

17 July 2020

Attorney-General

**Family Court (Supporting Children in Court) Legislation Bill (PCO 22604/4.0) –
Consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/319**

1. We have considered whether the Family Court (Supporting Children in Court) Legislation Bill (“the Bill”)¹ is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”).
2. The Family Court (Supporting Children in Court) Legislation Bill is the second of two Bills forming part of the legislative phase of a long-term programme of change to the family justice system. The first Bill, the Family Court (Supporting Families in Court) Legislation Bill reinstated legal representation in the early stages of Care of Children Act 2004 proceedings with legal aid for eligible parties.
3. This Bill amends the Care of Children Act 2004 (“COCA”) and the Family Dispute Resolution Act 2013 (“FDRA”) with the aim of enhancing children’s participation and wellbeing in care of children proceedings, both directly and by assisting parents to resolve parenting disputes.
4. The Bill inserts a new principle under s 5 of the COCA that the child should have the opportunity to participate in matters affecting their welfare commensurate with their age and maturity, and makes various amendments to the COCA with respect to the personal and professional qualifications of lawyers who may be appointed to represent children in these proceedings. The Bill also amends the FDRA to require a family dispute resolution provider to make every endeavour to facilitate the child’s participation in discussions between the parties to a dispute, of which they are the subject.
5. In our opinion the Bill is not inconsistent with the rights and freedoms that are contained in the Bill of Rights Act. In reaching this conclusion we have given particular consideration to the right to be free from discrimination under s 19 of the Bill of Rights Act.

Background

6. As set out in the explanatory note to the Bill, the care of children regime was extensively reformed in 2014. These reforms were intended to encourage individual responsibility and shift the focus from in-court resolution to encouraging parents to reach agreement themselves, through out-of court processes. Following the reforms, concerns were raised that some changes had

¹ Formerly referred to as the Strengthening the Family Court Bill.

had a negative impact on children, parents and whānau and exacerbated existing issues.

7. The 2014 reforms were reviewed by an independent panel (“the panel”) whose report, ‘Te Korowai Ture ā-Whānau’, was released in May 2019. The final report (“Report”) expressed concern that there is limited participation by children in issues that affect them. The panel heard that children can experience immediate and long-term consequences if they are not listened to, including feeling isolated, lonely, anxious, and having difficulty coping with stress. Specifically, it found that:²
 - 7.1 children were not sufficiently heard, advocated for or kept up-to-date with Court processes concerning them;
 - 7.2 children and their parents and whānau often do not understand the role of lawyer for the child or do not have that role explained to them;
 - 7.3 there was variation between the lawyers appointed for the child in terms of their knowledge, skills and practice. The Report noted that not all lawyers have the appropriate knowledge and skills to advocate for children;
 - 7.4 the statutory criteria for appointing a lawyer for the child do not require consideration of the lawyer’s personality, cultural background, training, qualifications or experience.
8. The panel therefore recommended the appointment criteria for lawyer for the child in s 159 of the Oranga Tamariki Act 1989 (“OTA”) be incorporated into the COCA along with the requirement in s 10(2) of the OTA for the lawyer to explain the proceedings to their clients:³
 - 8.1 Section 159 of the OTA contains specific appointment criteria for counsel for the child. These are: personality, cultural background, training and experience.
 - 8.2 Section 10(2) of the OTA places a duty on lawyer for child to “explain ... in a manner and in language that can be understood by that person, the nature of the proceedings ... and satisfy themselves that the person ... understands the proceedings”.

The Bill

9. The Bill implements some of the panel’s recommendations and responds to the Report’s findings that children are not sufficiently heard in Court processes affecting them.
10. The key provisions of the Bill are clause 4, 7 and 8.
 - 10.1 Clause 4 amends s 5 of the COCA to insert a new principle that the child should have the opportunity to participate in decisions affecting their care

² Te Korowai Ture ā-Whānau (May 2019) at [280].

³ Ibid at [284] and [287].

and welfare and that their views should be taken into account commensurate with their age and maturity.

- 10.2 Clause 7 and 8 require that the lawyer for the child's personality, cultural background, training and experience must be taken into account at appointment (clause 7), and that the lawyer appointed must explain the proceedings to the child in a manner they are most likely to understand (clause 8).
- 10.3 Clauses 5, 6, and 9 provide, respectively, that family violence must be taken into account (clause 5), that the purpose of s 6 COCA is to implement Article 12 of the United Nations Convention on the Rights of the Child (clause 6), and that lawyers have a (new) duty to take any steps that in their opinion will promote conciliation and resolve disputes as inexpensively, simply, and speedily as is consistent with justice before commencing any proceeding under the COCA (clause 9). Clause 9 in particular amends s 7B from imposing "duties on lawyers giving advice" to imposing "duties on lawyers for parties" thus making the duty applicable to all counsel, not just lawyer for the child.
- 10.4 We note the amendment in clause 9 is a significant change to the obligations currently imposed on counsel. However, as the lawyer is required only to take steps that will either 'promote' (but not require) conciliation or steps that are 'consistent with justice' we do not consider rights are engaged.

Analysis

Section 19

11. Section 19 of the Bill of Rights Act affirms the right to be free from discrimination on any of the grounds of discrimination in the Human Rights Act 1993. One of those grounds is age.⁴ Discrimination involves treating alike cases differently where that differential treatment is not justified and where it gives rise to a material disadvantage.⁵ Section 19 prohibits indirect as well as direct discrimination.⁶
12. We consider that clauses 4 and 7 may *prima facie* engage s 19 of the Bill of Rights Act but that any limitation is demonstrably justified.
13. Clause 4 of the Bill provides:

(g) a child who is capable of forming their own views about any matter affecting their care and welfare should have the opportunity to participate in any decision affecting them *and their views should be taken into account commensurate with their age and maturity*. [Emphasis added].
14. This distinction invites differential treatment on the basis of age and may result in material disadvantage. For example, there may be cases where a child's views are

⁴ Section 21(1)(i) of the Human Rights Act 2000.

⁵ *Ministry of Health v Atkinson* [2010] NZHRRT 1, (2010) 8 HRNZ 902 at [196].

⁶ As defined by s 65 of the Human Rights Act 2000.

not considered or are given less weight because of their age, and where the impact of the decision on the child is as distressing as it would be on an older child. To that extent we consider the amendment *prima facie* engages s 19.

15. However, we consider that distinctions in this context are demonstrably justified in terms of s 5. The purpose of clause 4 is to remedy the 2014 position which the panel found provided limited opportunities for children to participate and be heard in matters affecting them.⁷ The amendment therefore enhances the child's ability to participate in proceedings, voice their preferences and have those views be taken into account. For very young children who cannot yet verbalise their preferences, the differentiation is also rational.
16. Clause 7 of the Bill requires:

that when appointing a lawyer to represent a child a lawyer's personality, cultural background, training, and experience must be taken into account.
17. As noted at paragraph [8.1], this clause incorporates the appointment criteria for counsel in s 159 of the OTA. As that provision entered into force before the enactment of the Bill of Rights Act, the rights consistency of s 159 of the OTA has not been subject to a Bill of Rights Act vet.
18. We note that clause 7 may also engage s 19 if distinctions are made between otherwise equally qualified counsel solely because of their culture. If one lawyer is appointed and the other is not purely on the basis of their cultural background, the lawyer not appointed may consider they have been disadvantaged. While the provision could operate as a limitation on s 19 (because of a possible link between culture and the prohibited grounds of discrimination of race, religious or ethical belief and ethnic origin), we consider that even if that were so, the limitation would be justified in order to facilitate the proper participation of children in Court proceedings by ensuring that children have an effective relationship with their counsel. We also note that culture is expressed as a matter to take into account rather than a decisive factor. Further, in some cases the measure might not amount to discrimination at all by virtue of the positive discrimination provision in s 19(2).
19. We therefore conclude that the Bill does not limit the right to not to be discriminated against affirmed by section 19 of the Bill of Rights Act 1990.

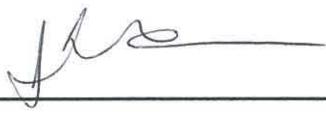
Conclusion

20. For all these reasons, it is our opinion that the Bill is not inconsistent with the rights and freedoms which are affirmed by the Bill of Rights Act.

Review of this advice

21. In accordance with Crown Law's policies, this advice has been peer reviewed by Crown Counsel, Daniel Jones.

⁷ Explanatory Note, Family Court (Supporting Children in Court) Legislation Bill.



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Noted



Hon David Parker
Attorney-General

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