



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

KIWISAVER (FOSTER PARENTS OPTING IN FOR CHILDREN IN THEIR CARE) AMENDMENT BILL

24/10/2018

KiwiSaver (Foster Parents Opting in for Children in their Care) Amendment Bill

1. Introduction

- 1.1 The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the KiwiSaver (Foster Parents Opting in for Children in their Care) Amendment (the Bill).
- 1.2 The Law Society does not seek to be heard but is happy to discuss this submission with the committee or officials advising on the Bill if that would be of assistance.

2. Overview

- 2.1 The Bill has been introduced as a member's bill by a member who has identified that there are practical difficulties in opening KiwiSaver accounts for some children in care – namely, those children who are in the day-to-day care of an adult who is neither their parent or guardian. The current avenues for opening KiwiSaver accounts for these children are said to be too cumbersome:¹

Currently the only way for a foster parent or kin carer to open a KiwiSaver account is by application to their allocated social worker and experience has proven that this is a very low priority for social workers, as they have other more urgent tasks to address. The CEO of MSD currently has the power to open a KiwiSaver account for a child who has contested or no legal guardians but this relies on complex processes to take place within a bureaucratic framework where the CEO's priorities are in urgent demand in other areas.

- 2.2 The Bill proposes to amend the KiwiSaver Act 2006 (the KiwiSaver Act) to facilitate KiwiSaver accounts being opened for these children by their "foster parents" or "kin carers". That appears to be a laudable objective.
- 2.3 However, as discussed below, further analysis and drafting changes are needed to ensure the legislation is fit-for-purpose. If the Bill is to proceed, the Law Society recommends that the select committee obtains advice from officials and drafting support from experienced parliamentary drafters.

3. Drafting issues

- 3.1 As noted above, many children are in the day-to-day care of an adult who is neither their parent or guardian; some will be in the care of an extended family or whanau member, while others will have no kin relationship with the child. While that adult may have a court order for day-to-day care,² that order does not give them the status of legal guardianship of the child. It therefore prevents them from opening a KiwiSaver account for the child's benefit. The Bill proposes to remove this barrier by allowing "foster parents" or "kin carers" who have the care of children but who are not legal guardians to opt into KiwiSaver on behalf of the child.
- 3.2 There are technical difficulties with the proposed definitions:

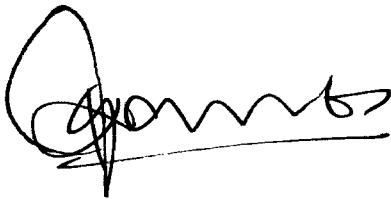
¹ Explanatory Note to the Bill, p1.

² Pursuant to sections 78 and/or 101 of the Oranga Tamariki Act 1989 (OT Act) or section 48 of the Care of Children Act 2004 (COCA).

- a. It is not clear what the phrase “in foster care” in proposed new sections 35(4A) and 35(4B) (clause 4) encompasses. Is it intended to include, for example, a child who is the subject of a care agreement under sections 139 or 140 of the Oranga Tamariki Act 1989 (OT Act)? Or does it include a child who is placed in an OT family home as opposed to an OT residence?
- b. The other difficulty is that there is no definition of “foster parent” and “kin carer” in the Bill or any of the relevant statutes: the KiwiSaver Act, the OT Act or the Care of Children Act 2004 (COCA). Also, is it intended that these two concepts are different? (It might be thought that one incorporates the other.)

If these terms are to be used, they will need to be defined to make it clear that they refer to people who hold a court order for day-to-day care of a child but who are not legal guardians. A better approach would be to use the phrase “non-guardian caregiver” and define that phrase, rather than introduce two new concepts.

- 3.3 Amendment will also be required to section 35(6) of the KiwiSaver Act. If a child under the age of 16 already has a KiwiSaver account prior to being in the care of the non-guardian caregiver, authority to make decisions such as voluntary transfers or to take other steps in respect of a child’s membership of the scheme will need to be transferred to the non-guardian caregiver. The current legislation only transfers this authority to a CYPFA³ guardian.



Tim Jones
Vice President
24 October 2018

³ Children, Young Persons and Their Families Act (CYPFA).