YouthLaw Aotearoa

Submission on the Family Court (Supporting Children in Court) Legislation Bill

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Who We Are

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres throughout Aotearoa / New Zealand.

Our service provides free legal advice and advocacy specifically for children and young people under 25 years of age. We help children and young people facing issues with the Family Court in a couple of ways:

- Our lawyers in the legal advice team support children and their families with information and advice to help them navigate the Family Court. In 2020 our legal advice team helped young people in 111 care of children cases.[1]
- We run legal education workshops about family law for children and young people or those supporting them.
- We publish youth-friendly information resources, undertake research, and make submissions on law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years.

The submission has been prepared by Robert Lim, a graduate solicitor on our legal team and our YouthLaw staff and board. Special thanks to Sarah Butterfield and Manawa Pomare for their contributions to this submission.

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[1] YouthLaw AGM report at 9.

YouthLaw Aotearoa Submission

Introduction

YouthLaw Aotearoa submit that the Bill does not sufficiently address the issues with child participation identified in the Independent Panel's Report on the 2014 Family Justice Reforms ("Report")[2].

In summary, our issues with the Bill are as follows:

(a) Children are not consulted about the appointment of a lawyer for the child;
(b) There is no mechanism for children to change their appointed lawyer for child;
(c) New duties placed on lawyers to resolve matters speedily may be inconsistent with the concept of genuine child participation;
(d) There is no obligation for FDR providers to ensure child's views are obtained;
(e) Appointments of lawyer for the child for Māori children do not take into account the lawyer's understanding of Māori practices and culture.

The structure of this submission will begin with a discussion of genuine participation and then follow the clause sequence of the proposed Bill.

Genuine Participation

YouthLaw Aotearoa submit that children should be placed at the centre of all decision-making processes that have the potential to affect their lives in the present and future. This right is enshrined in article 12 of the United Nations Convention on the Rights of Child ("UNCROC"), which states that:

(a) Children who are capable of forming their own views should be given due weight in accordance with the age and maturity of the child;[3]
(b) Children should be provided an opportunity to be heard in any judicial and administrative proceedings that affect them, either directly or through a representative.[4]

In the UN Committee's general comment on this section of UNCROC, it was noted that for the participation to be genuine, the views should be both **seriously considered** and a **significant factor in the settlement of the issue.**[5] YouthLaw Aotearoa strongly submit that genuine participation should be a key reason for the government's proposed changes in the Bill.

Principles

YouthLaw Aotearoa agree with the addition of the principle proposed in clause 4 of the Bill. However, we recommend that "should be" be replaced with "must be" in both instances. This would ensure that the wording is in line with section 6(2) of the Care of Children Act 2004 ("COCA") and removes any confusion between the sections, as the situations they cover may overlap. We submit that "must be" would be more effective than "should be" in ensuring meaningful child participation does take place.

YouthLaw Aotearoa support the addition in clause 6 that explicitly mentions New Zealand's obligations to article 12 of UNCROC. We submit that this section will encourage participants in the Family Court system to consider how child participation

[2] Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms (Ministry of Justice, April 2019).
[3] United Nations Convention on the Rights of Child, art 12(1)
[4] Art 12(2)
[5] UN Committee on the Rights of the Child (CRC), General Comment No 12: The right of the child to be heard, above n 8, at 11

looks like in the jurisdictions of other signatories to UNCROC.

YouthLaw Aotearoa recommend that section 5(g) be rewritten as: "a child who is capable of forming their own views about any matter affecting their care and welfare *must be* given reasonable opportunities to participate in any decision affecting them and that, commensurate with their age and maturity, their views *must be* taken into account."

Lawyer for the Child

Consulting Child on Appointment

YouthLaw Aotearoa supports the changes proposed in clause 7 of the Bill, but submit that it should also include a requirement for the court to consult with the child prior to the appointment. Not doing so runs the risk of the process being an adult-centric approach where adults make assumptions of the child's preferences. It also does not meet the requirement of genuine participation. It would also be difficult for the court to ascertain which personality types would suit the child, and what cultures they identify with without consulting the child.

YouthLaw Aotearoa recommend the addition of a subsection under clause 7 that "Any appointment made under this section should be made after ascertaining the child's preferences on personality and cultural background."

Changing Lawyer for Child

A common query that we receive from children going through custody proceedings is whether they can change their appointed lawyer for the child. The reasons for the change of appointment, vary but include issues like not feeling like the lawyer is sufficiently putting their views across or a perception that the lawyer is not putting in enough effort.

Children must be provided the opportunity to be heard, either directly or through a representative.[6] In custody proceedings, the lawyer for the child is often the main (and practically the only) conduit for many children to put their views across.

A lack of trust between the lawyer for child and the young person effectively precludes any meaningful participation from them, as they are either frightened to speak directly to the court, are afraid of public taking sides, or are unsure how to relay their views without proper guidance. While we want to stress that these comments are not meant to detract from the effective role that the majority of lawyer for the child play, we submit it is important for children to have a mechanism to alter their appointed lawyer if they believe they are not able to meaningfully participate.

This mechanism should be co-designed with young people to ensure that this process is both easy to understand and accessible. For example, young people who are having difficulty with their lawyer for the child should be able to submit a request directly to the court registrar for a change (without parental consent), provided they have provided genuine reasons and have not changed their lawyer already.

While we understand that this mechanism may interfere with the timeliness of proceedings, we submit that introducing this mechanism in conjunction with our recommendation above (to consult with the child on the initial appointment) would minimise its impact.

YouthLaw Aotearoa recommend that the Ministry of Justice lead an investigation into the creation of a mechanism that allows children to change their appointed lawyer for child that is both easy to understand and accessible.

[6] United Nations Convention on the Rights of Child, art 12(2)

Lawyer's Duty to Explain Proceedings

YouthLaw Aotearoa supports the requirement in clause 8 for lawyers for the child to explain proceedings in a way the child is likely to understand. However, we believe that this section runs the risk of not making any substantive difference, unless it co-exists with a commitment by government to consult with child and communication experts to develop best practices and fund ongoing training for lawyers for the child.

From our experiences in speaking to children about legal issues on our advice line, we find that explaining legal concepts and processes to children can often be challenging. Furthermore, it can often be difficult to determine whether our client has fully grasped the advice delivered to them, as they can be too shy to interrupt us, or do not want to appear ignorant. We believe that a commitment from the government to provide funding for further training in child-appropriate communication for court-appointed lawyers would ensure that the Bill's aims are met.

YouthLaw Aotearoa recommend that the Ministry of Justice commit to providing further funding for child-focused communication training for Lawyer of the Child.

Lawyer's Duty to "Speediness"

YouthLaw Aotearoa agrees with the principle of resolving disputes as simply and speedily as possible, as proposed in clause 9 of the Bill. This duty will hopefully ensure that children are not left waiting for long periods of time without certainty about their future, which can lead to a lot of distress.

However, we submit that the obligation in clause 9 may run in conflict with the aims of the Bill. Ensuring that youth have a genuine and meaningful voice in proceedings can be a time-consuming process, but this time is necessary to ensure that genuine participation can occur. The duty in clause 9 may put pressure on lawyers to take shortcuts or even bypass important steps in ensuring youth voice and participation in order to expediate proceedings. This duty should be re-written to ensure lawyers are aware that child participation is to take pre-eminence over any other duties.

YouthLaw Aotearoa recommend that section 7B(2)(b) be rewritten as: "in enabling the issues in dispute to be resolved as fairly, inexpensively, simply, speedily, as is consistent with justice and the principles in Article 12 of the United Nations Conventions on the Rights of Child.

Family Dispute Resolution

YouthLaw Aotearoa submit that clause 11 does not sufficiently address the issues of child participation outlined in the Report.[7] The Report showed that the 2014 reforms shifted a significant percentage of custody proceedings into out of court processes such as FDR. However, due to FDR providers being given a large amount of discretion to create and apply their own policies, levels of child participation are inconsistent over providers, and in many cases that we have observed, not occurring at all.

One of the main issues is that while FDR providers have a statutory duty to ensure that child welfare is paramount, there is no duty to ensure child views are obtained or child participation is guaranteed in FDR.[8] The proposed addition in clause 11 of the Bill is a good starting point, but we submit that it could be re-worded to ensure that it is more in line with obligations under the Family Court to ensure child voices are heard and considered.[9]

We are concerned that the wording of "to the extent (if any) that the FDR provider considers appropriate" is too vague and leaves too much scope for FDR providers to

[7] Above n 5 at 71.
[8] Family Dispute Resolution Act 2013, s 11(2)(c)
[9] Care of Children Act 2004, s 6

develop their own practices, which will inevitably lead to a variability in outcomes.

Furthermore, the clause does not address the primary issue that we have experienced with FDR, in that parents generally do not want their children to attend at all, even if the child has expressed a wish to participate. Common reasons we have observed include a concern that the child may say something counter-productive to the parent's own personal goals, or a concern that the child should not be "exposed" to adult matters. These concerns can be exacerbated in situations where family violence has occurred.

YouthLaw Aotearoa recommend that the government undertakes a stocktake of FDR practices as suggested in the Report.[10] This should include a consideration of how FDR could work with child participation as the paramount consideration, which could include practices such as the facilitator interviewing the child beforehand, or having a report written by a therapeutic support person.

We reiterate that clause 12.2 would apply to this clause, and by not wording the section to guarantee child participation, we believe that New Zealand is failing in its obligations under UNCROC to ensure that children have the views heard either directly or through a representative.

YouthLaw Aotearoa also submit that the wording of clause 9 is not child-centric. Clause 9 refers to children as "involved" in the dispute, which seems to imply that they are subjects of the dispute rather than independent actors with an important role. This section should be re-phrased to recognise the child's agency.

YouthLaw Aotearoa recommend that the Ministry of Justice to lead a stocktake of FDR practices and to set out mandated best practices to ensure child participation across providers.

YouthLaw Aotearoa recommend the addition of a new subsection 12(2)(bb) which states: "Ensure that any children who are party to the dispute are given reasonable opportunity to express their views either directly or through a representative."

YouthLaw Aotearoa recommend that section 11(2)(ba) be rewritten as: "facilitate the participation in those discussions of children who are party to the dispute, to the extent that the FDR provider considers appropriate"

Te Tiriti o Waitangi

YouthLaw Aotearoa submit that New Zealand's Family Law system is fundamentally Euro-centric and fails Māori whanau.[11] We believe that the Ministry of Justice, in partnership with iwi and other Māori, should develop the strategic framework to improve family justice services for Maori as recommended in the Report.[12]

The recommendations that we have espoused in this report follow a primarily Pakeha view (i.e. the pre-eminence of children's views at the individual level), which we acknowledge, may not be suitable for Māori children. Any strategic framework developed by the Ministry of Justice should include a focus on how to ensure Māori children effectively participate in a way that is suitable to their needs, such as an increased recognition in the role of grandparents or other extended whānau to support them or represent their views.

We also submit that clause 7 should include a presumption that children of Māori descent will be represented by a Māori lawyer, subject only to availability, or if the child expressed an alternative preference. As a euro-centric system, Māori children can find the custody process particularly difficult and alienating. Having a representative that is able to have

[10] Above n 5 at 7.
[11] Above n 5 at 37.
[12] Above n 5 at 8.

regard for their values and beliefs would be a necessary provisional measure to support them until an alternative tikanga-based process to custody disputes is introduced.

YouthLaw Aotearoa recommend that the Ministry of Justice lead the development and implementation of a tikanga-based process both in the Family Court and in FDR, in partnership with iwi and other Māori.

YouthLaw Aotearoa recommend that under clause 7, a subsection be added that "Children of Māori descent should have a presumptive right to have a Māori lawyer appointed to them, subject only to availability and the child's own cultural preferences."

Recommendations

YouthLaw recommends the following:

1. **Section 5(g) be rewritten as: "a child who is capable of forming their own views about any matter affecting their care and welfare *must be* given reasonable opportunities to participate in any decision affecting them and that, commensurate with their age and maturity, their views *must be* taken into account."**

2. **The addition of a subsection under clause 7 that "Any appointment made under this section should be made after ascertaining the child's preferences on personality and cultural background."**

3. **The Ministry of Justice lead an investigation into the creation of a mechanism that allows children to change their appointed lawyer for child that is both easy to understand and accessible.**

4. **The Ministry of Justice commit to providing further funding for child-focused communication training for Lawyer of the Child.**

5. **Section 7B(2)(b) be rewritten as: "in enabling the issues in dispute to be resolved as fairly, inexpensively, simply, and speedily as is consistent with justice and the principles in Article 12 of the United Nations Conventions on the Rights of Child.**

6. **The Ministry of Justice to lead a stocktake of FDR practices and to set out mandated best practices to ensure child participation across providers.**

7. **The addition of a new subsection 12(2)(bb) which states: "Ensure that any children who are party to the dispute are given reasonable opportunity to express their views either directly or through a representative."**

8. **Section 11(2)(ba) be rewritten as: "facilitate the participation in those discussions of children who are party to the dispute, to the extent that the FDR provider considers appropriate"**

9. **The Ministry of Justice lead the development and implementation of a tikanga-based process both in the Family Court and in FDR, in partnership with iwi and other Māori.**

10. **Under clause 7, a subsection be added that "Children of Māori descent should have a presumptive right to have a Māori lawyer appointed to them, subject only to availability and the child's own cultural preferences."**

Ngā mihi nui,

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