that was sought to be encapsulated under sub-section 1(a)(i) was care legislation because it used the word removed, which has an understood affect in such legislation. That view is complimented by the fact that the second limb of sub-section (a) uses the particular words of care legislation "Care and Protection".

        Given that a reversal of onus is a significant change to the normal circumstance of care proceedings and notwithstanding that a purposive effect should be given to the same it is arguable that the ambit of sub-section 1(a)(i) is limited to care legislation either in this State or in another State of New South Wales. It will be interesting to see that matter argued and what the Court's decision is.

    (b) The next issue is that the parent must satisfy the Court that "the circumstances" that gave rise to the removal, but not the failure to restore no longer exist.

        This appears to require the Court to compare and contrast facts and circumstances at the time of removal rather than Final Order in determining whether there has been a change.

        There is no prescription as to what that change should be. If the Director General simply produces outline evidence showing a removal and a non-restoration is there an obligation on the parent to adduce the full evidence as to the circumstances in

which the removal took place. One would think that is not so given that they may not agree with all of those circumstances.

What is the position if no Court determined in a hearing what the exact circumstances were. In most care proceedings the threshold issue of whether a finding can be made is not contested. Concessions can be made on a limited basis or indeed under the current legislation without admissions. Re: Dessertaine[5].

27. The circumstances that gave rise to the previous removal creates a degree of vagueness and uncertainty that makes it difficult to understand what would be required. It could be said on behalf of a parent there being simple evidence of removal (without any detail) and non-restoration that the circumstances as seen by the parent was a relationship with an other person. The parent might plead that that relationship has ended and has not been re-instituted. Is that sufficient to rebut the presumption absent any other evidence identifying other circumstances existed. It would seem arguable to the writer that it is. The reversal of onus is one that should be construed in a limited fashion and in accordance with the legislation. If a parent identifies such a circumstance has altered then why should that not be sufficient to place the onus fairly and squarely upon the Director General in accordance with the general obligation under Section 93(4).

28. Unless this is seen as a legalistic approach it is suggested that one should return to the start of this paper where it suggested that the section does no more than to state what the writer believes was and is the position at general law in respect of prior history. In that circumstance is it arguable that because the legislature has intruded on that topic that the past history is no longer otherwise relevant except for the purposes of the sub-section, which is sought to prescribe its use. In that case if the Director General seeks to adduce limited evidence and there is a rebuttable of it in the manner suggested is the Director General entitled to adduce further evidence?

29. Certainly in other complimentary amending legislation there was an intention that for example where evidence was excluded because of the application of the Rules of Evidence is now in effect directed to allow further evidence to be adduced (see Section 68(2)).

30. The writer's view is that given that the legislation is protective that the narrower view canvassed above would not be adopted. That interpretation is reinforced by what was said by Justice Young in Frances and Benny[6] no.2.

31. Accordingly it seems to the writer that the amending legislation may have the effect of lengthening and protracting proceedings rather than reducing it where there is a real contest. In many cases where the history was properly before the Court a concession would be made

when combined with a critical event that had lead to the proceedings being commenced. If the Director General simply files the bare bones of evidence to satisfy 106A (as appears to have been happening) and little attention is paid to more recent events then one can see the following occurring:-

(a) The initiating proceedings are filed.

(b) There is a rebuttal in a limited way sufficient to place the onus back upon the Director General.

(c) The Director General files all of the evidence.

(d) A parent may seek to reply to a substantial part.

32. Therefore an amending provision that was intended to expedite the timely disposition of proceedings may have the reverse effect. It is for that reason that the writer's general view of the section is that it adds little by way of assistance but potentially adds much by way of complication. Time will tell whether his pessimistic view is correct or not.

33. Another important aspect of 106A is its ambit in terms of Application to proceedings under the Care Act. There is a view, expressed by some for the Director General, that 106A is an all enveloping provision that deals with not only the question of a finding but interim relief as well as Final Orders under Section 79.

34. The argument appears to be that 106A is an enabling provision in respect of evidentiary matters and there appears to be no warrant to restricting its interpretation to a finding only.

35. While there may be some attraction to that view it is suggested that that interpretation is not correct. As indicated Courts, while giving a purposive effect to legislation, will be slow to allow a general reversal of onus (where otherwise the onus rests upon the Director General) unless there is a clear and mandated legislative intention to do so.

36. It is perhaps useful to look at the language of 106A and the Minister's Second Reading Speech as to its intended affect to assist in the interpretation of the ambit of its affect.

37. 106A expresses the sub-section (2) that the prima facie evidence is to apply to the issue in the Care Application of whether there is a "need of care and protection". The use of that word, it is suggested is deliberate and precise. Section 71(1) in identifying the grounds describes that a Court must be satisfied that "the child or young person is in need of care and protection" for specified reasons. Section 72 further identifies the two stage process of both

at the time of removal and at the hearing, subject to the qualifications contained in sub-section (b) and focuses the Court's enquiry on whether the child or young person is then in need of care and protection.

38. It is only if and when a Court makes such a determination that it turns to a consideration of other orders. In Section 79(1), which says that the Court may make various orders thereafter identified if and only if it "finds that a child or young person is in need of care and protection".

39. In determining whether orders should be made under Section 79 the legislature has prescribed a number of steps that must be considered including under the permanency planning principles whether there is a realistic possibility of restoration (see Section 83) taking into account the objects and principles. A similar methodology appears to apply to whether undertakings should be given and received (Section 73) and whether a Supervision Order should be made (Section 76).

40. It is therefore clearly the intention that before there is an exercise of the power to make one of the discretionary orders available to the Court that it needs to determine whether a child is in need of care and protection. If that determination is made it can and may proceed to make orders of varying lengths and intrusions into the life of the family.

41. Care and protection is not defined but its use as a threshold test as to whether the Court has jurisdiction to make Final Orders is clear and apparent. It is therefore suggested that in its own words the intention of 106A is to enable a Court to determine a finding on prior historical events mandated under sub-section (2) and if a parent either omitted or failed to rebut those prima facie evidentiary matters by adducing evidence pursuant to Section 106A(3).

42. Turning to the question of Interim Orders a finding of need of care and protection does not form the basis of the test to be applied (see Section 69(2) and Section 70).

43. Indeed in the recent Court of Appeal decision of Re: Jayden[7] the Court of appeal found that the onus applicable to such proceedings was lesser than the allegation of a finding on the balance of probabilities. Whilst that decision on that topic can no longer be good law because of the amending provisions of Section 93(4) came into effect on the 1 January 2007, it is an authority decision that distinguishes the test to be applied between Section 69(2) on its face and Section 71. The language used in sub-section 69(2) may be similar in its effect but is in different and discrete terms to the language of Section 71 and 72 where the issue is a finding of need of care and protection.

44. It is therefore suggested that Section 106A will be interpreted as applying only as a facilitative piece of legislation to assist in a finding to overcome the vices (however erroneously identified

and held) by the Minister in her Second Reading Speech. That is on whether a finding can be made.

45. Certainly the writer is aware that a number of Children's Court Magistrates have taken the preliminary view of construing 106A in the manner referred to. The consequences for the Director General are that in cases where they have simply pleaded the matters required under 106A and given brief or negligible evidence about recent events they are at risk of a Court declining to make Interim Orders which are usually sought following the administrative removal of a child and usually invite an order of PR to the Minister.

46. Whilst again past history of poor parenting will be relevant to the overall determination of a long term order that should be made, it is suggested the Director General will not be able to rely upon a reversal of the onus of proof provided for under 106A. Even if it can the manner in which it can be counted by a parent suggests that it will be of limited utility. The Director General will be required to adduce detailed evidence where great reliance is being placed upon that history.

47. In conclusion therefore the writer would suggest as follows:-

    (a) 106A is not the revolution that it might otherwise appear to be and may in certain circumstances tend to complicate by lengthening the proceedings rather than reducing it as was the apparent intention.

    (b) There remains a number of areas that need to be explored including the interaction of 106A and the application to the grounds under Section 71(1) exactly what parent has to do to rebut the presumption under Section 106A(3).

    (c) That Section 106A will not be of assistance to the Director General in interim proceedings or in Final Orders by creating a rebuttable presumption.

BIBLIOGRAPHY

1. See dicta McHugh JA in Kingston –v- Keprose Pty Limited (1987) 11 NSW LR 404.
2. Whale –v- Tonkins 9 FAM LR 410.
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4. R –v- DOCS 2001 NSW SC 419 Hulme J.
5. Director General, Department of Community Services –v- Dessertaine & Ors 31 FAM LR 55.
6. Frances –v- Benny (no.2) Young J 2005 NSW SC 1207.
7. Re: Jayden Court of Appeal 2007 CLN 2.