

New Zealand Law Society

SUBMISSION ON THE HAGUE CONVENTION CHILD PROTECTION CONVENTION

Introduction

The Family Law Section, which has prepared this submission for the New Zealand Law Society, generally supports New Zealand's accession to the Convention.

Due to the short timeframe given to respond to a reasonably complex area of law, the Society provided its preliminary answers to the specific questions posed by the Ministry by letter of 16.2.10.

1. Given that the definition of parental responsibility is intended to be broad, do you consider that it might include a parent who is not a guardian but has day-to-day care by agreement or Court order?

1.1 Although it is by no means clear that the intended, broad definition of "parental responsibility" will necessarily include a parent who is not a guardian, but has day-to-day care by agreement or by court order, the intent that it do so is evident. The practical implications of this are not, however, clear.

Analysis

1.1.1 The term "parental responsibility" is also found, with the same definition, in Article 18 of the United Nations Convention on the Rights of the Child (UNCROC).

1.1.2 The definition is not exhaustive, but is expressed as "includes" thereby suggesting that a broad interpretation is warranted.

1.1.3 The term is redolent of, but not identical to, "guardianship" in New Zealand law (s15 of the Care of Children Act 2004 (COCA)).

1.1.4 "Parental" authority/responsibility for the most part arises from the parent's status as a guardian.

1.1.5 Under New Zealand law, a person who is not a guardian does not have "the duties, powers, rights and responsibilities that a parent of the child has in relation to the

upbringing of a child” but does not necessarily have the additional duties, powers, rights and responsibilities vested by enactments such as the Education Act 1989.

- 1.2 Acquisition of “parental responsibility” (guardianship) is not an automatic function of biological parenthood although a non-guardian parent may have certain legal liabilities/obligations; for example, liability for child support and certain rights, such as consultation regarding adoption under the Adoption Act 1955 and membership of a “family group” in terms of the Child Young Persons and Their Families Act 1989 (CYPTF Act).
- 1.3 There is, in short, a distinction to be drawn between “parenthood” in the biological sense and “parental responsibility”, the legal package of rights, responsibilities, powers, etc but it is by no means easy to draw.
- 1.4 UNCROC distinguishes between “parents” (common responsibilities for the upbringing and development of the child) and “legal guardians” (who may not be parents).
- 1.5 The Report of the Special Commission dealing with the preliminary draft of the Convention noted the term “parental responsibility” was intended to embrace “the entirety of the duties and rights which belong to the father and mother under the law” (emphasis added). In New Zealand law the following examples demonstrate the breadth of this:
 - s40 of COCA makes agreements as to the role of providing day-to-day care or context or upbringing as between “parents or guardians” potentially enforceable.
 - s48 of COCA extends the opportunity to apply for a parenting order to a non-guardian parent (and indeed a person who may not be a parent or a guardian) who will thereby derive enforceable rights and responsibilities also enforceable against them.
 - s99 of the Child Support Act 1991 provides for a “step-parent” to have child support obligations without acquiring “parental responsibility”.
- 1.6 The matter is confused further by the associated reference to “rights of custody” (Article 3(b)) which is not defined but will no doubt derive its meaning from Hague Convention jurisprudence. Case law has exposed some considerable differences of opinion as to the breadth of this term.

- 1.7 Although one of the objects of the Convention, Article 1(1)(c) “to determine the law applicable to parental responsibility”, the link between Articles 16(1), 16(3), 16(4) and 17 is not crystal clear.
- 1.7.1 Cautious deconstruction of those articles suggests the following:
- 1.7.2 **Article 16(1)**
 The attribution of parental responsibility “by operation of law” (i.e. without the intervention of a judicial or administrative body) means, in New Zealand terms, attribution by statute; for example, COCA. If, therefore, New Zealand is the State of habitual residence then it seems likely that the term “parental responsibility” will extend widely and include non-guardians in certain circumstances. Agreement under s40 of COCA may, for example, create some (albeit tenuous) “parental responsibility”.
- 1.7.3 **Articles 16(3) and 16(4)**
 If parental responsibility exists under New Zealand law then it will survive a change of habitual residence and someone with “parental responsibility” maintains that status. If, however, it does not exist then the exercise of “attribution” (see Article 16(i)) commences afresh and is governed by the law of the State of the new habitual residence. Thus,, someone without “attributed” parental responsibility in State A (and thus unable to rely on Article 16(3)) could seek to have such parental responsibility attributed in State B by relying on State B’s laws.
- 1.7.4 **Article 17**
 Attribution and existence of parental responsibility, however, is distinct from the “exercise of parental responsibility” which is governed by the law of the State of habitual residence (even if it has changed). Status as someone with “attributed” parental responsibility does not lead inexorably to the right to “exercise” the authority conferred by that status. The practical implication of this distinction is by no means clear (see Care of Children Case Study 2 of the background paper).
- 1.8 However, given the confirmation that a “primary consideration” is the best interests of the child and the over-arching object of the Convention (“to improve the protection of children in international situations” and to provide for the taking of “measures directed to the protection of the child”) it is considered that a liberal, rather than an overly technical, approach to the definition of parental responsibility would be adopted.

2. Do you think the Convention gives sufficient recognition to the importance of family, whanau and extended family?

- 2.1 The main thrust of the Child Protection Convention is to set in place mechanisms for dealing with the conflict of laws concerning the power of authorities and the law applicable to the protection of children. The preamble of the Convention affirms that the best interests of the child are the primary consideration.
- 2.2 With that in mind, little comment is made in the document to a child's extended family or whanau as the focus is very firmly on the issue of jurisdiction and the immediacy of protective measures that can be taken in relation to children within a signatories jurisdiction.
- 2.3 The Convention deals predominantly and almost exclusively with the issue of jurisdiction, which is then pinned to a child's habitual residence, and then flowing on from that the definition of parental responsibility.
- 2.4 It is arguable that the definition of "parental responsibility" is wide enough to include other members of a child's family and/or whanau who may have the legal parental responsibility for that child, even though they are not a parent.
- 2.5 Parental responsibility is defined as "*parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, **guardians** or other legal representatives in relation to the person or the property of the child*". The inclusion of the terms "parental authority" and "guardians" would cover a member of a child's extended family and/or whanau should they have legal status such as guardianship or a parenting order with regards to that particular child.
- 2.6 Extended members of a child's family and/or whanau have in New Zealand the ability to apply under COCA to be appointed as additional guardians or to obtain a parenting order in respect of a child under certain circumstances. Such orders made in New Zealand would allow an extended member of the child's family to use the Convention (if appropriate) given the definition of "parental responsibility".
- 2.7 There is also applicable ability under the CYPTF Act for guardianship orders and custody orders to be made in favour of extended family and/or whanau which would be sufficiently covered and included by the terminology of the new Convention.

2.8 Given the intention of the Convention, it would appear on reading the document that sufficient recognition is given for the importance and involvement of extended family and whanau within the context of what is hoping to be achieved by the adoption of the Convention in New Zealand. It is however not the scope nor intention of this Convention to address wider issues of family or whanau per se.

3. **What types of provisional measures might be taken under Article 12 in both private family law and care and protection cases?**

3.1 The thrust of the Convention, similar to the Convention on the civil aspects of international child abducting, is that relevant issues should be determined in the child's country of habitual residence. There is a marked crossover between the two conventions apparent from reading the document. This has two effects:

- recognition must be given to existing orders in the state of habitual residence; and
- orders made under Article 12 are, as a consequence, interim only.

3.2 The Convention applies not only to the person but also the property of the child. While there has been no time to research the point, there does not appear to be any commentary on one important point. Like most other countries New Zealand has always jealously guarded its jurisdiction over immovable property (i.e. land) situated within its territorial boundaries. Is it intended that a foreign Court having jurisdiction over a child habitually resident within its territory should have jurisdiction over any interest that child might have in immovables situated in New Zealand? If so, it would be a major departure from the current law.

3.3 Both COCA and the CYPTF Act would clearly apply to any child found within the territorial boundaries of New Zealand.

3.4 It is not generally recognised that s14 of COCA gives jurisdiction under that Act to the Court to appoint a guardian to administer a child's property pursuant to s33(1). That would be in addition to the wide range of protective measures available to protect the person of the child even on an interim basis.

3.5 Equally, the CYPTF Act contains a wide range of remedies that would not only deal with children in need of care and protection but can also order the transfer of a protection order under s207K to a "*participating state*", which presumably would be expanded to include both countries that are participants to the convention. Both Acts appropriately give jurisdiction to give orders preventing the removal of a child from New Zealand.

3.6 Insofar as property is concerned, and apart from the provisions referred to above, the High Court would have sweeping powers to protect and control the property of a minor, and of course there are powers under the Trustee Act 1956 which would protect the situation in relation to trusts.

3.7 On the basis of this, there appears to be no present need for significant legislative amendment. The Society believes that the New Zealand Courts have a sufficient armoury of powers available to deal with any issues that might arise under Article 12 of the Convention. This matter should be given further thought at the next stage of the consultation process.

4. What are the relative advantages and disadvantages of the Convention and Subpart 3 of the Care of Children Act 2004 (COCA), and Part 3A of the Children, Young Persons and Their Families Act 1989 (CYPTF)?

Advantages

4.1 The age at which a child is under the jurisdiction of the Convention is consistently 18 years whereas in COCA and CYPTF Act the age varies

Under COCA, “child” means a person under the age of 18 years and would encompass guardianship matters. However, there are exceptions for children who are married and/or in a de facto relationship. Parenting orders cannot be made in respect of child 16 years or over. Under the CYPTF Act the age limit is 17 years. The Society notes that the Children Young Persons and Their Families Amendment Bill (No 6), yet to be passed, proposes increasing the age of a child to 18 years.

4.2 The scope of matters covered under the Convention is much wider than under COCA and CYPTF Act

Particularly as the Convention allows a court to exercise jurisdiction to protect property and the CYPTF Act does not.

4.3 The State having jurisdiction under the Convention is that of the child’s habitual residence –“jurisdictional certainty”

As it is usual for the Contracting State where the child habitually lives to have the most significant connection with the child that seems the most efficacious way of dealing with matters and provides jurisdictional certainty. Whilst COCA allows a wider jurisdictional base it is not inconsistent with this premise. The Convention is consistent with the CYPTF Act,

which was designed for the jurisdiction to be where the child resides once the child was in that State.

4.4 **The relatively large number of countries bound**

At present COCA extends only to Australia and similarly with the CYPTF Act. New Zealand now has significant relations with many other countries in the world and the Convention provides the framework for working relationships with those States. The Convention binds a greater number of countries – 12 at this time.

4.5 **Early intervention under the Convention**

The Convention allows for assistance and co-operation between Contracting States to be given at a relatively early level such as under Article 31(b) relating to mediation and conciliation and Article 31(c) where a State can request assistance to locate a child. Under COCA, the reciprocity does not occur until an Order has been made. Under the CYPTF Act, orders or proceedings are required and generally co-operation is in terms of the Protocol between Australia and New Zealand authorities. It may be expected that by New Zealand acceding to the Convention that would give that protocol more weight. There is limited ability for co-operation and action taken between other states at this lower level and the Convention would enable this and provide formalisation of co-operation between States.

4.6 **Registration and Enforceability**

It is an advantage that enforceability under the Convention is directed by the Convention to be simple and rapid.

Disadvantages

4.7 **Exceptions to jurisdiction**

The Convention has a number of exceptions as to when a State may take jurisdiction, which might open the door for prolonged disputes. There is less opportunity for this under Subpart 3 of COCA and Part 3A of the CYPTF Act.

4.8 **The arms the State are exercising are both the administrative and judicial arms under the Convention**

4.8.1 Pursuant to the Convention it can be the administrative arm and/or the judicial arm of a Contracting State that will have authority to exercise the provisions of the Convention. Under COCA it is purely the judicial arm, the New Zealand Court, dealing with matters under the

Act. The CYPTF Act was designed to enable both the administrative and judicial arms to act to the highest level with its counterpart in Australia to carry out functions under Part 3A of the Act.

- 4.8.2 The Convention does not direct another Contracting State to mirror which arm is authorised to deal with matters under the Convention. It is unclear if it is intended that only a New Zealand court would have the authority to deal with another Contracting State's Court or whether it would have authority to deal with the administrative arm only, (being the arm given authority in that State), or a combination of the two.

4.9 **One size fits all if you are a Contracting State**

The Convention applies to all Contracting States and those States are bound by the Convention. Part 3A of the CYPTF Act is particularly tailored to Australia and New Zealand and therefore, at times, some matters covered in Part 3A will be inconsistent with the Convention. A Contracting State will therefore have limited ability to tailor matters to its particular needs. By contrast, non-contracting States will retain a flexibility to tailor solutions because they are not bound by the Convention.

4.10 **Registration and Enforceability**

Pursuant to Article 23 of the Convention the recognition of a State's Order is by operation of law. This is much wider than COCA and creates an inconsistency under which a New Zealand Court has the right to vary, cancel or discharge its orders. The Convention provisions are wider but not inconsistent with the CYPTF Act.

4.11 **Ability of the Child to be heard**

The ability of a child to be heard pursuant to the Convention is limited compared with COCA and the CYPTF Act.

5. Can you identify any problems inherent in recognising and enforcing the orders of other Contracting States?

- 5.1 Under the Convention, the New Zealand Courts will be required to respect the measures already taken by another Contracting State and not to take measures that would be incompatible with those already taken. The Convention states that the attribution or extinction of parental responsibility is governed by the law of the child's habitual residence. If there is a change in habitual residence, a person who had parental responsibility does not

lose it. This may be in conflict with the current law in New Zealand (refer to the answer to question 1, para 11).

- 5.2 Article 27 of the Convention confirms that no review of the merits is allowed. This appears to be balanced to some extent by the affirmation in the preamble that the best interests of the child are a primary consideration, and the ability to re-examine an order if it is found to be manifestly contrary to public policy. The interface between Article 27 and the best interests of the child and the manifestly contrary to public policy "loopholes" will no doubt be subject to careful judicial scrutiny in the future.
- 5.3 The Convention will require New Zealand Courts to enforce care orders made in States with different histories, jurisprudence and inherently different approaches to child welfare than New Zealand.
- 5.4 New Zealand has a set of child protection laws that have been informed by the particular history of child protection matters in New Zealand. The Bristol report and the reforms that followed that report, reinforced by the scrutiny the Family Court and child protection Agencies were subjected to after cases such as that of James Whakaruru, are notable examples. Not much more than a decade ago inter-spousal violence that was not seen by children was largely regarded by the New Zealand Family Court as an adult issue that did not impact on the welfare of the children to any great extent. In contrast there is now a presumption that inter-spousal violence may well result in violence against children. Where allegations of violence are made, the allegedly violent spouse is required by New Zealand law to have supervised contact with children until the Court is satisfied that the children are not at risk. This requires the careful examination of the matters set out in s60 of COCA.
- 5.5 Under the Convention, a previously violent parent may be entitled to unsupervised contact that has been granted in another State, without any of the careful consideration of s60 COCA matters that would have taken place had the originating application been filed in the New Zealand Court. This may run contrary to a New Zealand Courts usual stance on child protection matters, and in the Society's view could be problematic.
- 5.6 It is unclear whether the incompatibility between New Zealand laws and the orders made in other Contracting States, that the New Zealand Courts will be asked to enforce, will be resolved by the use of the best interests of the child and the manifestly contrary to public policy provisions.

6. What other authorities should be listed as competent authorities under Article 44?

6.1 The only appropriate authority pursuant to Article 44 should be the Central Authority and no other.

7. Is a reservation needed in relation to a Māori child's interest in Māori land?

7.1 The Society believes that a reservation under Article 55 is required in respect of a Maori child's interest in Maori land. New Zealand, and only New Zealand, should have the ability and authority to make any decisions in relation to a Maori child's interest in Maori land.

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22.3.10