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13 March 2015

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

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the draft Fifth Periodic Report of New Zealand (draft report) under the United Nations Convention on the Rights of the Child. The United Nations Convention on the Rights of the Child (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.

2. The draft report states at [6] that the government has made "substantial progress in improving outcomes for children [and] implementing the articles of the Convention" in the reporting period (February 2011 – March 2015).

3. In the Law Society's view, however, the draft report does not provide a full account of some recent significant legislative amendments affecting children – the most important being the recent changes to the family justice system which have reduced children's right to be heard and to express their views in administrative and judicial proceedings affecting them. The Law Society sets out below a number of concerns with the draft report, and recommends that they be addressed in the final report to the United Nations Committee on the Rights of the Child.

Consultation with civil society

4. The draft report states at [5] that the New Zealand Government will undertake public consultation on the report between December 2014 and February 2015. However, the Law Society was only invited to comment on the draft report on 26 January 2015, with submissions required by 27 February.[1] The Law

[1] The Law Society was given a short extension of time for its submission, to 12 March 2015.

Society considers that a longer public consultation period should have been provided, given the significance and importance of UNCROC.

Definition of child

5. The draft report states at [58] that New Zealand's legal definition of a "child" and "young person" have remained unchanged during the reporting period.

6. As noted below, there are significant legislative gaps and inconsistencies in various statutes relating to the age of a "child" or "young person". The Law Society considers that a consistent definition of "child" as a person under the age of 18 years should be adopted across all legislation.

7. Article 1 of UNCROC defines a child as "every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier". A "child" is defined as a person under the age of 18 years in the Care of Children Act 2004 (COCA) and for the purposes of Part 1 of the Vulnerable Children Act 2014, which is consistent with the Article 1 definition. However, the definitions of child and young person in the following legislation are inconsistent with Article 1:

    - The Children, Young Persons, and Their Families Act 1989 (CYPTF Act) defines a "child" as a boy or girl under the age of 14 years of age and a "young person" as a boy or girl over the age of 14 years but under the age of 17 years who is not married or in a civil union. An order for guardianship under the CYPTF Act may continue until a young person in need of care and protection attains the age of 20 years.
    - The Age of Majority Act 1970 and the Adoption Act 1955 define a child as under the age of 20 years.

Recommendation:

8. That the report notes that the definitions in the CYPTF Act, the Age of Majority Act and the Adoption Act are inconsistent with Article 1.

Care and protection

9. The Law Society notes the statement at [58] that the case for raising the age that young people leave the custody of the Chief Executive of the Ministry of Social Development to 18 is being "explored as part of the UNCROC work programme".

10. In the Law Society's view this issue needs to be resolved as a matter of urgency. It is a significant issue for young people who have an intellectual disability and who have been in state custodial care (under the CYPTF Act up until the age of 17).

11. Part 1 of the Protection of Personal and Property Rights Act (PPPR Act) applies only to persons over the age of 18 years.[2] Until a young person turns 18 years of age, there is no jurisdiction to apply for an order

[2] The Act does contain a definition of child but it is not age limited. However, the Act does not apply to those under 18 years, but it could apply to those under that age if they are 16 years or over and are in or have been in a de facto relationship, or are under 18 years but have been or are married or have been or are in a civil union.

under the PPPR Act to appoint a welfare guardian or to make a specified personal order that might see the young person being required to live at a specified place and to receive identified therapeutic intervention. This gap between the regimes for young people between 17 and 18 years of age would have been bridged by the proposed amendment in the CYPTF Amendment Bill (No 6) 2007 to extend the definition of "young person" in the CYPTF Act to young people aged 18 years of age but that amendment has not been enacted.[3]

Recommendation:

12. It would be helpful for the report to provide an update on progress of action (including timeframes) being taken on this issue, given that it is a significant issue for these vulnerable young people.

Ratification of international human rights instruments

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)

13. The draft report at [10] refers to the government's recent work programme on protection of vulnerable children. There is no reference however to the fact that New Zealand has still not ratified the Hague Child Protection Convention. That Convention has now been adopted by Australia and the majority of European Union countries.

14. 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. The Law Society's Family Law Section wrote in 2014 to the then Minister of Justice Hon Judith Collins recommending that New Zealand ratify this Convention. We understand the Ministry of Justice has proposed 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. The Ministry has advised that acceding to the Convention will provide significant practical benefits for New Zealand children, and that there are no significant disadvantages in New Zealand acceding to the Convention. 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:

15. It would be helpful for the report to provide information on New Zealand's proposed accession to the Hague Child Protection Convention and an update on progress with this.

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[3] It is often the case that in order to provide a secure placement for a young person who has previously been the subject of a custody order under the CYPTF Act an order is made placing that young person under the guardianship of the Family Court as such an order may, if necessary involve detaining a young person if that is required in his or her welfare and best interests. *Corkhill v H* FAM 2008-032-60, Family Court, Lower Hutt, 12 November 2010.

Welfare and best interests of the child

16. The draft report states at [75] that:

> "New Zealand continues to affirm the principle of the best interests of the child. The welfare and best interests of the child are the first and paramount consideration of New Zealand courts in applying COCA and the care and protection provisions of CYPTF Act. These Acts provide a model for other child-related legislation and policies in New Zealand for recognising the 'best interests of the child' principle."

17. It is correct that the "welfare and best interests" principle is the first and paramount consideration under COCA. However under the care and protection provisions of the CYPTF Act the wording is "welfare and interests" which is a lower standard than best interests. It is also not correct that these Acts provide a model for other child relevant legislation: the "welfare and best interests" principle is not included in the Child Support Act 1991 or the Adoption Act 1955 (which states only that the "welfare and interests of the child will be promoted"). Neither complies with Articles 3 and 21.

Recommendation:

18. The report should provide information on the various standards provided for in New Zealand's child-related legislation and note that in some cases these fall short of the "welfare and best interests of the child" as the first and paramount consideration.

Views of the child

19. The draft report (as noted at [2]) is intended to update the United Nations Committee on the Rights of the Child on progress against the Committee's 2011 Concluding Observations. The Concluding Observations included a request for information on measures *to promote, facilitate and implement the principle of respect for the views of the child [CRC/C/NZL/CO/3-4, paragraph 27(a)]*.

20. The draft report at [80] states the COCA says that a child involved in court proceedings must be given a reasonable opportunity to express their views on matters affecting them and that any views the child expresses (either directly or indirectly) must be taken into account. Children's views may be obtained by judicial interview, the child's court-appointed lawyer, a specialist report writer or through the evidence of their parents or others.

21. While COCA contains this provision, there is no such provision in either the Adoption Act or the Family Disputes Resolution Act 2013 (FDR Act). The Law Society considers that this is a breach of Article 12.

Recommendation:

22. The draft report should be amended to reflect the absence of provision in the Adoption Act 1955 and the Family Disputes Resolution Act 2013 for the views of the child to be expressed and taken into account.

Family Court reforms

Welfare and best interests in Family Dispute Resolution

23. The draft report at [126] 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).

24. The FDR process is governed by the Family Disputes Resolution Act 2013 (FDR Act). The draft report at [126] correctly states that under the legislation, FDR mediators must make every endeavour to assist the parties to reach an agreement that best serves the welfare and best interests of children. However there is no provision in the FDR Act setting out that the welfare and best interests of the child in FDR are paramount and there are no criteria to determine what constitutes a child's welfare and best interests. The Law Society questions how an FDR mediator is able to fulfil their statutory obligation to assist the parties to reach an agreement that best serves the welfare and best interests of the child in the absence of information about the child's views (other than those articulated by the parties). The Law Society considers that this is a breach of Article 3.

Recommendation:

25. The report should explain that the Family Disputes Resolution Act 2013 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.

Welfare and best interests – without notice applications

26. While there has been a reduction in the number of parenting applications to the Family Court, recent amendments to COCA have resulted in a significant increase in the number of cases being dealt with on a without notice basis. Matters filed without notice raise concerns about the process by which the welfare and best interests of children are ascertained.

27. A without notice application is an application made by one party and which asks the Court to make an interim order on that application without reference to the other party and without the testing of the applicant's evidence. Accordingly, although the decision is ostensibly one made with the child's welfare and best interests as the primary consideration, the quality of the decision is solely dependent on the applicant's evidence.

28. Significant systemic delays arising from recent administrative changes to the family justice system mean that in reality, interim decisions will often not be reviewed for several months. Consequently, even though both COCA and the CYPTF Act on their face comply with Article 3, their practical application increasingly results in a compromised "welfare and best interests" analysis.

Recommendation:

29. The report should be amended to reflect the impact of without notice applications on the "welfare and best interests of the child" analysis.

The voice of the child in Family Dispute Resolution (FDR), and legal representation for children

30. The right of a child to participate in proceedings is set out in Article 12. The form of participation required by Article 12, and in particular the right of the child to freely express their views in judicial and administrative proceedings (FDR), have been undermined by the recent Family Court reforms.

31. As noted above, there is no provision in FDR for the child's voice to be ascertained, expressed or given any weight. This undermines the right of a child to participate in proceedings affecting the child and in the Law Society's view is a breach of Article 12.

32. 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.

33. The draft report at [126] states that some FDR mediators offer a child-inclusive model of FDR. The involvement of children in FDR appears to be on an ad hoc basis with no statutory guidance as to the appropriateness of such involvement. Of further concern is the absence of provision for the child to consent (or not) to attend FDR and of any legislative protection for the child.

34. Similar concerns arise in respect of Family Court cases where lawyers for children are not appointed and the Court is left to rely solely on the parents to ascertain and report a child's views or when a lawyer for child is appointed later on in the proceedings, resulting in the child's views not being made known to the Court early in the process.

35. 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 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. This right is supported by Article 12(1) and (2).

Recommendation:

36. The report should note concerns about the lack of legislative provision in FDR for the child's voice to be ascertained or expressed or to be given any weight, and for the child's right to be heard at and effectively participate in proceedings affecting them, in breach of Article 12.

Legal representation for parties

37. The removal of legal aid for the purposes of obtaining legal advice and of the right of a parent to legal representation,[4] in the context of both FDR and the court process that can result in final orders being made for the day-to-day care and contact of a child, breaches UNCROC in a number of respects. In particular:

    a. It discriminates against parents who are unable to pay for their own pre-Court legal advice. As a matter of practice, those who are benefit-dependent (including women, Māori and those from ethnic minorities or with disabilities) will be discriminated against. This will constitute discrimination against children on the basis of the sex, status and/or ethnicity of the child's parent (Article 2(1)).

    b. The removal of access to adequate legal advice and representation is a breach of the obligation to ensure that the best interests of the child shall be a primary consideration (Article 3(1)).

    c. Participation in all proceedings which involve the separation of a child from his or her parents is a fundamental tenet of Article 9. The inability to access adequate or any legal advice, because of a lack of properly funded legal services, or by legislative prohibition on being represented by a lawyer, is a fundamental breach of the state's obligation to ensure that all interested parties are given the informed opportunity to participate in proceedings and to make their views known.

Recommendation:

38. The report should explain the recent changes to the family justice system to limit legal representation for parties and to remove legal aid.

Family Dispute Resolution

39. The draft report states at [126] that the recent reforms to the Family Court shift the focus from court resolution of disputes to encourage parents to reach agreement through FDR. It is not entirely correct to say that the reforms "shift the focus", as the initial focus of the previous law was on conciliation and reaching agreement, including through state-funded counselling. The position now is that parties must pay for FDR. This is a disincentive to access FDR compared with free counselling under the old system and therefore has potential to expose children to risk.

40. In the first few months following implementation of the new family justice system, there was a significant delay in parties accessing FDR being assessed and mediations being allocated and completed.[5] The Law Society is concerned about the impact on children of delays in parties accessing FDR.

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4 While a new Family Legal Advice Service was introduced to replace the availability of legal aid in parenting and guardianship disputes, in the Law Society's view it does not provide for the adequate provision of legal advice to parties.

5 FDR statistics received from the Ministry of Justice for the month ending January 2015 show that only 782 mediations have been completed, with 710 exemptions from FDR being issued. A low volume of mediations have been completed or exempted (1,492) compared to the volume of applications for guardianship and parenting orders made to the Family Court in any one year. Figures received from the Ministry of Justice in November 2011 in response to an Official Information Act

Recommendation:

41. The report should note the low volume of cases where mediations have been completed or exempted since the implementation of the new family justice system, compared to the average volume of applications for guardianship and parenting orders made to the Family Court in any one year.

Contribution to costs

42. The draft report does not mention that as a result of the recent amendments to COCA, parties are now required to contribute to the cost of lawyer for the child and to specialised reports, unless parties can show undue financial hardship.

43. The appointment of lawyer for child or the obtaining of a specialist report is not mandatory pursuant to COCA. However, lawyer for child has traditionally been appointed so as to meet the statutory requirement in COCA that a child's views must be ascertained and considered by the Court.

44. It would appear there is now a tension between the concept that lawyers representing children are appointed by the state to ensure the state's compliance with UNCROC, and the reforms which provide for the cost of lawyers to be borne by the parties, at least in part. The Law Society is concerned that the fiscal tension between these roles will result in a significant decline in the numbers of applications being made to the Court given the inevitable cost to the parties.

Recommendation:

45. The report should explain that recent amendments to COCA require costs contributions unless parties can show undue financial hardship, and address the concerns expressed above that this will create a fiscal barrier to COCA applications.

Vulnerable Children Act 2014

46. The draft report at [10] states that:

> "The Children's Action Plan (CAP) is focussed on improving outcomes for vulnerable children by driving fundamental changes around how government agencies, non-government organisations and iwi work together at national and local levels to identify, support and protect vulnerable children. … The Vulnerable Children Act 2014 (VCA) and CAP are also improving the safety and competency of the children's workforce through new Safety Checking, Core Competencies and Child Protection Policies for people who work with children. CAP is also implementing a multi-agency strategy for the most vulnerable children in the care of Child, Youth and Family (CYF). The Vulnerable Children's Board (VCB) oversees the implementation of CAP and members are jointly accountable for improving outcomes for vulnerable children in New Zealand."

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request show that 26,281 substantive guardianship and parenting applications were made to the Family Court in the 2010/2011 financial year.

47. The Law Society welcomes government initiatives to protect and improve outcomes for vulnerable children and supports legislation that promotes the rights of children as reflected in UNCROC. However, the Law Society considers that the provisions for the development and implementation of the CAP under the Vulnerable Children Act provide for limited accountability for achieving positive outcomes for vulnerable children in the following respects.

a) The definition of "vulnerable children"

Section 5 of the Act defines "vulnerable children" as "children of the kind or kinds (that may be or, as the case requires, have been and are currently) identified as vulnerable in the setting of Government priorities under section 7".

While the Law Society appreciates the desire to maintain flexibility in terms of identifying at-risk children, the definition of "vulnerable children" is central to the legislation and it is important that the responsible ministers and government agencies making decisions under the legislation are given adequate guidance. In its submission on the Vulnerable Children Bill,[6] the Law Society recommended that the definition of vulnerable children be amended to adopt the definition from the government's White Paper,[7] and to reflect a number of rights under UNCROC.

b) Government priorities are not defined

The Law Society's submission on the Vulnerable Children Bill expressed concern that the proposed legislative mechanism for setting the government's priorities for improving the welfare of vulnerable children was not sufficiently strong. The Law Society remains concerned about this aspect of the legislation as enacted in the Vulnerable Children Act, and considers the mechanism for setting priorities for vulnerable children does not fully comply with Articles 3(3) and 19.

c) Children's Action Plan

In its submission on the Bill, the Law Society suggested ways in which the CAP could be strengthened in two important respects: first, that the CAP should identify how the measures aimed at protecting vulnerable children were to be achieved, which would give the CAP a greater direction and standard against which it can be measured; and secondly, requiring consultation with the Office of the Children's Commissioner. The Law Society remains of the view that the CAP should be strengthened in these respects.

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6 6.11.13, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0018/74115/Vulnerable-Children-Bill-06-11-13.pdf.

7 As "children who are at significant risk of harm to their wellbeing, now and into the future, as a consequence of the environment in which they are being raised or due to their own complex needs", with a further explanation of what counts as a "consequence of the environment" – for example: "environmental factors that influence child vulnerability include not having their own basic emotional, physical, social, developmental or cultural needs met at home or in their wider community."

d) Vulnerable Children's Board and Children's Teams

The Law Society is concerned that the Vulnerable Children Act does not define the purposes, functions and powers of the Children's Teams and the VCB. There are no legislative criteria to assess families in respect of safety and no legislative authority to intervene in the lives of vulnerable children and their families. In the Law Society's view, this puts families at risk of intervention when it is not necessary. As the VCB and Children's Teams have not been established by statute, they can easily be disbanded. It is also unclear how the role of the new agencies interrelate with the role of CYF under the CYPTF Act, and in particular with the central statutory role played by Family Group Conferences.

Recommendation:

48. The report should address the concerns outlined in paragraph 47(a) – (d).

Children, Young Persons, and their Families (Vulnerable Children) Amendment Act 2014

49. Appendix 3 to the draft 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 (articles 20, 26, 27).

50. Appendix 3 notes that this Act "makes changes to improve responses for children who have come to the attention of Child, Youth and Family". The Law Society acknowledges that changes have been made to the CYPTF Act which will support better outcomes for children. However, the Law Society considers that the new 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 prove to be a disincentive to caregivers who are considering providing long-term care to children. The Law Society considers that these two amendments are contrary to the objectives of the legislation to protect and improve the well-being of vulnerable children and will materially disadvantage children in long-term care. In its view, the changes are contrary to Articles 19, 20 and 39.

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 to provide financial and other assistance in the circumstances set out in the legislation. This important change is not mentioned in the draft 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 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 Act 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 in the CYPTF (Vulnerable Children) Amendment Act 2014 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 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 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. It seems unlikely that the frustration of a planned holiday or even a dispute over schooling or religious upbringing will suffice. However, these are the types of situations that the legislation was intended to address, as expressed by the then Minister of Social Development at the time the legislation was introduced.

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. In the Law Society's view, these legislative provisions are likely to be ineffective in fulfilling New Zealand's obligations in terms of Articles 19, 20 and 39.

Recommendation:

51. The report should address the concerns outlined in paragraph 50(a) – (b).

Review of adoption legislation

52. The draft report states at [137] that reform of New Zealand's adoption laws "is on hold due to other law reform priorities in the justice sector". There is no indication when the legislation will be reviewed.

53. The Adoption Act 1955 is now 60 years old. It was enacted 38 years before New Zealand's ratification of UNCROC, and in a number of significant respects (outlined in Appendix 1 to this submission) does not comply with the Convention. It does not reflect current social attitudes and values within the community.

54. The 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.

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

Recommendation:

56. That the report note that adoption law reform is overdue and advise the United Nations Committee on the Rights of the Child on a timeframe for progressing this reform.

Conclusion

If you wish to discuss these comments, please do not hesitate to contact the Law Society's Family Law Section through the Law Society's Law Reform Manager Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / ph 04 463 2912).

Yours sincerely

Allister Davis
Vice President

Appendix 1 **attached**

APPENDIX 1: problems identified with the Adoption Act 1955

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, use their own language and 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

Theses 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 draft report at [80] states that the Adoption Act and the Adoption (Intercountry) Act 1997 both provide for the views of the child to be respected. 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 draft report at [139] states there have been significant improvements in alternatives to adoption that can provide a permanent, loving home for a child without completely severing the legal and familial ties to their birth parents. The "home for life" policy relating to caregivers of permanently placed children under the CYPTF Act who apply for COCA orders, 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

The draft report at [140] states that 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. While that might be the case, 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). The draft report should be amended to reflect the lack of legislative basis for "open adoptions".

COCA orders

The draft report at [140] states that birth parents may also seek leave of the Court to make an application for contact under COCA. While that is correct, birth parents cannot apply for conditions regarding guardianship matters (i.e. decisions regarding education, health etc.) in respect of the child because they are no longer

considered “parents”. Under the Adoption Act the natural parents are strangers to their birth child. This does not comply with Article 9. The report should clarify that while birth parents can seek leave of the Court to apply for contact under COCA, they cannot apply for conditions in respect of guardianship matters.