



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill

28/07/2016

Submission on the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill

Introduction

1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill (Bill).

Clause 4 – Section 2 amended (Interpretation)

Definition of “young person”

2 The Law Society supports the proposed amendment that the definition of “young person” for the purposes of the care and protection provisions of the Children, Young Persons, and Their Families Act 1989 (Act) (Parts 2 to 3A) will extend to persons who are 17 years of age.¹ As noted in the background papers to the Bill, the current “exclusion of 17 year-olds from protections afforded by the State to children and young people is not in alignment with the United Nations Convention on the Rights of the Child (UNCROC), ratified by New Zealand in 1993, which defines a child as a person under the age of 18”.²

3 In relation to a similar extension of the definition to Parts 4 and 5 of the Act (Youth Justice), the Law Society notes that this will be considered during the second stage of the CYPF legislative reform process.³ The Law Society has written to the relevant Ministers supporting such an extension.

Clause 6 – Section 7 amended (Duties of chief executive)

4 Clause 6(2) inserts a new subsection 7(2)(bb), placing a duty on the chief executive to ensure that services are available to children and young persons (with a special emphasis on the needs of those in care) and that they are provided with an opportunity and support to express their views about matters that are important to them in relation to any action or service, as well as the ability to comment on the operation and effectiveness of processes and services for the purpose of contributing to the improvement of these.

5 The Law Society supports this provision in principle.

6 It is however not clear how two aspects of the proposal will work in practice, and the select committee may wish to obtain advice from officials in relation to:

6.1 the relationship between the independent advocacy services provided for in proposed section 7(2)(bb) and (3), and other mechanisms for children and young persons to participate in and express views relating to processes affecting them (for example as contemplated in proposed new section 11); and

6.2 the extent to which the service providers will be required to comply with the objects and principles of the Act (as set out in sections 4, 5, 6 and 13, for example), and whether any of those sections might need to be amended to provide for this.

¹ Clause 4: new section 2(1)(a).

² Ministry of Social Development *Regulatory Impact Statement: Children, Young Persons, and Their Families Act age settings* (9 March 2016), page 7.

³ Ministry of Justice, section 7 New Zealand Bill of Rights Act advice (17 May 2016), paragraph 20.

Clause 8 – Section 11 replaced (Duty of court and counsel to encourage and assist child or young person to participate in proceedings)

Participation at Intention to Charge Family Group Conferences

- 7 Clause 8 (new section 11) places duties on persons who are responsible for proceedings or processes, to encourage and assist a child or young person to participate in proceedings which will result in actions and decisions under the Act that may significantly affect the child or young person. Under proposed section 11(3)(a), for proceedings before a court, duties are placed on the judge or “other person presiding”, and the barrister or solicitor representing the child or young person. Under proposed new section 11(3)(b), for proceedings of a Family Group Conference (FGC), duties are placed on the person responsible for convening the conference (the FGC Co-ordinator).
- 8 The Law Society supports the Bill’s objective of “embedding the views of children and young persons at an individual and systemic level” to support their participation (Explanatory Note, page 1, bullet point 2).
- 9 Youth Advocates (solicitors or barristers appointed by the court under section 323 of the Act to represent a child or young person in court proceedings) play a fundamental role in protecting the rights of children and young persons. Legal representation at key points of the process ensures children and young persons are fully informed and empowered to participate in decision-making in a meaningful way. The Youth Advocate is present solely to represent the child or young person and essentially to be their voice.
- 10 There has been recognition by the youth justice sector that there is a gap in the provision of legal representation at Intention to Charge Family Group Conferences (ITC FGCs).⁴ ITC FGCs have a specific purpose and carry potentially serious consequences. The child or young person will be expected to respond to alleged criminal activity and penalties will be imposed. The victim is also likely to be present. ITC FGCs take place before a Youth Advocate is appointed by the court under section 323 of the Act. There is a significant risk that, without legal representation at ITC FGCs, a child or young person may admit to an offence they did not commit or to which they have a substantive defence, or may be incorrectly charged. The child or young person may not have the communication skills or be sufficiently assertive to indicate that they did not commit an offence, especially in the presence of police. They will not know the law relating to that offence.
- 11 Currently, an FGC Co-ordinator may invite a Youth Advocate to attend an ITC FGC if the Youth Advocate has previously acted for the child or young person or is otherwise likely to be appointed by the court. Invitation is at the FGC Co-ordinator's discretion and the Youth Advocate's attendance is pro bono. (A child or young person’s family may also seek representation privately.)
- 12 The background papers to the Bill indicate that officials did not consider expanding the role of Youth Advocates, as a policy decision has been made that an independent advocacy service will be established.⁵
- 13 It is not reasonable to place the responsibility for ensuring that the child or young person’s legal rights are preserved at the ITC FGC, on the proposed independent advocacy service or the FGC Co-ordinator.

⁴ See Ziyad Hopkins *Diverted from Counsel: Filling the Rights Gap in New Zealand’s Youth Justice Model* pages 62–68, available at <http://www.fulbright.org.nz/wp-content/uploads/2015/08/HOPKINS-Ziyad-PDF-report.pdf>.

⁵ Ministry of Social Development *Regulatory Impact Statement: Modernising Child, Youth and Family: Enhancing children and young people’s participation* (5 April 2016), page 16.

- 14 The FGC Co-ordinator's role is not to preserve the legal rights of the child or young person: it is to facilitate the ITC FGC process and remain impartial in relation to the victim, child or young person, police and family. It is fundamentally flawed to require the FGC Co-ordinator to encourage a child or young person to participate in a process that the child or young person does not understand involving police charges and the legal elements required to constitute offending, and to speak in an environment that is likely to be perceived as intimidating because of the roles of the adults present and the imbalance of power between the adults and the child or young person.
- 15 The proposed independent advocacy service would not necessarily have the skills and specialist legal knowledge to ensure the child or young person's legal rights are identified and preserved. A key component of the ITC FGC is to determine whether the child or young person admits or denies the charge. The independent advocacy service would be unable to provide legal advice to the young person as to whether to admit or deny the charge.
- 16 The Law Society considers that there is a significant gap in the legislative framework. Youth Advocates should be appointed prior to the ITC FGC to ensure that all children and young persons are afforded legal representation and the ability to participate fully. Further policy work should be undertaken to consider amendments to the Act and administrative mechanisms necessary to enable appointment of Youth Advocates at this earlier stage. Such amendments could be made at the same time as changes to the youth justice provisions that are anticipated in the next stage of the CYPF legislative reforms.

Recommendation

- 17 It is recommended that the select committee:
 - 17.1 obtain advice from officials on amendments to the Act and administrative mechanisms that would be necessary to enable appointment of Youth Advocates before the Intention to Charge Family Group Conference;
 - 17.2 obtain advice from officials on how proposed section 11(3)(b) (which provides for the convenor's duty to encourage and assist the participation and expression of views of children and young persons at Family Group Conferences) can be amended, to ensure that the interests of children and young persons who are not legally represented at Intention to Charge Family Group Conferences are not prejudiced; and
 - 17.3 recommend amending proposed section 11(3)(b) of the Bill to add "the barrister or solicitor representing the child or young person" to those responsible for performing the duties imposed under sections 11(2)(a) – (c) for proceedings of a Family Group Conference.

Conclusion

- 18 The Law Society does not wish to appear in support of this submission, but is available to meet with the committee or officials advising if that would be of assistance.



Andrew Logan
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28 July 2016