NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Marriage (Court Consent to Marriage of Minors) Amendment Bill

20/07/2017

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Introduction

1. The New Zealand Law Society appreciates the opportunity to comment on the Marriage (Court Consent to Marriage of Minors) Amendment Bill (Bill).

Comments

2. The Law Society supports the objective of this Member's Bill, to provide protection against forced marriage by requiring Family Court consent to the marriage of minors. Together with the proposed amendments to the Crimes Act in clauses 97 and 98 of the Family and Whanau Violence Legislation Bill,[1] the Law Society considers that a requirement for judicial sanction for marriages involving a minor is a desirable step in preventing forced marriages from occurring in New Zealand, and is consistent with New Zealand's obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[2] Ideally, this Bill should also have been a Government Bill, so that the legislative response to the issue of forced marriages could occur in a comprehensive way, informed by policy analysis from officials.

3. It should be noted that the Bill places an additional administrative and cost burden on 16 and 17 year olds due to the need to apply to the Family Court for consent to marry. This is addressed in the officials' advice on the Bill's compliance with the New Zealand Bill of Rights Act 1990.[3] The advice concludes:

> To the extent that the Bill creates a material disadvantage for those aged 16 and 17, we consider it is justifiable. The principal Act already contains a safeguard in relation to the marriage of 16 and 17 year olds by requiring consent of a parent or guardian. This is because 16 and 17 year olds have the legal status of children. The policy objective of the Bill, to protect 16 and 17 year olds from forced marriage, is sufficiently important to justify an additional safeguard being put in place for this group.
>
> We also consider the limit is rationally connected to the objective and impairs the right no more than reasonably necessary. The court has the ability to consider the range of available evidence to determine whether a 16 or 17 year old genuinely consents to a proposed marriage in a specific case, and may still grant the ability for that 16 or 17 year old to marry where it considers this to be appropriate.

4. The Law Society agrees with that advice.

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1 Clause 97 makes it an offence, punishable by imprisonment for a term not exceeding 5 years, to coerce a marriage or civil union. Clause 98 makes it an offence to abduct someone for the purposes of, amongst other things, coercing a marriage or civil union.

2 CEDAW, art 16: the right to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations," in particular the right to freely choose a spouse and enter into marriage only with free and full consent.

3 Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Marriage (Court Consent to Marriage of Minors) Amendment Bill* (3 May 2017) at [11] – [12].

Drafting improvements

5. While supporting the objective of the Bill, the Law Society recommends amendments to the drafting of the Bill, as set out below.

Clause 5: sections 18 to 20 replaced

"Authorising" or "consenting to" a marriage

6. The reference to "consent to the marriage" from a Family Court judge in the proposed new section 18(1) of the Marriage Act 1955 contained in clause 5 might be better expressed as "an order *authorising* the marriage", and the name of the Bill could be amended to the "Marriage (Court Authorisation of Marriage of Minors) Amendment Bill" accordingly. This is the formulation used in section 12 of the Australian Marriage Act 1961. This change would require consequential amendments to sections 3(2) and 42(3) of the Marriage Act (clauses 4 and 6 of the Bill).

Recommendation

7. That the Bill be amended to refer to Family Court orders authorising (rather than consenting to) a marriage.

The court process

8. Section 18 of the Marriage Act currently provides for consents from parents, (legal) guardians, or other relatives, depending on the circumstances of the minor concerned. Applications to the Family Court for the consent of a judge must be served on the persons whose consent is required, although the judge has a discretion to dispense with service on any such person.

9. Proposed section 18(3)(b) would require the Court to give the parents of the applicant an opportunity to be heard "so far as is reasonably practicable". The Law Society has two comments on this:

    (a) First, the proposed provision would not confer any such entitlement on guardians, even if the minor had in effect been raised by guardians in the place of parents. Such guardians could no doubt participate in the hearing by leave of the Court, but would have no right to.

    (b) Second, it is not clear whether the "so far as is reasonably practicable" exception would empower the Court to dispense with the participation of a parent whose involvement in the court process could be seen as problematic. An extreme example would be a father who had been excluded from the life of the minor after proven allegations of sexual abuse of the minor, but who is not in prison at the time of the proceeding. The test of "reasonably practicable" tends to connote considerations of practicality and convenience, rather than propriety.

10. Proposed section 18(3)(c) entitles "the applicant and other witnesses" to be represented by a lawyer. It does not provide for legal representation of parties served with the proceeding, or those entitled to be heard, unless they give evidence as witnesses. Nor does new section 18 provide for who is to be served with the proceedings seeking consent. The select committee may wish to consider whether the Bill should provide for service, as the current Act does. This could be set out in detail in the amended Act or provided for in rules of the Family Court. The select committee may also wish to consider whether the right to legal representation should be tied to appearing as a party rather than as a witness.

11. Proposed section 18(3)(d) prohibits members of the public and media representatives from being present at a hearing of an application for consent. While the reasons for this are understandable, the Law Society queries whether a blanket ban is appropriate. It would prevent the Family Court from granting leave to a person with a genuine interest in the process under section 18 – such as a legal researcher or a member of the media – to observe the conduct of such proceedings. This would be so even if those involved did not object and there were restrictions on what could be reported.

12. New section 18 would be improved by articulating matters about which the Court needs to be satisfied before making an order. In particular, the Law Society submits that the Court should be satisfied that:

    (a) the minor freely and fully consents to entering into the intended marriage (consistent with the CEDAW article 16 requirement for "full and free consent"); and

    (b) the health, safety and well-being of the minor will not be put at risk as a consequence of the intended marriage. (In the United Kingdom, the "need to secure the health, safety and well-being" of a minor is a factor to which the court must have regard in deciding whether to issue a "forced marriage protection order" under the Family Law Act 1996 (UK), as amended by the Forced Marriage (Civil Protection) Act 2007 (UK)).

Recommendation

13. That the Bill be amended to address the issues above.

<u>Consequences of non-compliance with new section 18</u>

14. Section 18(7) of the Marriage Act currently provides that no marriage will be void by reason only of the absence of the consent of any person whose consent is required under section 18. Section 17(2) provides likewise in the case of the marriage of a person under the age of 16. The Bill does not provide explicitly for the consequences, in terms of validity, for a marriage that takes place in circumstances where proposed section 18 has not been complied with.

15. Section 22 of the Marriage Act preserves the validity of marriages where certain errors or defects of process have occurred, or "or on account of any other infringement of the provisions of this Act". This may well extend to non-compliance with new section 18.

Recommendation

16. That the select committee consider whether more explicit provision should be made for the consequences of non-compliance with proposed new section 18.

Clause 7: section 64A amended (Rules of procedure)

17. Section 64A currently provides for procedural rules to be made under section 16A of the Family Court Act 1980 for proceedings under sections 19 and 26 of the Marriage Act. The Bill would remove references to section 19, under which the Family Court deals with applications for the consent of a judge to the marriage of a minor. It would not provide for rules to be made for proceedings under proposed section 18.

18. It is not clear whether this is because section 64A is redundant, in that section 16A provides sufficient authority for such rules, or whether it is intended that there should be no power to make rules for proceedings under section 18. If the latter, the Law Society considers that there

would be merit in leaving the power in place. The power does not need to be used. However, it may enable rules to be made for the guidance of those involved in proceedings under section 18.

Recommendation

19. That the select committee consider whether to recommend amending the Bill to address the issue above.

Clause 9: section 46 [of the Care of Children Act 2004] amended (Certain children may seek review of parent's or guardian's decision or refusal to give consent)

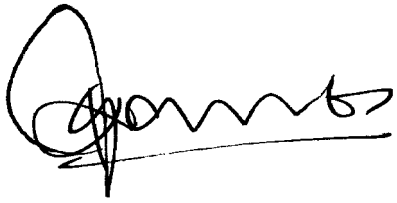
20. Clause 9 amends section 46 of the Care of Children Act 2004. Section 46 has been repealed. The correct cross-reference is section 46C.

Recommendation

21. That the cross-reference in clause 9 be amended.

Conclusion

22. The Law Society does not wish to be heard but is happy to discuss this submission with officials, if that would be helpful.



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