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2 November 2015

Committee on the Rights of the Child
Human Rights Treaties Division
Office of the United Nations High Commissioner for Human Rights
Palais Wilson – 52, rue des Paquis
CH-1201
Geneva
Switzerland

United Nations Convention on the Rights of the Child – Fifth Periodic Report by the Government of New Zealand 2015

EXECUTIVE SUMMARY

1. The New Zealand Law Society welcomes the opportunity to comment on the Fifth Periodic Report by the Government of New Zealand (report) under the United Nations Convention on the Rights of the Child (UNCROC). The New Zealand Law Society is the statutory body, established in 1869, that regulates New Zealand's 12,000 lawyers.[1] This shadow report has been prepared by the Law Society's Family Law Section, which monitors adherence to UNCROC in New Zealand.

2. New Zealand ratified UNCROC in 1993 and has a longstanding commitment to children's rights and the protection of children. UNCROC guarantees basic civil, political, social, economic and cultural rights to the world's children, and periodic reporting by the government plays an important role in advising the United Nations how well New Zealand is doing to deliver those guarantees for children in New Zealand. It is therefore concerning that the report does not provide a full account of some recent significant legislative amendments that are inconsistent with UNCROC, and that New Zealand has not ratified a Convention that would provide significant and practical benefits to New Zealand children.

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1 One of the New Zealand Law Society's functions is to "assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law": Lawyers and Conveyancers Act 2006, s 65(e).

3. This shadow report focuses on:

   a. **The need for New Zealand ratification of the Hague Child Protection Convention**,[2] to provide protection for children in cases of international child abduction where overseas orders are already in place (article 11);

   b. **Adoption Act 1955**, which is overdue for reform and which does not comply with UNCROC in a number of significant respects (articles 3, 8, 9(1), 9(2), 9(3), 12, 20, 21, 21(a), 24(1) and 30);

   c. **Children, Young Persons, and Their Families (Vulnerable Children) Amendment Act 2014**, in respect of financial and other assistance for permanent caregivers and special guardianship (articles 19, 20 and 39); and

   d. **Family Court reforms**, in respect of the views of the child, the welfare and best interests and the voice of the child in Family Dispute Resolution (FDR) and the right of the child to participate in proceedings affecting the child (articles 2, 3 and 12).

4. The Law Society's focus is restricted to legislative developments (or lack thereof) in the current reporting period (February 2011 – March 2015).

SPECIFIC CONCERNS ABOUT THE NON-RATIFICATION OF INTERNATIONAL CONVENTIONS

Ratification of international human rights instruments

Hague Child Protection Convention

5. The report at [259] refers to the government considering the ratification of international human rights instruments to which it is not yet a party, and states that work towards accession to the Hague Child Protection Convention is on the Ministry of Justice's work programme. No further information (including a timeframe) is provided.

6. The Convention has been adopted by Australia and the majority of European Union countries. Acceding to the Convention would provide significant practical benefits to New Zealand children, particularly in cases of international child abduction where overseas orders are already in place.

7. The Law Society's Family Law Section wrote in 2014 to the then Minister of Justice Hon Judith Collins recommending that New Zealand ratify the Convention. The Ministry of Justice has

[2] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague Child Protection Convention).

recommended that New Zealand accedes to the Convention, as it complements other Hague Children's Conventions intended to protect children across international borders, to which New Zealand is already a party. In response to the Law Society, the Minister advised that Cabinet had agreed to accede to the Convention and that legislation was expected to be introduced in 2014.

Recommendation 1: That the government provide detailed information on New Zealand's proposed accession to the Hague Child Protection Convention.

SPECIFIC CONCERNS ABOUT THE LACK OF AMENDMENT TO LEGISLATION AFFECTING CHILDREN

Adoption Act 1955

8. The report at [120] states that the review of New Zealand's adoption law "is on hold because of competing priorities for law reform in the justice sector". There is no indication when the legislation will be reviewed.

9. The Adoption Act 1955 is now 60 years old. It was enacted 38 years before New Zealand's ratification of UNCROC, and does not reflect current social attitudes and values within the community. It also does not comply with UNCROC in the following significant respects:[3]

    a. The process of adoption does not take into account the cultural and ethnic background of a child being deprived of family background. Children should not be denied the right to enjoy their own culture and use of their own language, and should be able to trace their own lineage (articles 8, 20, 21 and 30).

    b. The legal fictions created by adoption deny children the right to know their genetic and medical background and as a result they may not be able to have the highest attainable standard of health (article 24(1)).

    c. The adopted child's original birth certificate cannot be accessed before the age of 20 years. This deprives the child of knowledge of their natural parents and other family members and therefore the right to maintain personal relations and direct contact with both parents and family members (article 9(3)).

    d. The Adoption Act 1955 does not contain the paramountcy principle of "welfare and best interests" of the child (articles 3 and 21).

[3] See Appendix 1 for more detail.

e. There is no mechanism in the Adoption Act to appoint a lawyer to represent the child and therefore give the child an independent voice in respect of that child's views and the opportunity to be heard (article 12).

f. For an adoption to proceed, the birth mother must give her consent, as must the birth father (if known). There are no provisions that require the consent of the child on whether an adoption order should be made. Other family members are not given an opportunity to participate in the proceedings and make their views known (article 9(2)).

10. The New Zealand Law Commission issued a report, *Adoption and its Alternatives: a Different Approach and a New Framework*, in 2000. This was a comprehensive study and recommended substantive legislative amendment. Although an Adoption Bill was drafted by the Ministry of Justice in 2006, it has not been enacted.

11. The Law Society considers that adoption law reform is now significantly overdue and should be expedited.

Recommendation 2: That the Committee note that adoption law reform is overdue and request that the government provides a timeframe for progressing this reform.

SPECIFIC CONCERNS ABOUT CONSISTENCY OF LEGISLATION WITH THE CONVENTION

A. Children, Young Persons and Their Families (Vulnerable Children) Amendment Act 2014 (articles 19, 20 and 39)

12. Appendix 3 to the report lists legislation enacted since February 2011 that "enhances New Zealand's compliance with the Convention". The list includes the Children, Young Persons, and their Families (Vulnerable Children) Amendment Act 2014. Appendix 3 notes that this Act makes changes to improve responses for children who have come to the attention of Child, Youth and Family.

13. The Law Society acknowledges that changes have been made to the Children, Young Persons, and Their Families Act 1989 which will support better outcomes for children. However, the Law Society considers that the provisions in the CYPTF (Vulnerable Children) Amendment Act 2014 for financial and other assistance for permanent caregivers and the provisions for special guardianship will have a significant negative impact and will be a disincentive to caregivers who are considering providing long-term care to children:

a. Financial and other assistance for permanent caregivers

New provisions in the CYPTF (Vulnerable Children) Amendment Act 2014 abolish existing services and support orders in favour of permanent caregivers and replace them with a duty on the chief executive of the Ministry of Social Development to provide financial and other assistance in the circumstances set out in the legislation. This important change is not mentioned in the report.

Services orders have historically provided certainty and reassurance to caregivers that reasonable support would be provided by the Ministry of Social Development. The new provisions set a high threshold, are discretionary in nature, and provide caregivers with a limited right of review of the chief executive's decision to the Family Court.

It is the Law Society's view that the new provisions will not provide certainty to caregivers and that few if any permanent caregivers will be able to satisfy the high threshold for assistance that is now required to be provided. The Law Society therefore considers that these amendments do not enhance the response to children who have already been abused or neglected, to increase their chances of better long-term outcomes.

b. Special guardianship

The report (at Appendix 3) notes that the CYPTF (Vulnerable Children) Amendment Act 2014 has introduced "a new special guardian order for the purpose of providing a long-term, safe, nurturing, stable and secure environment" for the child or young person. The intent of special guardianship is to ensure permanent caregivers are able to make guardianship decisions without being hindered by a requirement to consult and obtain consent from otherwise difficult and disaffected parents.

The Law Society is concerned that the new provisions for appointment of special guardians will be available only to a small group of caregivers and only after they have exhausted numerous legal avenues under the Care of Children Act 2004 (COCA) to resolve disputes that have arisen between themselves and the birth parents in respect of the permanently placed child.

Before a special guardianship order can be made permanent caregivers must first obtain leave of the Family Court to make the application. Leave may be given only if the Court is satisfied that all available mechanisms under COCA to resolve disputes between the permanent caregivers and any parent or guardian of the child or young person have

been exercised. Permanent caregivers seeking special guardianship orders will need to show that they have attempted to consult and make joint decisions with the parents or other guardians, and that it is the actions of the parents or other guardians which have resulted not only in the impasse but also a threat or serious disturbance to the child's or young person's welfare. The requirement that the conduct of the parents or other guardians form a pattern of behaviour requires the permanent caregiver to establish repeated instances of the offending conduct. In most cases, the issue will need to be significant and go to the heart of the child's or young person's welfare.

The thresholds that permanent caregivers must satisfy are too high and may defeat the purpose of creating the status of special guardian. On appointment of a special guardian, the legislation requires that guardian to exercise some guardianship decisions in collaboration with existing guardians. This is likely to be impractical and an impediment to the long-term safe and stable care of the child or young person. The provision will therefore assist only a small number of children in ensuring safer and more stable long-term care, and appears contrary to the intention of the legislation.

14. The Law Society considers that these amendments are contrary to the objectives of the legislation to protect and improve the well-being of vulnerable children, will materially disadvantage children in long-term care, and are contrary to articles 19, 20 and 39.

Recommendation 3: That the Children, Young Persons and Their Families (Vulnerable Children) Amendment Act 2014 be amended to the extent required to remove its inconsistency with UNCROC articles 19, 20 and 39.

B. Family Court reforms

Family Dispute Resolution Act 2013

15. The report at [105] states that a number of reforms have recently been made to the Family Court. The most significant change is the introduction of family dispute resolution (FDR) to assist parents to reach agreement about care arrangements for children following parental separation without the need for protracted adversarial court proceedings. FDR is mandatory before court proceedings can be filed, unless one of the exceptions applies (e.g. family violence or urgency).

a. Welfare and best interests of child (article 3)

The FDR process is governed by the Family Dispute Resolution Act 2013 (FDR Act). The FDR Act does not stipulate that the welfare and best interests of the child in FDR are paramount, does not provide a mechanism for obtaining the child's views, and does not provide criteria for determining what constitutes a child's welfare and best interests. It is therefore not apparent how FDR mediators are able to fulfil their statutory obligation to assist the parties to reach an agreement "that best serves the welfare and best interests of all children involved in the dispute",[4] in the absence of information about the child's views (other than those articulated by the parties).

Recommendation 4: That the Family Dispute Resolution Act 2013 be amended to the extent required to remove its inconsistency with UNCROC article 3.

b. Voice of the child in Family Dispute Resolution (FDR)

There is no provision in FDR for the child's voice to be ascertained, expressed or given any weight or for a child to be legally represented at FDR. This undermines the right of a child to freely express their views and to participate in proceedings affecting the child (article 12).

The Law Society questions how the child's voice will be heard in FDR other than as articulated by the parties, who may not be able to adequately convey this information because of their own psychological distress, lack of foresight or understanding or the existence of power imbalance. The FDR mediator is provided with no evidence, sworn or otherwise. They are unable to access records from the Police or welfare agencies. There is no triangulation of data or specialist reports, and no lawyer or other advocate for the child. This is in direct contrast to the mediation that was available in the Family Court prior to the reforms, where a lawyer for child was appointed to attend mediation to represent a child's views.

The report at [105] states that some FDR mediators offer a child-inclusive model of FDR. However, the involvement of children in FDR is on an ad hoc basis, with no statutory guidance. The absence of provision for the child to consent (or not) to attend FDR and of any legislative protection for the child is an additional concern.

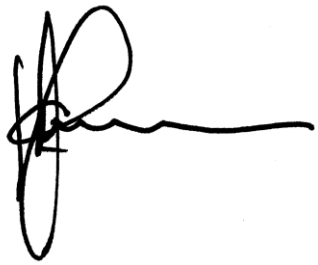
The right to natural justice requires that children be given the right to be heard at, and otherwise effectively participate in, proceedings affecting them. This includes the right

[4] Family Dispute Resolution Act 2013, s 11(2)(c).

to be heard in the FDR process. Depending on the facts of the case, the effective exercise of this right may require that they have separate legal representation (article 12(1) and (2)).

Recommendation 5: That the Family Dispute Resolution Act 2013 be amended to provide for the child's voice to be ascertained, expressed and given weight, and for the child's right to be heard at and effectively participate in proceedings affecting them, in accordance with UNCROC article 12.

Yours sincerely,



Chris Moore
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Appendix 1: problems identified with the Adoption Act 1955

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The Act is drafted on the basis that children do not have rights and interests separate from those of their parents. It creates a number of legal fictions, including that:

- the child was born to the adoptive parents;
- the natural parents cease to be the parents of the child;
- the child's relationship to family members through natural parents is severed; and
- the child acquires a new set of relatives through their adoptive parents.

Cultural and ethnic background

The process of adoption does not take into account the cultural and ethnic background of a child being deprived of family background. Indigenous and minority children should not be denied the right to enjoy their own culture and use their own language, and should be able to trace their own lineage. These fictions impact severely on Māori and Pacific children, in particular, because of the importance of broader family concepts and lineage to their cultures. The Act therefore does not comply with Articles 8, 20, 21 and 30.

Genetic and medical background

These fictions also deny children the right to know their genetic and medical background. As a result they may not be able to have the highest attainable standard of health, which does not comply with Article 24(1).

Knowledge of parents and family members

The adopted child's original birth certificate cannot be accessed before the age of 20 years. This deprives the child of the knowledge of their natural parents and other family members and therefore the right to maintain personal relations and direct contact with both parents and family members. This does not comply with Article 9(3).

Paramountcy principle

The Act does not contain the paramountcy principle of "welfare and best interests" of the child and therefore does not comply with Articles 3 and 21. The Adoption Act (section 11) requires that the "welfare and interests of the child will be promoted by the adoption". There is no overarching principle as in section 4 of COCA that the child's welfare and best interests are to be the paramount consideration. Section 11 does not comply with Article 21.

Child's views and opportunity to be heard

The report at [119] states that the Adoption Act provides for due consideration to be given to the wishes of the child. However, the child does not have an independent voice. Section 11 of the Adoption Act 1955 states that "… due consideration being … given to the wishes of the child, having regard to the age and understanding of the child", but apart from the child's views being obtained by a social worker there is no mechanism to obtain the independent views of a child. There is no power in the Adoption Act to appoint a lawyer to represent the child. The general practice has been for the Court to appoint counsel to assist, whose brief includes taking into account the views of the child. The Family Courts Amendment Act 2013 restrictively defined the role of lawyer appointed to assist the Court. It is therefore unlikely that counsel to assist can now be appointed to obtain the views of the child. This is a breach of Article 12.

Consent

For an adoption to proceed, the birth mother must give her consent, as must the birth father (if known). There are no provisions that require the consent of the child on whether an adoption order should be made. Other family members are not given an opportunity to participate in the proceedings and make their views known. This breaches Article 9(2).

Counselling

Counselling for natural parents is not provided when giving consent to the adoption. This breaches Article 21(a).

Alternatives to adoption

Home for life

The report at [99] refers to the "home for life" policy, relating to caregivers of permanently placed children under the CYPTF Act who apply for COCA orders. This applies only to children in permanent state care. The only vehicle for children who are not in permanent state care for adoption is through the Adoption Act 1955.

Open adoptions

Many adoptions in New Zealand are now "open adoptions" where both sets of parents are able to meet before consent is given and that birth parents are able to make a contact agreement to have some kind of ongoing relationship with the child. However, there is no provision in New Zealand legislation for such adoptions. Any agreement between birth parents and natural parents relating to

the child is not legally enforceable and can be withdrawn at any time. As natural parents no longer have any status under the law they can only apply for contact with leave of the Court. These matters are decided on a case by case basis. This is in breach of Articles 9(1) and 9(3).