Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill

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INTRODUCTION

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill (Bill).

2. The Law Society's submissions on the Bill are in three parts, in relation to:

   A. **The new "child-centred" care and protection system** (pp 2 – 38),

   B. **Information-sharing** (pp 39 – 42), and

   C. **Youth justice provisions** (pp 42 – 52).

3. The Law Society wishes to be heard.

PART A: CARE AND PROTECTION

Executive Summary

4. The Bill makes a fundamental philosophical change from "minimum intervention" by the state in the lives of vulnerable children and young people to one of "early intervention" to improve the long-term outcomes for children and young people and to reflect the government's objectives for a "child-centred" care and protection system.

5. In the Law Society's view, such a fundamental shift requires a complete redrafting of the Children, Young Persons and Their Families Act 1989 (the Act) to ensure a clear process for early intervention and to ensure the government's objectives are achieved. Instead, the Bill makes a range of complex amendments to the Act that will inevitably create difficulties, as the philosophies of the Act and the Bill are in many respects inconsistent.

6. This Bill is an opportunity to establish a children's ministry to ensure coordination of services, robust sharing of information, a common approach to the same problems, and a process for measuring and tracking the effectiveness of interventions designed to protect vulnerable children. In the Law Society's view, the Bill as currently drafted will not achieve these objectives.

7. It is unclear how the Bill is intended to intersect with the Vulnerable Children Act 2014 and the establishment and overall structure of the new Ministry for Vulnerable Children, Oranga Tamariki. It is also unclear what part the recently established Children's Teams are to play in the new philosophy for child-centred intervention. The Children's Teams are presumably going to be part of the system of early intervention in the lives of vulnerable children and young people. If this is the case, it is important that their legal authority for intervention, and their purpose, functions, powers and accountabilities, be set out in legislation.

Terminology

8. The Bill contains many terms and phrases which are new and do not have clear definitions. This creates internal inconsistencies within the legislation. The meaning of some words and

phrases, such as “real life outcomes”, “transition”, “developmental potential” and “supports capability building”, is unclear.

9. The terms “usual caregiver” and “caregiver” are both used in the Bill, as are the phrases “persons who have the care of” the child or young person and “person who has the care” of the child.[1] “Caregiver” has been defined only in terms of new sections 386AAA to 386C. The phrase “usual caregiver” has not been defined at all, and it is not clear how it relates to the concept of a person “having the care” of a child or young person. It may indicate that where the term “caregiver” appears in the Bill, other than in the sections just mentioned, those people are different than “usual caregivers”, or persons “having the care”.

10. Parents and guardians appear to have been overlooked, especially in respect of the new “purposes” in clause 6. The term “family group”, which is defined in the current legislation and encompasses all cultures, has largely been omitted from the Bill while the new term “immediate family” has been introduced, but with no definition of what this term encompasses.

11. The most concerning change in terminology is the change from “welfare and best interests” to “well-being”. There is a significant body of New Zealand case law and international jurisprudence on the welfare of the child. Using a new word, which suggests a different meaning, invites litigation that could be avoided.

12. In these respects, the Bill requires amendment to provide both clarity and consistency.

Māori children and young people

13. The terms “iwi” and “hapū” appear to have been removed from many of the principles and they should be retained. This is concerning given the over-representation of Māori children and young persons in the care and protection and youth justice systems and the fact that the Bill specifically provides further duties on the chief executive in relation to improvement of outcomes for Māori children and young people.

14. The Bill has not retained some principles from the existing legislation that are protective of Māori children. These include the principle that, provided children and young people can be kept safe from serious harm, priority should be given to family, whānau, hapū, iwi and family group as caregivers and that, only as a last resort (when children cannot be kept safe by family, whānau, hapū, iwi and family group) should other non-kin placements be considered. The principle of culturally appropriate placements is consistent with the principles and rights contained in Care of Children Act 2004 (COCA) and United Nations Convention on the Rights of the Child, Article 20 (UNCROC), and should be retained.

Regulations

15. Much of the detail has been left to be addressed in regulations. This detail will be key to ensuring that the Ministry is able to carry out its statutory functions as efficiently as possible and that those professionals that practise in the area have clear guidance when making daily

[1] For example, in proposed sections 14(1)(f) and (g) and 14 (2)(b) (clause 14). The Act uses and defines the term “permanent caregiver”, which means something else, as well as containing many references to persons having the care of children or young persons.

decisions involving vulnerable children and young people. Considering the importance of the detail, the Law Society seeks to be consulted on any draft regulations.

Early intervention and resourcing

16. The Law Society supports the Bill's emphasis on "early intervention" in relation to children in need of care and protection.

17. The sheer volume of cases has seen the Ministry unable to properly carry out its existing statutory functions in a timely way. Currently, there are serious delays around the country in the allocation and convening of family group conferences (FGCs). This Bill proposes to extend the chief executive's powers to direct a matter be referred to an FGC in cases where there has been no declaration that a child or young person is in need of care and protection. Such a change will require a significant increase in funding.

18. At paragraph 138 of this submission the Law Society has suggested that it would be more appropriate to refer those cases where a child is not in need of care and protection to a Children's Team. The Explanatory Note to the Vulnerable Children Bill suggested that the Children's Teams would operate in relation to children and young persons who did not require immediate intervention from Child Youth and Family but whose circumstances made them at risk of abuse or neglect in the future. This is exactly the situation contemplated by new section 18AAA, yet the Bill is silent as to what role the Children's Teams will play in the early intervention in relation to children and young people.

PART A: CARE AND PROTECTION

Detailed comments

Clause 4 Section 2 amended (Interpretation)

Mana tamaiti (tamariki)

19. Clause 4 inserts a new definition of mana tamaiti (tamariki) into section 2 of the Act as follows:

20. mana tamaiti (tamariki), in relation to a person who is Māori, means their intrinsic worth, well-being, and capacity and ability to make decisions about their own life.

21. Māori family lawyers have advised the Law Society that they do not support this definition as currently drafted. It does not accurately reflect the Māori world view concept of mana tamaiti (tamariki) as a Māori child or young person is not seen as an autonomous individual who is separate from (as opposed to inextricably linked to) the kin matrix of whānau, hapū and iwi as the definition suggests. The definition provided is seen through a non-Māori world view of a child or young person, yet it is to apply to Māori children and young people. Mana tamaiti (tamariki) means the inherent dignity of a child both as an individual and as part of a greater kin collective (whānau, hapū and iwi). Whānau in this context is not limited to the Pakeha nuclear family, but includes wider whānau connections. The definition should be redrafted to more accurately reflect the true concept of mana tamaiti (tamariki).

Recommendation

22. That section 2 be amended to more accurately reflect the concept of mana tamaiti (tamariki), as noted above.

Usual caregiver

23. This is a new phrase used in the Bill. Although it is defined (in new section 386AAA) for the purposes of sections 386AAA to 386C, it is unclear what the phrase “usual caregiver” means. It arguably differs from a “caregiver”, which is also used in the Bill, and from a person “having the care of” a child or young person. It is presumably not limited to someone who has a parenting order and would possibly cover foster parents and those who are caring for a child on an informal or unauthorised basis. It is unclear how long a person must have had care of a child in order for that person to be a “usual caregiver”. The use of the concepts of “caregiver”, “usual caregiver” and “person having the care” of a child or young person should be reviewed and, if the terms are retained, they should be clearly defined.

24. In this context, the Law Society notes that proposed section 7(2)(bad) (to be inserted by clause 11 of the Bill) requires the establishment of complaints mechanisms available to “caregivers” (among others). This could mean that complaints mechanisms would need to be available to casual caregivers, which may or may not be intended.

Recommendation

25. That the use of the concepts of “caregiver”, “usual caregiver” and “person having the care” of a child or young person should be reviewed and, if the terms are retained, clear definitions should be provided so that the relationship between them is clear.

Intervention

26. Clause 13 introduces the new phrase “intervention”. The lack of definition is concerning and section 2 should be amended to provide a clear definition (see comments under clause 13).

Recommendation

27. That section 2 be amended to clearly define the term “intervention”.

Child

28. The definitions of “child” in the Children, Young Persons and Their Families Act 1989 and the Vulnerable Children Act 2014 should be consistent, which is not the case currently. The Vulnerable Children Act uses the non-gendered word “person” in its definition of “child” (section 5), and the same definition should be used in the CYPF Act. Clause 4 of the Bill should include an amended definition of “child” in section 2 of the CYPF Act, by deleting the words “boy or girl” and replacing them with “person”.

Recommendations

29. That clause 4 amend the definition of “child” in section 2 of the Children, Young Persons and Their Families Act by deleting the words “boy or girl” and replacing them with “person”.

30. That the clause 4(2) definition of "young person" be amended to read "a person of or over the age of 14 years …".

Young person

31. Similarly, the definition of "young person" in amended section 2(1) (to be amended by clause 4(2)) should be amended by deleting the words "boy or girl" and replacing them with "person".

Recommendation

32. That proposed amended section 2(1) be amended by deleting the words "boy or girl" and replacing them with "person".

Clause 6 Section 4 and cross-heading replaced – "Purposes"

33. The purposes of a piece of legislation should be clear, concise and straight-forward. Clause 6 replaces the seven "Objects" in the current Act. New section 4 contains twelve separate purposes. They are a confused mixture of a wide range of factors that are not clearly worded, lack overall coherence and are repetitive. They are likely to create unnecessary legal issues and the Law Society therefore recommends the following amendments.

Recommendations

34. Concepts that are essentially values should be included in the "Principles" (new section 5) and new sections 4A and 5A (the paramountcy principle and the principle of child and young person participation).

35. Clause 6 should be deleted and the current section 4 retained with the word "purposes" replacing the word "objects". Alternatively, clause 6 should be deleted and redrafted to clearly set out the purposes of the Act. The following purposes are suggested:

    The purposes of this Act are to promote the welfare and best interests of children, young persons, and their families and family groups by providing a system to -

    - *(a) deal with children and young persons in need of care and protection:*
    - *(b) deal with children and young persons who offend:*
    - *(c) enable information sharing among agencies:*
    - *(d) enable a practical commitment to the principles of the Treaty of Waitangi for Māori children and young persons.*

36. If either of the two recommendations above are not adopted, the Law Society makes the following comments on the purposes contained in clause 6.

(a) promoting the provision of services that advance positive long-term health, educational, economic, and social outcomes for children and young persons:

37. This purpose covers a range of services dealing with almost the whole of a child's life. However, the Act does not deal with education, health, financial support, etc except in the wider sense of encouraging co-operation between ministries and agencies providing these services (as in proposed section 7(2)(bab)). These services are the responsibility of the Ministry of Education, District Health Boards, and the like. The provision and coordination of relevant services is already covered under new section 4(i). As a purpose, new section 4(a) is therefore redundant and should be deleted.

Recommendation

38. That proposed section (4)(a) be deleted.

(b) preventing and responding to the suffering of, or risk of harm to, children and young persons (including to their well-being and development), and preventing and responding to ill-treatment, abuse, neglect, and deprivation of children and young persons, and offending by them:

39. This purpose is unclear and convoluted. It contains three different purposes: first, prevention of harm; second, dealing with or responding to actual harm; and third, offending by children or young people. The purposes should be kept separate – i.e. the prevention of child abuse should be separated as a purpose from the state response to actual cases of child abuse and the prevention and responding to offending by children or young persons should again be a separate purpose, or included in the purpose at paragraph (h).

40. Paragraph (b) separates "harm" from "ill-treatment, abuse, neglect and deprivation". The existing section 4(b) puts them together. These words are not defined and the differences between them are unclear. New section 14 also draws similar distinctions. It would be preferable if this paragraph simply referred to "harm" and left other provisions such as new section 14 to detail what "harm" is.

41. The opening words of (b) are also awkward because of the phraseology. It reads "… the suffering of, or risk of harm to, children ...", which could for example include children who suffer ordinary illnesses. The Act is not designed to provide health care. The intention is to respond to "the suffering of harm to children". This problem could be solved by shifting the comma: "the suffering of, or risk of, harm to children …" but it is preferable to delete the reference to suffering. Paragraph (b) should be amended to read "preventing harm to children and young persons" and "responding to harm to children and young persons".

Recommendations

42. That:

    (a) new section 4(b) be amended to read "preventing harm to children and young persons" and "responding to harm to children and young persons"; and
    (b) offending by children or young persons be addressed in new section 4(h).

(c) ensuring that children and young persons who come to the attention of the department have a safe, stable, and loving home from the earliest opportunity:

43. The motive for this purpose is understandable but in the Law Society's view it is too broad. It is unclear what is meant by the phrase "come to the attention of the department". Many children will come to the attention of the department without being at risk of harm. The department should not have a mandate to intervene in all situations. In addition, the use of the word "home" refers to housing in other contexts, for example, "the family home" in the Property (Relationships) Act 1976. The Act is not a housing Act. The provision should be amended to read "ensuring that children and young persons who come under the Act have safe, stable and loving care".

Recommendation

44. That new section 4(c) be amended to read "ensuring that children and young persons who come under the Act have safe, stable and loving care".

(d) supporting families, whānau, hapū, iwi, and usual caregivers to enable them to provide a safe, stable, and loving home for, and meet the needs of, their children and young persons:

45. This purpose omits parents[2] and family groups and fails to mention guardians. The phrase "family group", which is defined in the current section 2, clearly covers parents, guardians and communities other than Māori. Guardians and parents have legal responsibilities under the law, most notably under the Care of Children Act 2004 (COCA). They should be supported. This purpose also includes the phrase "usual caregivers" (see comments at paragraphs 23 – 25). This principle should be amended to include parents, guardians and family groups and the phrase "usual caregivers" be deleted or clearly defined in section 2 of the Act.

Recommendations

46. That new section 4(d) be amended:

    (a) to include parents, guardians and family groups; and
    (b) by deleting the phrase "usual caregivers" or alternatively defining the phrase "usual caregivers" in section 2.

(e) strengthening the relationships between children and young persons and their family, whānau, hapū, and iwi (including the relationships between siblings):

47. As in new section 4(d), this principle also omits parents and family groups and does not refer to guardians. Strengthening relationships with these people is surely as desirable as with those already listed. This principle should be amended to include parents, guardians and family groups.

Recommendation

48. That new section 4(e) be amended to include parents, guardians and family groups.

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[2] Except to the extent they are encompassed within the term "families".

(f) protecting children and young persons who are not safe from harm or whose needs are not being met in their usual caregiving arrangement:

49. This purpose is already covered by new section 4(b) and should be deleted.

Recommendation

50. That new section (4)(f) be deleted.

(g) supporting children and young persons who are or have been in care or custody under this Act or in a youth justice residence so that they have the best opportunity to successfully transition to adulthood:

51. The word “transition” is not a verb. This principle should be amended by deleting the word “transition” and replacing it with “move” or “make the transition”.

Recommendation

52. That new section 4(g) be amended to delete the word “transition” and replace it with “move” or “make the transition”.

(h) responding to offending by children and young persons in a way that prevents or reduces future offending, responding to the rights and interests of the victims of offending, promoting the rights and best interests of children and young persons, and holding children and young persons accountable for their offending and encouraging them to accept responsibility for their behaviour:

53. This purpose contains at least five purposes: (1) dealing with current and future offending; (2) victims’ rights and interests; (3) rights of children; (4) best interests of children; and (5) accountability for offending.

54. The scope of new section 4(h) appears to relate to offending by children and young persons. However, the phrase “promoting the rights and best interests of children and young persons” is unlimited. “Rights and best interests” are crucially important but are dealt with elsewhere, notably in new sections 4A and 5. New section 4(h) should be amended to make a general statement about a system for dealing with youth offending, with the other points made in new section 4(h), other than rights and best interests, to be included in the existing section 208 which contains principles relating to youth justice.

Recommendations

55. That:

    (a) new section 4(h) be amended to make a general statement about a system for dealing with youth offending; and

    (b) existing section 208 be amended to include the other points made in new section 4(h), other than rights and best interests.

(j) enabling co-operation, and enabling and where necessary requiring information-sharing, among agencies to enable the purposes in paragraphs (a) to (i) to be achieved:

56. The Law Society agrees with this purpose but the drafting is unnecessarily convoluted. The words "enabling co-operation, and enabling and where necessary requiring" should be replaced with "providing for".

Recommendation

57. That new section (4)(j) be amended to read "providing for information-sharing among agencies to enable the purposes in section 4 to be achieved".

(k) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for Māori children and young persons who come to the attention of the department:

58. The Law Society agrees with this purpose, although it may be better seen as a principle to be followed when exercising powers under the Act. It may be seen as replicating new section 5(d) (the recognition of whakapapa and whanaungatanga, as a principle to be applied in exercising powers under the Act), and could therefore be deleted.

(l) promoting an approach that supports capability building at the whānau level to improve life course outcomes for Māori children and young persons and their whānau.

59. This purpose may be laudable but the meaning is obscure. The meaning of the words "supports capability building" is unclear. It might mean "assists whānau in learning parenting skills". It could however mean something quite different. For example, it could relate to training that leads to better employment opportunities that may help satisfy children's financial needs. But this is not the object of the Act. The meaning of the words "improve life course outcomes" is also unclear. (A non-lawyer asked what they thought the phrase meant considered that it referred to death, which, after all, is the ultimate outcome of the course of one's life.) Such unclear phrases should be deleted. In the Law Society's view, new section 4(l) should be deleted or redrafted in a way that can be easily understood.

Recommendation

60. That new section 4(l) be deleted or redrafted in a way that can be easily understood.

Clause 7 New section 4A inserted (Well-being and best interests of child or young person)

61. Clause 7 inserts new section 4A which, in effect, re-enacts the current paramountcy principle in existing section 6 of the Act (new section 4A(1)) with some changes.

62. The paramountcy principle is fundamental to any child-focused legislation and is mandated by the United Nations Convention on the Rights of the Child (UNCROC). The Law Society supports the relocating of this principle ahead of the other principles set out in the Bill. As section 6 is to be repealed, it is suggested that new section 4A should be renumbered as new section 5 and the new section 5 should become section 6, with new section 5A becoming new section 6A. (Otherwise, the use of a letter may suggest that section 4A is of less importance than other sections.)

63. The new section replaces the words “welfare and interests” with “well-being and best interests”. The Law Society has no difficulty with the addition of the word “best” as this conforms to the formulation of the paramountcy principle in section 4 of COCA. However, the Law Society has serious reservations about changing the key word “welfare” to “well-being”. We acknowledge that “wellbeing” (with no hyphen) is found in current section 4 but this does not justify using the new term in the fundamental paramountcy principle. The Explanatory Note claims that the change will promote “a holistic approach”.[3] It is not obvious that this is correct. Indeed, it may do the opposite.

64. The Law Society has identified the following problems with using the phrase “well-being”:

(a) The word differs from that used in COCA. A lack of consistency between the major child-focused statutes is highly undesirable.

(b) There is a significant body of New Zealand case law and international jurisprudence on the welfare of the child but this is not true of “well-being”. Using a new word invites litigation that in this case can and should be avoided.

(c) UNCROC, cited in new section 5(a)(i), uses the word “welfare”. For consistency, that term should be used.

(d) The meaning of “well-being” is uncertain. Its introduction implies that it means something different from “welfare”. The Concise Oxford Dictionary (8th edition) defines “well-being” as “a state of being well, healthy, contented, etc”. On the other hand, it defines “welfare” as “well-being, happiness, health and prosperity”. In other words, according to this dictionary “welfare” encompasses “well-being” and goes beyond it. “Welfare” is thus a wider word, more capable of promoting “a holistic approach” than “well-being”. Further, the courts have long recognised the broad nature of “the welfare of the child”, taking into account all aspects of the child’s life. It is the ideal word for the purposes of the Act.

(e) When the current section 6 was originally enacted in 1989, the language used was “the deciding factor”. The use of this unusual language immediately created doubts about how it related to the “welfare” terminology. In due course, Parliament was forced to amend the section to what it is now, using “welfare” instead.

65. For these reasons, new section 4A should be amended by deleting the word “well-being” and replacing it with the word “welfare”. In addition, “welfare” should replace “well-being” in all other relevant places in the Bill.

66. New section 4A(1) uses the phrase “the first and paramount consideration”. This is also found in the existing section 6 and in section 4(1) of COCA. Arguably, the words “first and” are unnecessary and elusive as the key concept is found in the word “paramount”. New section 4A(1) should be amended by deleting the words “first and”. If this submission is accepted, a consequent amendment should be to remove the words “first and” from section 4(1) of COCA.

[3] See page 3 of the Explanatory Note.

Recommendations

67. That:

(a) the phrase “well-being” should be deleted and replaced with “welfare” throughout the Bill, including in the heading to new section 4A, and new section 4A(1) and (2);

(b) new section 4A(1) be amended by deleting the words “first and”; and

(c) existing section 4 of COCA be amended to remove the words “first and”.

Clause 8 Section 5 amended (Principles to be applied in exercise of powers conferred by this Act)

68. Clause 8 amends section 5 by replacing the current seven principles in section 5(a) to (g) with a total of 18 principles set out in new section 5(a) to (c), with an additional two further principles contained in new section 5(d) that are to be applied in respect of Māori children and young persons. However, the opening words of existing section 5 are retained, including the words “Subject to section 6”. Clause 10 repeals section 6, so existing section 5 will need to be amended to read “subject to section 4A”.

69. The new principles are arranged with a particular focus:

- New section 5(a) – the child or young person is at the centre of decision making – ten principles
- New section 5(b) – recognition of the child or young person’s place within their family – five principles
- New section 5(c) – recognition of the child or young person’s place within their community – three principles
- New section 5(d) – additional principles to be applied to Māori children and young persons – two principles.

70. The Law Society supports the new overall principle contained in new section 5(a) that places the child or young person at the centre of decision-making. However, in the Law Society’s view, the preferable approach is to:

- retain new section 5(a), **subject to our comments below** (paragraphs 73 – 75),
- delete new section 5(b) and (c), other than the inclusion of section 5(b)(iv) regarding the relationship between the child and young person and their siblings, (**subject to comments below:** paragraph 81), and
- retain the principles in existing sections 5(a), (b), (c), (e) and (g),

as the Law Society believes the wording of the existing principles is far clearer and more internally consistent than that proposed in the Bill.

Recommendations

71. That:

(a) the opening words of existing section 5 be amended to read “Subject to section 4A”;

(b) new section 5(a) be retained (subject to the amendments proposed at paragraphs 73 – 75);

(c) new sections 5(b) and (c) be deleted, other than the inclusion of new section 5(b)(iv) with the amendments proposed at paragraph 81; and

(d) existing sections 5(a), (b), (c), (e) and (g) be retained.

72. If the recommendations above are not adopted, we make the comments below.

73. New section 5(a)(iii) includes the phrase "safe, stable and loving home". The Law Society does not disagree with the concept that children should ideally have a "safe, stable and loving home". However, it would be preferable if the section was amended to delete the word "home" and replace it with the "care" (see comments at paragraph 43).

74. New section 5(a)(ix) uses the word "holistic" approach, as does the current section 5(g). While the Law Society understands what is trying to be achieved, the provision is not easy to follow and the word should be removed. In addition, there is no reference to a child or young person's identity (included in existing section 5(g)) or spirituality, which may be important factors for some children or young persons. These should be included in new section 5(a)(ix).

75. New section 5(a)(x) provides an obligation to consider the impact of a child's disability and then to mitigate "any" impact. The Law Society considers that new section 5(a)(x) should be amended so that the duty is expressed as a positive duty to take steps in every instance to mitigate the impact of the disability. This is consistent with the earlier principle in section (5)(a)(v) of supporting children to reach their "developmental potential".

76. New sections 5(b) and (c) include all children and young persons while subsection (d) relates to Māori children and young persons only. While the Law Society does not consider that (d) intends that Māori children are excluded from the principles contained in new section 5 (b) and (c) it would be helpful if new section (5)(d) was amended to clarify this. The Law Society does not disagree with the inclusion of the two principles to be applied when making decisions about Māori children and young persons, but notes that these principles simply require recognition to be given to whakapapa and whanaungatanga responsibilities. When balanced against other principles, these two principles may carry little weight or even be devalued.

77. New section 5(b)(i) uses the term "immediate family". This term is new in the care and protection provisions of the Act, and is not defined for the purposes of those provisions. New section 5(b)(i) should be amended to delete the word "immediate", or the meaning of the phrase "immediate family" should be clarified.

78. New section 5(b)(i), (ii) and (iii) contain the phrase "usual caregiver". This is a new term and is not defined in the Bill (see comments at paragraphs 23 – 25). If this phrase is to be retained, it requires a clear definition.

79. Current section 5 is consistent in the use of the words referring to a child or young person's family, whānau, hapū, iwi and family group when considering the principles of participation, a child or young person's views, that the relationships of children and young persons with wider family should be maintained and strengthened, and the impact a decision might have on the welfare and stability of the child or young person. The Law Society supports special consideration being given to cultural concepts specific to Māori children. However, the population of New Zealand includes a significant Pasifika population and other ethnicities. Cultural concepts that are relevant to children and young people of other ethnicities should be given recognition that is similar to that given to Māori children and young people.

80. New section 5(b)(i) to (v) sets out five principles to recognise the child or young person's place within their family. However, the terms "hapū" and "iwi" appear only once, in subparagraph (v). There is no reference to the term "family group" which is used throughout the current legislation, defined in section 2 and is able to embrace all ethnicities and cultures. Specifically, there is no recognition of hapū, iwi and family group in the principles of primary responsibility for caring for and nurturing the well-being and development of a child or young person (new section 5(b)(i)); of strengthening and supporting to care for and nurture the child or young person (new section 5(b)(ii)); or that, wherever possible, the relationship to the child or young person is respected, supported and strengthened (new section 5(b)(iii)). These sections should be amended to include the defined phrase "family group" and also include reference to hapū and iwi.

81. New section 5(b)(iv) provides that the relationship between the child or young person and their siblings is respected, supported and strengthened. While the Law Society supports this as a principle, there may be cases where siblings do not get on or where a sibling is an abuser. New section 5(b)(iv) should be amended by adding after the word "strengthened" the words "where appropriate".

Recommendations

82. That:

- new section 5(a)(iii) be amended by deleting the word "home" and replacing it with the word "care";
- new section 5(a)(ix) be amended by deleting the word "holistic" and including reference to a child or young person's identity and spirituality;
- new section 5(a)(x) be amended to reflect a positive duty to take steps in every instance to mitigate the impact of a child's disability;
- new section 5(d) be amended to clarify that the principles contained in new sections 5(b) and (c) also extend to Māori children and young persons;
- new section 5(b)(i) be amended to delete the word "immediate", or the meaning of the phrase "immediate family" clarified;
- if the phrase "usual caregiver" is to be retained in new sections 5(b)(i), (ii) and (iii) then it should be clearly defined in section 2;
- new sections 5(b)(i), (ii) and (iii) be amended to include references to hapū, iwi and family group; and
- new section 5(b)(iv) be amended by adding after the word "strengthened", the words "where appropriate".

Clause 9 – New section 5A inserted (Principles of participation)

83. In the Law Society's view, new section 5A improves and strengthens the current law. It puts greater emphasis on a child's participation; the wider concept of "views" replaces "wishes"; it makes it clear that the child's views must be taken into account; and the removal of references to "age, maturity, and culture" mean that the principle of participation applies to all children irrespective of those factors.

84. The Law Society recommends that the heading of new section 5A be changed to "Principles of participation by children and young persons" as it does not cover participation by others, most notably the family or whānau.

85. New section 5A(1) refers to "whenever a decision is made under this Act or regulations made under this Act". Then subparagraphs (a) and (c) refer to "a decision affecting a child or young person" but subparagraph (b) is not limited in this way. This creates an internal inconsistency. For example, does subparagraph (b) apply to all decisions under the Act? In addition, the term "decision-making process" is potentially confusing and either too narrow or too broad in scope. Actions taken under the Act may not necessarily be "decisions": in this respect the term may be too limited. On the other hand, all decisions appear to be captured. This may lead to a child or young person being asked about every minor "decision" made during the various processes under the Act, many of which may be of a purely procedural nature. There is a risk that the child will feel harassed by continual requests to express a view about matters that are of no substantive consequence. This degree of intrusion may well be undesirable and it is well known that too many professional interactions with children can amount to systemic abuse that is detrimental to them. There could also be significant resource implications in consulting the child on an unnecessary and frequent basis.

86. Article 12 of UNCROC includes the right of a child to express views is in relation to "all matters affecting the child". For clarity, it is suggested that new section 5A(1) be amended to:

> *"The following principles apply to all important matters affecting a child or young person under this Act and regulations made under this Act:"*

87. New section 5A(1)(a) uses the phrase "encouraged and assisted to participate". Section 6 of COCA requires that a "reasonable opportunity" be given to the child to express their views. In the Law Society's view, this is a clearer phrase than "must be encouraged and assisted to participate". It also aligns more closely with Article 12 of UNCROC, which states that a child has a right to express their views and be provided an opportunity to be heard. New section 5A(1)(a) should be amended by deleting the words "encouraged and assisted" and replacing those words with "given a reasonable opportunity". It would be clearer if subsection (a) were split into two subsections, with new subsection (b) reading "the child or young person's views must be taken into account by the decision maker".

88. New section 5A needs to be read in conjunction with current sections 10 and 11, which impose duties on the court and counsel to explain proceedings and to encourage and assist children and young persons to participate in proceedings. Because these sections also relate to principles of participation of a child or young person, we suggest that current sections 10 and 11 be relocated to come directly after new section 5A.

Recommendations

89. That:

(a) the title of new section 5A be amended to "Principles of participation by children and young persons";

(b) new section 5A(1) should be amended to read "The following principles apply to all important matters affecting a child or young person under this Act and regulations made under this Act:";

(c) new section 5A(1)(a) be amended by deleting the words "encouraged and assisted" and replacing them with "given a reasonable opportunity";

(d) subsection (a) be split into two subsections, with new subsection (b) reading "the child or young person's views must be taken into account by the decision maker"; and

(e) current sections 10 and 11 be relocated to come directly after new section 5A.

Clause 11 – Section 7 amended (Duties of chief executive)

90. Section 7 of the Act sets out various duties of the chief executive. Clause 11(2) makes minor amendments to the wording of current section 7(2)(b)(i). As per our comments at paragraphs 11 and 63 – 67, clause 11(2)(i) should be amended to replace the word "well-being" with "welfare".

91. Clause 11(3) also expands the current section 7 duties to incorporate requirements for the chief executive to co-ordinate with other government funded activities (new section 7(2)(bab)); comply with standards of care (new section 7(2)(bac); establish a complaints mechanisms for children, young persons, parents, families and caregivers (new section 7(2)(bad)); ensure that outcomes of complaints inform policies and services (new section 7(2)(bae)); and develop and publish policies and practice standards in relation to family group conferences and their outcomes (new section 7(2)(baf)).

92. The Law Society agrees in principle with the proposed duty in new section 7(2)(bac) for the chief executive to comply with standards of care as prescribed in regulations, although those standards of care are not yet available for consideration. The Law Society would like to be consulted on draft regulations that prescribe standards of care.

93. New section 7(2)(bad) proposes a duty to establish a complaints mechanism. The Law Society supports the view that children and their families should have an avenue to complain about actions taken by the chief executive. However, it would be desirable for the complaints process to be independent of the Ministry. Those making complaints would then be more likely to have confidence in its objectivity. The Office of the Children's Commissioner (OCC) has a well-established role in investigating matters in respect of children and young people and also in monitoring and assessing the policies and practices of the Ministry pursuant to section 13(1) of the Children's Commissioner Act 2003. The extension of the OCC's role to include the specific task of setting up and administering a complaints process would be logical. This would require a legislative amendment to the Children's Commissioner Act 2003.

94. There may be practical difficulties in giving children a genuine opportunity to make a complaint. Careful consideration will need to be given to how this right would be given practical effect, having regard to UNCROC. The OCC would be well placed to set up a process that is accessible for children, given its existing role, functions and expertise. We anticipate that this would require significant resourcing.

95. The classes of person for whom the complaints mechanisms are to be established comprise, apart from children and young persons, "parents, families, and caregivers". The Law Society

assumes this is intended to mean the parents, families, and caregivers of the relevant children and young persons, not parents, families, and caregivers generally. In this provision (new section 7(2)(bad)) parents are seen as something other than families. The Law Society has commented earlier (at paragraphs 10, 45 and 47) on the downgrading of the role of parents and (in particular) guardians. In other contexts, parents could be included in the term "families", but the wording of section 7(2)(bad) could raise a doubt as to whether they are. Guardians would have to be family members or caregivers to have a right of complaint. Yet caregivers, no matter how casual, would have a right to complain, as noted at paragraph 24. The Law Society recommends a review of the description of persons entitled to use the complaints mechanisms.

96. New section 7(2)(bae) provides for the chief executive to ensure that outcomes of complaints inform the policies and services provided by the Ministry. This is a positive approach and is welcomed by the Law Society. To provide additional accountability, it is suggested that the complaints service (whether part of the Ministry or the OCC), should have a duty to provide an annual report to Parliament containing information on the number of complaints received, the issues raised and the outcomes reached.

97. New section 7(2)(baf) provides for a requirement to develop and publish policies and practice standards in relation to family group conferences (FGCs). This is also a welcome addition. Those working in this area are well aware of significant issues with the timeliness, consistency and quality of the FGC process. A requirement for the chief executive to develop and publish policies and practice standards should provide better guidance to social workers and care and protection co-ordinators and create more consistency of practice for those working in this area.

Recommendations

98. That:

(a) clause 11(2) be amended to replace the word "well-being" with "welfare";

(b) the Law Society be consulted on draft regulations that prescribe standards of care;

(c) new section 7(2)(bad) be amended to refer complaints to the OCC, and the Children's Commissioner Act 2003 be amended to provide for the establishment of a complaints mechanism;

(d) the description in new section 7(2)(bad) of persons entitled to use the complaints mechanisms be reviewed; and

(e) new section 7(2)(bae) be amended to contain a duty to provide an annual report to Parliament containing information on the number of complaints received, the issues raised and the outcomes reached.

Clause 12 – New section 7A inserted (Further duties of chief executive in relation to improvement of Māori outcomes)

99. Clause 12 inserts a new provision that provides further duties on the chief executive in relation to improving outcomes for Māori children and young people. This is a welcome addition given the over-representation of Māori children and young persons in the care and protection and youth justice systems.

100. New section 7A(3) should be amended to include specific statistics in the report to be provided by the chief executive where Māori children and young people have been removed from their family, whānau, family group, hapū or iwi. Such statistics should include the number of Māori children and young people that have been placed outside of their whānau; outside of their hapū; outside of their iwi; and placed with non-Māori caregivers.

Recommendation

101. That new section 7A(3) be amended to include specific statistics in the report to be provided by the chief executive where Māori children and young people have been removed from their family, whānau, family group, hapū or iwi.

Clause 13 Section 13 amended (Principles)

102. Clause 13(1) amends current section 13(1) by replacing "section 6" with "section 4A". The Law Society suggests that the words "first and" be deleted from the existing section 13(1) as they are unnecessary and "paramount" is the essential word (see paragraph 66).

103. New section 13(2), 13(2)(a), (e) and (j) contains the word "well-being". These sections should be amended by deleting the word "well-being" and replacing it with "welfare" (see paragraphs 11 and 63 – 67).

104. New section 13(2)(b), (c), (d), (f) and (g) contains the phrase "usual caregivers". As noted at paragraphs 23 – 25 and 78, it is unclear what this phrase means. It should be deleted, or alternatively, if it is to be used throughout the legislation it should be clearly defined.

105. New section 13(2)(c) and (d) contains the phrase "home". These sections should be amended by deleting "home" and replacing it with "care" (see paragraphs 43 and 73).

106. New section 13(2)(a) provides that intervention should occur early to improve the safety and well-being of children, young persons and their families and to address risk of future harm. It removes the previous principal of 'minimum intervention' included in current section 13(2)(b)(ii) of the Act, a change that is supported by the Law Society. However, the term "intervention" is not defined and the Bill does not provide for how an intervention will come into operation, what steps will be taken and what will happen if the child or young person and their parents, caregivers or guardians do not consent. If the state is to intervene in a child or young person's life, where there is no finding that the child or young person is in need of care and protection, there should be clear provision in the legislation to address these issues.

107. In addition, new section 13(2)(a) uses the phrase "developmental potential". It is unclear whether this refers to physical, educational or social development (or all three). Nor is it clear what criteria or considerations would be used to assess whether there is a risk that a child or young person will not achieve their "developmental potential". The Law Society recommends that this phrase be reconsidered and either defined or removed.

108. New section 13(2) removes reference to some principles from the existing legislation that are protective of Māori children. These include the principle that, provided children and young people can be kept safe from serious harm, priority should be given to family, whānau, hapū, iwi and family group as caregivers and that, only as a last resort (when children cannot be kept safe by family, whānau, hapū, iwi and family group) should other non-kin placements be considered (see existing sections 13(2)(d), (f)(ii) and (g)(i)). This is

consistent with the principles and rights contained in COCA and UNCROC (Article 20). The principle underlying the existing sections, in relation to culturally appropriate placements, should be retained.

109. New section 13(2) removes the existing principle at section 13(2)(b) of the Act that the primary role in caring for and protecting a child or young person lies with the child or young person's family, whānau, hapū, iwi and family group and that the family, whānau, hapū, iwi and family group should be supported, assisted and protected as much as possible. This principle is consistent with the principles and rights contained in COCA and UNCROC, and should be retained.

110. New section 13(2) also removes the existing principle at section 13(2)(c) of the Act that it is desirable that a child or young person live in association with his or her family, whānau, hapū, iwi and family group and that his or her education, training, or employment be allowed to continue without interruption or disturbance. The Law Society recommends this principle be retained.

111. The only reference to a child or young person's parents and guardians is found in new section 13(2)(b). The Law Society recommends that parents and guardians be specifically included in the new section 13 principles.

112. New section 13(2)(b) adopts the principle that "interventions" should, "where possible" be with the consent of the child, young person and their parents, guardians or usual caregivers and should reflect the child or young person's views. The obtaining of consent prior to intervention is also in the best interests of children and young people and is supported by the Law Society.

113. New section 13(2)(f) states that a child or young person should be removed from the care of their usual caregivers only if there is a serious risk of physical or emotional harm to them. The Law Society recommends that the word "emotional" be replaced with the word "psychological", which would more accurately reflect the meaning of domestic violence at section 3(2) of the Domestic Violence Act 1995. As noted at paragraphs 23 – 25 and 78, the phrase "usual caregivers" should be deleted and the words "parents, guardians, family, whānau, hapū, iwi and family group" be included in this principle.

114. New section 13(2)(g) is a radical departure from the existing principle in section 13(2)(f) of the Act. Existing section 13(2)(f) provides that, when removed from his or her family, whānau, hapū, iwi and family group, wherever practicable the child or young person should be returned to, and protected from harm within, that family, whānau, hapū, iwi and family group. If the child or young person cannot be immediately returned to his or her family, whānau, hapū, iwi and family group and protected from harm he or she should live in an appropriate family-like setting that is in the same locality that the child or young person was living and where the child's links with his or her family group are maintained and strengthened and where the child or young person can develop a sense of belonging and continuity with his or her personal and cultural identity. The Law Society recommends that the principle underlying section 13(2)(f) of the Act be retained in combination with new section 13(2)(g) to provide guidance in situations when a child or young person cannot be returned to and protected from harm within his or her family, whānau, hapū, iwi and family group.

115. The new section 13 principles remove any reference to the existing principle at section 13(2)(g), that, when a child or young person cannot be returned to his or her family,

whānau, hapū, iwi or family group, and consideration is being given to who the child should be placed with, priority should be given to a person who is a member of the child or young person's hapū or iwi, or if not possible, a person who has the same tribal, racial, ethnic or cultural background as the child or young person and who lives in the same locality as the child or young person. Placement with a child or young person's hapū and iwi or with a person who has the same cultural background is an underlying principle in UNCROC and COCA and should also be an underlying principle in the Act. The Law Society recommends that the principle underlying existing section 13(2)(g) be retained.

116. New section 13(2)(i) retains existing section 13(2)(i) of the Act. New section 13(2)(i) should be amended by including the words "shall apply" after the words "section 208(g)".

117. Other than the paramountcy principle contained in new section 4A (clause 7), the principles in new section 13(2) do not appear to have been allocated an order of priority. While it is difficult or perhaps impossible to stipulate the priority that should be given to competing and important principles, the Law Society recommends that the principles be reordered so that all the principles dealing with "intervention" are grouped together and those dealing with removal of a child or young person are similarly grouped together.

Recommendations

118. That:

(a) existing section 13(1) be amended to delete the words "first and";

(b) new section 13(2), 13(2)(a), (e) and (j) be amended to delete "well-being" and replace it with "welfare";

(c) new section 13(2)(b), (c), (d), (f) and (g) be amended to delete "usual caregivers" or the phrase be defined;

(d) new section 13(2)(c) and (d) be amended by deleting "home" and replacing it with "care";

(e) new section 13(2)(a) be amended to define "intervention" and to provide for how an intervention will come into operation, what steps will be taken and what will happen if the child or young person and their parents, caregivers or guardians do not consent;

(f) new section 13(2)(a) be amended to either delete "developmental potential" or define it for clarity;

(g) new section 13 be amended to retain the principle underlying existing sections 13(2)(b), (c), (d), (f) and (g), in relation to culturally appropriate placements;

(h) new section 13 be amended to include specific reference to parents and guardians;

(i) new section 13(2)(f) be amended by replacing the word "emotional" with the word "psychological", "usual caregivers" be deleted, and "parents, guardians, family, whānau, hapū, iwi and family group" be included;

(j) new section 13 be amended to retain existing section 13(2)(f), and that new section 13(2)(g) be added to existing section 13(2)(f) to provide further guidance in situations when a child or young person cannot be returned to and protected from harm within his or her family, whānau, hapū, iwi and family group;

(k) existing section 13(2)(g) be retained;

(l) new section 13(2)(i) be amended by including the words “shall apply” after the words “section 208(g)”; and

(m) new section 13 be amended to re-order the principles so that all the principles dealing with “intervention” are grouped together and those dealing with removal of a child or young person are similarly grouped together.

Clause 14 – Section 14 replaced (Definition of child or young person in need of care or protection)

119. Clause 14 replaces current section 14 of the Act and significantly changes the definition of a child or young person who is in need of care and protection. New section 14(1)(a) to (h) sets out a non-exhaustive list of circumstances which may result in serious harm or the likelihood of serious harm.

120. The introduction of the word “serious” in new section 14(1) is potentially problematic for two reasons.

121. First, under this provision, for a child or young person to be in need of care or protection there must be actual or likely serious harm. New section 14(1) then sets out a (non-exhaustive) list of circumstances that “may” – or may not – result in actual or likely serious harm. This leads to a two-step process: (1) assessing whether any of the section 14(1)(a)-(h) circumstances exist, and (if not) what other circumstances indicating potential serious harm exist, and (2) assessing whether any of these amount to actual or potential serious harm, and therefore a need for care and protection. By contrast, new section 14(2) sets out two sets of circumstances that will automatically mean there is a need for care and protection.

122. Comparing the present and proposed legislation, section 14(1) of the current Act operates with a one-step process, similarly to proposed new section 14(2), but not new section 14(1). Under current section 14(1)(a), if a child is being ill-treated or abused, there is automatically deemed to be a need for care or protection. Under proposed section 14(1)(a), it is necessary to go on to consider whether the child is suffering actual or likely “serious harm” before a finding of a need for care or protection is made. This suggests a higher bar for intervention, contrary to the statement in the Explanatory Note at pages 4-5 that the content and substance of the section has not changed. Even if it is argued that the existence of ill-treatment or abuse would almost certainly result in a finding of serious harm, this two-step process involves greater uncertainty and is cumbersome, rather than making the section clearer and easier to apply.

123. It is also not clear why the circumstances in new section 14(2) are treated differently from those in new section 14(1) because they are not inherently more indicative of a need for care and protection.

124. Second, including the word “serious” in new section 14(1) raises issues about the relationship with other sections in the Act as proposed to be amended. For example, as currently drafted, new section 13(2)(f) states that a child or young person should be removed from the care of their usual caregivers only if there is a “serious risk of physical or emotional harm” to them. While it makes sense that the removal of a child or young person from the care of his or her caregivers should only occur if there is a “serious” risk of harm, all that is required in this case is a risk of “harm”, not “serious harm”. This does not sit well with

the higher threshold test (of "serious harm") for intervention where new section 14(1)(a) is being applied.

125. The Law Society recommends reviewing the wording of new section 14(1) and section 14(2) in light of the comments made above, including amending new section 14(1) to remove the word "serious". It would also be preferable if the circumstances that may result in harm or the likelihood of harm were set out in a new subsection, for greater ease of reference.

126. The Law Society supports the addition of new section 14(1)(c), namely that a child or young person has been exposed to domestic violence (within the meaning of section 3 of the Domestic Violence Act 1995). However, for ease of reference and internal consistency with new section 13(f) and new section 14(1)(a), the Law Society recommends that new section 14(1)(a), (b) and (d)(i) be amended to remove the words "mental" and "emotional" and replace them with the word "psychological".

127. It is unclear what new section 14(3)(a) adds to the application of new section 14(1). Given the non-exhaustive list of circumstances that may result in serious harm or the likelihood of serious harm as set out in new section 14(1)(a) to (h), it is clear that a child may be in need of care and protection if just one circumstance, a number of circumstances or potentially a circumstance not specifically contemplated by new section 14(1)(a) to (h) exists and can be proven.

128. Section 3(4)(b) of the Domestic Violence Act 1995 states that "a number of acts that form part of a pattern of behaviour may amount to abuse (for that purpose), even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial". If the intention is that a number of circumstances may, when viewed cumulatively, equate to "[serious] harm" or "a risk of [serious] harm" as defined by new section 14(1)(a), then new section 14(3)(a) should be amended to make that clear.

Recommendations

129. That:

(a) the wording of new section 14(1) and section 14(2) be reviewed in light of the comments made above, including amending new section 14(1) to remove the word "serious";

(b) the circumstances that may result in harm or the likelihood of harm be set out in a new subsection, for greater ease of reference;

(c) new section 14(1)(a), (b), (d)(i) be amended to remove the words "mental" and "emotional" and replace them with "psychological";

(d) consideration be given to the use of the word "caregiver" in new section 14(1)(b) and "usual caregiver" in other parts of the Bill to provide consistency; and

(e) new section 14(3) be amended with a definition similar to section 3(4)(b) of the Domestic Violence Act 1995 with regard to cumulative effect.

Clause 17 Section 17 amended (Investigation of report of ill-treatment or neglect of child or young person)

130. Currently section 17 provides for the investigation of reports of concern made pursuant to section 15, and for consultation with the care and protection resource panel. Where an investigation reveals care or protection concerns, the care and protection co-ordinator is to be notified in accordance with section 18. There is an obligation on the person receiving the report of concern to inform the person who made the report whether the report has been investigated, and if so, whether any further action has been taken.

131. Clause 17 proposes to insert a new section 17(2A). This provides that where an investigation does not lead the social worker to a belief that the child is in need of care or protection, the Ministry may nevertheless continue its involvement by undertaking further assessment; providing services; or referring the child, young person, their family or usual caregivers, to other agencies. New section 17(2A) should be amended in respect of the term "usual caregiver" (see comments at paragraphs 23 – 25 and 78).

132. The reality is that the Ministry commonly takes such steps under the existing law, although there is no authority to enforce the co-operation of children and their families as the threshold for state intervention ("child in need of care or protection") has not been met. Any intervention on the part of the Ministry is therefore dependent on the social worker encouraging the child and/or family to take steps to address the concerns. The same approach would be required under the proposed amendment, as there is still no provision for enforcement. This is appropriate given that the new section 17(2A) relates to situations where there is no finding that the child or young person is in need of care and protection. It is also in line with clause 13(2)(b) requiring interventions to occur with consent where possible.

133. New section 17(2A) includes authority for the chief executive to "take no further action" if the investigation discloses no identifiable risk of harm or appropriate action has already been taken. This is an appropriate amendment and should promote accountability for decisions to take no further action following an investigation. However, lawyers working in this area often see cases where children and families are referred to another agency for assistance following investigation, but there is then poor or non-existent monitoring to ensure that sustainable changes are made. Later, the child often comes to notice again for similar problems as the issues have not been effectively addressed. This problem could be addressed through better monitoring. The Law Society recommends new section 17(2A) be amended to provide for the chief executive to monitor outcomes from such interventions.

Recommendations

134. That new section 17(2A) be amended:

    (a) in respect of the term "usual caregiver"; and

    (b) to provide for the chief executive to monitor outcomes from such interventions.

Clause 18 – New section 18AAA inserted (Chief executive may make family group conference available in certain circumstances)

135. Where there is no finding that a child or young person is in need of care and protection, new section 18AAA allows the chief executive, in certain circumstances, to report a matter to a

care and protection co-ordinator who must convene an FGC pursuant to section 20. This is a powerful new provision but it is unclear how it will work in practice.

136. In the Law Society's view, new section 18AAA is contrary to the child-centred approach at the heart of this proposed reform. It is understandable that the chief executive be given the ability to refer matters directly to an investigative body which will be obliged to report back directly to the chief executive. However, FGCs are designed to deal with a finding that a child or young person is in need of care and protection; where there is no such finding, in the Law Society's view it is not appropriate to use the FGC mechanism. If the child is not in need of care or protection, the matter should not be referred to an FGC.

137. An FGC is not necessarily a child-centred forum as the child is generally not legally represented and power conflicts often exist between the adults' interests and the child's interests. In addition, the outcome of an FGC can have a significant and long-lasting impact on the child or young person and parents. As there are no court proceedings filed or contemplated in this situation, the parent(s) and the child or young person will not be legally represented and legal aid will not be available. There is therefore potential for serious injustice to occur.

138. In the Law Society's view, referring the matter to the established Children's Teams provides a better child-centred approach than convening an FGC when the child or young person is not in need of care and protection and there is no possibility of the matter proceeding to court. The Explanatory Note to the Vulnerable Children Bill suggested that the Children's Teams would operate in relation to children or young persons who did not require immediate intervention from Child Youth and Family but whose circumstances made them at risk of abuse or neglect in the future. This is exactly the situation contemplated by new section 18AAA.

139. New section 18AAA should therefore be amended to provide for the matter to be referred to a Children's Team. If this recommendation is accepted, the purposes, functions and powers of the Children's Teams should be set out in the legislation to provide them with the legal authority for intervention.[4]

140. If new section 18AAA is to remain, without providing for a reference to Children's Teams as recommended above, the Law Society suggests using an alternative phrase than "family group conference" to cater for interventions when a child or young person is found not to be in need of care and protection. This would clearly differentiate between cases where findings of a child or young person in need of care and protection have been made and those that do not meet that threshold. If this recommendation is accepted, the new phrase should be defined to make it clear that this process is available when there is no finding made that a child or young person is in need of care and protection.

141. The Law Society notes that the Act as amended would treat FGCs convened after a referral pursuant to section 18AAA as an FGC under section 20, like FGCs convened pursuant to sections 18(1) or 19(2)(a). It is assumed that referrals to an FGC where a finding has been made that a child or young person is in need of care and protection will be prioritised ahead of those referrals where no such finding has been made. There are already significant delays

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[4] This recommendation was made by the Law Society in its submission dated 6.11.13 on the Vulnerable Children Bill: see paragraphs 21 to 22, http://www.lawsociety.org.nz/__data/assets/pdf_file/0018/74115/Vulnerable-Children-Bill-06-11-13.pdf.

in convening an FGC pursuant to existing section 18 when there has been a finding that a child or young person is in need of care and protection. Unless there is a significant increase in resources available the current delays will be exacerbated.

Recommendations

142. New section 18AAA be amended to:

(a) provide for a referral to a Children's Team rather than an FGC and specify the purposes, functions and powers of the Children's Team; and

(b) use an alternative phrase than "FGC" for interventions where there is no finding that care or protection is needed.

Clause 22 Section 18C amended (Confirmation of decision not to apply for declaration under section 67)

143. As the Bill is already amending existing section 18C, the Law Society repeats its recommendations for further amendment included in its submission of the Vulnerable Children Bill.[5]

144. Existing section 18C sets out the procedure for an application for confirmation of a decision not to apply for a declaration under section 67 (that a child or young person is in need of care or protection). Following consideration of the application, the court may confirm the decision, decline to confirm it, or adjourn in order to seek more information or a reconsideration of the social worker's assessment and decision. When considering the application, under section 18C(3) the court may (but need not) allow a person to be heard on the application.

145. No issue arises if the court intends to confirm the decision not to apply for a declaration. However, if the court decides not to confirm the decision, issues of natural justice arise. It is wrong in principle to override the social worker's decision without giving the parent the opportunity to be heard. The natural justice concerns are compounded by the shift in onus to the parent under section 18C(5). At the very least, the parent should be given the opportunity to be heard before the court can decide not to confirm the social worker's decision in favour of the parent.

Recommendation

146. That section 18C(3) be amended so that the court, before it can decide not to confirm the social worker's decision in favour of the parent, must give the parent the opportunity to be heard.

Clause 28 – Section 28 amended (Functions of family group conference)

147. Clause 28 amends existing section 28(a) and (b) and uses the phrase "well-being". Clause 28 should be amended by deleting the word "well-being" and replacing it with the word "welfare" (see comments at paragraphs 11 and 63 – 67).

5 See paragraphs 86 to 89.2 of the Law Society's submission on the Vulnerable Children Bill.

Recommendation

148. That clause 28 be amended by removing the word "well-being" and replacing it with "welfare".

Clause 29 Section 29 amended (Family group conference may make decisions and recommendations and formulate plans)

149. Clause 29 amends existing section 29(1) and uses the phrase "well-being". Clause 29 should be amended by deleting "well-being" and replacing it with "welfare" (see comments at paragraphs 11 and 63 – 67)

Recommendation

150. That clause 29 be amended by removing "well-being" and replacing it with "welfare".

Clause 30 Section 30 amended (Care and protection co-ordinator to seek agreement to decisions, recommendations, and plans of family group conference)

151. This clause inserts new section 30(1)(aaa), to provide for the care and protection co-ordinator to communicate decisions, etc reached at FGCs convened under section 18AAA to the chief executive and certain other interested parties and seek their agreement. The provision is along the same lines as section 30(1)(a) and (b), which concerns FGCs convened under sections 18(1) and 19(2)(a) respectively. Existing section 30(2) provides for a representative nominated by the FGC to attend meetings held pursuant to paragraphs (a)(i) and (b)(i) of section 30(1), but does not provide for this in the case of any meetings held pursuant to paragraph (aaa)(i). It is not clear whether this was intended.

Recommendation

152. That clause 30 be reviewed to determine whether existing section 30(2) should be amended to include a reference to paragraph (aaa)(i) of section 30(1).

Section 31 Procedure where no agreement possible

153. The Bill does not amend section 31. Section 31 provides for a process where there is no agreement on decisions, etc made at FGCs. The care and protection co-ordinator who convened the conference must, where the conference was convened under section 18(1), make a report on the matter to the social worker or constable who referred the matter for an FGC, and in any other case report on the matter to "a social worker". This would mean that reports on FGCs convened under s 18AAA would be made to a social worker, not the chief executive who referred the matter for an FGG. It is not clear whether this was intended.

Recommendation

154. That section 31 be reviewed to determine whether section 31(1) and (2) should be amended to provide for reports on FGCs convened under section 18AAA to be made to the chief executive, not a social worker.

Clause 39 Section 67 repealed (Grounds for declaration that child or young person is in need of care or protection)

Clause 40 Section 68 amended (Application for declaration that child or young person is in need of care or protection)

155. Currently, the formal involvement by Child Youth and Family and the making of care or protection orders is achieved by means of a two-part process. An application is first made for a declaration that the child or young person is in need of care or protection. An FGC must be held before the application is heard. If a declaration is made and the court contemplates making significant orders, the matter is adjourned for a social work plan to be prepared as the court must obtain and consider the plan before making orders (see existing section 128). When the plan is available, a hearing determines what order(s) will be made.

156. The Law Society supports the repeal of section 67 and the amendment to section 68 which replaces an application for a declaration with a direct application for a care or protection order. The concept of a declaration is less tangible than the subsequent orders for custody or guardianship. Parties often struggle to understand the current process because the threshold application seems vague and unstructured. The concern for adult parties is generally about whether the chief executive will obtain orders such as for custody or care. If the process can be a one-step process rather than a two-step process, that will reduce time from application to disposition, which will benefit children.

157. The proposed change does not affect the current legal test. A court cannot make a care or protection order unless it finds the child is in need of care or protection. That threshold is simply a necessary component of a successful application rather than being required as a preliminary hearing of its own.

158. However, in the Law Society's view, the repeal of section 67 and amendments to section 68 will not achieve the desired result of a one-step process, as suggested in the Explanatory Note[6] unless existing section 128 is also amended. The court process will be delayed by waiting to obtain and consider a section 128 plan. Currently this causes delay particularly because caregiver assessments are commonly not undertaken until the making of a declaration. This issue could be addressed by requiring the social worker to file a plan fourteen days before the hearing of the application for a care or protection order. Caregiver assessments should, as a matter of course, be prepared in advance of the hearing for a care or protection order.

159. In practice, this will require the social worker to present a detailed proposal to the court and the respondent(s). In some cases, the course of the hearing or the court's own views will result in different orders being made than those proposed. Nevertheless, this will enable the real issues to be properly considered at the hearing and the court will, in most cases, be able to dispose of all matters at the end of the one hearing. In the Law Society's view, unless section 128 is amended as suggested, the new provision will be almost ineffective in practice.

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6 See page 14 of the Explanatory Note to the Bill, re clause 39.

Recommendation

160. That existing section 128 be amended to require a social worker to file a plan fourteen days before the hearing of the application for a care or protection order.

Clause 47 – Section 78 amended (Custody of child or young person pending determination of proceedings)

161. Clause 47 inserts a new section 78(1A) which allows a court, on application by the applicant or lawyer representing a child or young person, or on its own motion, to make an interim custody order in relation to the child or young person, if it is satisfied that new section 78(1B) applies. That subsection applies "if it is in the interests of the child or young person **or in the public interest** that an interim custody order be made as a matter of urgency" (emphasis added). It is unclear what this provision is intended to achieve, and in what circumstances. The Law Society is also concerned by the creation of a legal test where an interim order could be made contrary to the interests of a child or young person but "in the public interest", and the practical effects of clause 47(5).

162. New section 78(1A) permits the court to make an interim custody order under Part 2 "Even if there are no proceedings under this Part ...". If that is intended to mean "Where there are proceedings under Part 4 (Youth Justice) but not under Part 2 …" it would be preferable if the clause was amended to expressly state that. If it means something else, the clause should be redrafted for clarity.

163. First, new section 78(1A) refers to "an application by the applicant or a lawyer representing the child or young person". We have difficulty understanding who could be an applicant if there were no proceedings before the court under Part 2 and wonder in what circumstances such a matter might arise. If it is intended to allow some cross-over from the youth justice jurisdiction, we note that not all Youth Court Judges are Family Court Judges. Accordingly, the practical circumstances in which such an application might arise appears problematic and should be clarified.

164. Second, new section 78(1B) gives the court jurisdiction to make an interim custody order where it is "a matter of urgency". As currently drafted, the legal test is either "in the interests of the child or young person or in the public interest". This contemplates the making of an interim order that is contrary to the interests of the child or young person, albeit in the public interest. It is difficult to imagine a situation in which such a provision could be appropriate (i.e. that the child or young person's interests would not be engaged but the public interest would be). New section 78(1B) should be amended to provide clarity.

165. New section 78(1B) introduces a new term "the interests of the child or young person". As noted in paragraphs 11 and 63 – 67, the introduction of a new term creates uncertainty and the section should be amended to "welfare and best interests".

166. Clause 47(5) inserts new section 78(4) whereby an interim custody order under new section 78(1A) may be "made … for a period of 28 days" or until a later date that accommodates the holding of an FGC. The Law Society is concerned about the practical effect of this new section, particularly in smaller centres where courts sit less frequently, or in circumstances where an FGC fails to occur as soon as expected, or a subsequent appearance in court is impossible, for example, the sitting judge is taken ill. If the new section 78(1A) interim custody order is warranted, it is suggested that the order could remain, like any other

interim custody order, until it is set aside by a judge on application. That could occur at a hearing for that purpose or when the matter is next before the court and better information or a change of circumstances support a change to the interim custody order rather than the arbitrary lapse of time. There could also be a requirement to use best endeavours to review such an order within a specified period.

167. The current drafting suggests an order must be made for 28 days. If the current approach is retained, the Law Society recommends providing for an order for a period of no more than 28 days, to allow for a lesser period.

Recommendations

168. That:

(a) new section 78(1A) be amended to provide clarity on the process for applying for an interim custody order;

(b) new section 78(1B) be amended to provide clarity as to when an interim order would be made that is not in the welfare and best interests of the child or young person but is in the public interest; and

(c) New section 78(4) be amended:

- so that an interim custody order remains in place until it is set aside by a judge on application, possibly coupled with a requirement to use best endeavours to review such an order within a specified period, or
- in relation to the 28-day period referred to.

Clause 49 Section 83 amended (Orders of court on making of declaration)

169. The Law Society supports these amendments; however, we refer to the comments on clause 39 (see paragraphs 158 – 159) in respect of the recommendation that existing section 128 be amended.

170. Clause 49(3) inserts a new section 83(1A), which requires the court to make a care and protection order in certain circumstances relating to subsequent children. We note that the options for a care or protection order include an order for discharge under section 83(1)(a). This may or may not be intended.

Clause 54 Section 88 amended (Interim restraining orders)

171. Clause 54 inserts new section 88(2) to (4). The proposed amendment is of similar structure and terms to clause 47 (interim custody orders), except that new section 54(4)(a) provides for an order for "a maximum period of 28 days", not just "28 days". Subject to this, we repeat our concerns (at paragraphs 166 – 167) and recommend that clause 54 be redrafted.

Recommendations

172. That:

(a) new section 88(2) be amended to provide clarity on the process for applying for an interim restraining order;

(b) new section 88(3) be amended to provide clarity as to when an interim restraining order would be made that is not in the welfare and best interests of the child or young person but is in the public interest; and

(c) new section 88(4) be amended so that an interim restraining order remains in place until it is set aside by a judge on application, possibly coupled with a requirement to use best endeavours to review such an order within a specified period.

Clause 62 New section 110AA inserted (Interim guardianship orders)

173. The Law Society supports the provision of jurisdiction to make an interim guardianship order. It is a practical addition that will enable the court to better support the needs of children and young persons at an earlier opportunity than under the current law. The Law Society suggests that new section 110AA(2) be amended by deleting the words "only if the immediate needs of the child or young person cannot be dealt with without making the order". In the Law Society's view, the general principles of the Act provide sufficient guidance and the law's existing caution on interim relief provides sufficient check. There is no need for an additional rider on this provision.

174. In respect of new section 110AA(5), (6) and (7) which are of similar structure and terminology to proposed amendments in clause 47 (and, to a lesser extent clause 54) (see paragraphs 161 – 167) they should be amended as recommended at paragraph 168.

Recommendations

175. That:

(a) new section 110AA(2) be amended by deleting the words "only if the immediate needs of the child or young person cannot be dealt with without making the order"; and

(b) new section 110AA(5), (6) and (7) be amended as per the recommendations as paragraph 168.

Clause 63 – Section 121 amended (Court may make orders for access and exercise of other rights by parents and other persons)

176. Clause 63 extends the court's power in section 121(2) (to make orders for access, etc) to cases where an interim guardianship order is made under section 110AA "pending the determination of the proceedings". This could be seen to limit the application of new section 121(2)(ca) to cases where an order is made pursuant to new section 110AA(1), i.e. in the context of existing proceedings, not section 110AA(5). It is not clear whether this is intended. The same issue arises in relation to current section 121(2)(a), which relates to custody orders made under section 78 "pending the determination of the proceedings". Once amended by the insertion of subsection (1A), section 78 would allow interim custody orders to be made without substantive proceedings being extant.

Recommendation

177. That the inclusion of the phrase "pending the determination of the proceedings" in new section 121(2)(ca), and existing section 121(2)(a), be reviewed.

Clause 64 Section 125 amended (Application for variation or discharge of orders made under this Part)

178. This clause amends section 125(1)(g) to extend the power to vary or discharge orders to interim guardianship orders made under section 110AA. The Law Society has no issue with this, but notes that section 125(1)(a) is not amended and so the power to vary or discharge will apply only to custody orders made under section 78 "pending the determination of any proceedings". This would arguably exclude orders made under new section 78(1A), which may or may not be intended.

Recommendation

179. That the inclusion of the phrase "pending the determination of the proceedings" in existing section 125(1)(a), be reviewed.

Clause 65 Section 131 amended (Adjournment for purposes of obtaining plan)

180. We refer to our comments (at paragraphs 158 – 159) regarding the amendment of existing section 128, and the practicality of delivering a one-step process for care or protection orders instead of the current two-step process, and recommend that consideration be given to requiring that a plan be filed fourteen days before the hearing for a care or protection order. For those cases that still require a further plan, this provision is serviceable. In the Law Society's view, unless existing section 128 is amended as suggested, the aim of achieving a one-step process will not be attained.

Recommendation

181. That new section 131(2) be amended as per the recommendation at paragraph 160.

Clause 66 Section 132 amended (Access to plans)

182. The Law Society supports this amendment. The current situation whereby plans are required only one working day in advance fails to give parties sufficient time to read, consider and respond. It results in many adjournments which comprise avoidable delay. This amendment is practical and in the interests of justice and effective disposition of cases.

Clause 115 New sections 386AAA to 386AAG inserted

New section 386AAB Purposes

183. In the Law Society's view there should be an additional purpose which recognises that young people who are seeking assistance may well have significant needs and challenges as a result of the care and protection issues that led them to being placed in state care.

Recommendation

184. That new section 386AAB be amended to include an additional principle which recognises that young people who are seeking assistance may well have significant needs and challenges as a result of the care and protection issues that led them to being placed in state care.

New section 386AAC Principles to be applied when assisting young person to move to living independently

185. Clause 115 inserts seven principles to be applied by those who are performing functions or exercising powers under new sections 386AAA to 386C to assist a young person to move to living independently. New section 386AAC(c) and (d) should be amended by inserting the words "caregivers [or, as appropriate, usual caregivers if this term is defined] of the child or young person". This would recognise that children and young people may be living with caregivers and the relationship between the caregivers and the child or young person should be maintained, strengthened and supported.

186. New section 386AAC(f) provides that the young person is to be supported, to the extent that is reasonable and practicable, to achieve and meet their aspirations and needs, with priority given to supporting the stability of their education. While the inclusion of this new section is desirable, it is noted that the financial support to be provided under new section 386AAG and 386B(2)(b) is narrowly prescribed and the numbers of young people likely to receive such assistance to meet and achieve their aspirations will be limited.

Recommendation

187. That new section 386AAC(c) and (d) be amended by inserting the words "[usual] caregivers (if usual caregivers is defined) of the child or young person".

New section 386AAD Young persons entitled to live with caregiver up to age of 21 years

188. New section 386AAD(1) is not easy to follow and should be amended to read "…. been in care or custody for a continuous period of at least 3 months after the age of 14 years and 9 months,".

189. Section 386AAD confers an entitlement on young persons who are at, or were in the past for, the qualifying time in care or custody under an order or agreement referred to in section 361(a), (c) or (d). Section 361(a) currently refers to agreements made under sections 139, 140 and 141. Clause 68 of the Bill will repeal section 141 and clause 110 will amend section 361(a) by deleting the reference to section 141 in it. Depending on when these provisions in the Bill come into effect, there may be an impact on the entitlements of young persons previously in care pursuant to an agreement under section 141 because they may not meet the prerequisites for entitlements under section 386AAD.

190. New section 386AAD(2) provides that the young person may, at any time up to the age of 21 years, request support from the chief executive to remain or return to living with a caregiver after they have turned 18 years. The onus should not solely be on the young person to seek support. Many young people who are vulnerable and have been in care for years may not be proactive about seeking the assistance and support they need. Many young people may see the end of their period in care as "freedom" and not recognise that they will continue to need support.

191. New section 386AAD(2) should be amended to make provision for the chief executive to have the power to provide support (or at least to offer support) where he or she will be aware that a young person will be in need of support whether or not such a request is

initiated by a young person. It is the prospective responsibility of the chief executive to ensure that assistance consistent with the statutory provisions is provided in such cases.

192. New section 386AAD(3) provides for a young person to be "entitled to be supported" by the chief executive to remain with or return to living with a caregiver with whom they are or were living immediately before they turned 18 years, or to live with another caregiver (new sections 386AAD(4) and (5)).

193. The phrase "entitled to be supported" is a vague concept with little definition as to what support that will entail and how that support will be provided. It is unclear how this will work in practice. We presume there will be criteria and an approval process for potential caregivers included in regulations. If this is the case, the Law Society wishes to be consulted on the draft regulations. We note that what constitutes "advice and assistance" is set out in new section 386B(4). A new subsection should be included in this part of the legislation to set out what is meant by "entitled to be supported", what this support will entail and how it will be provided.

194. The heading to new section 386AAD indicates the young person is entitled to live with a caregiver until the young person turns 21, when the entitlement ceases. The wording of section 386AAE(1) – setting out what the chief executive must advise to the young person – is to the same effect. It is therefore reasonably clear that the entitlement – and the associated possibility of financial assistance under section 386AAG – cease when the young person turns 21. However, the body of new section 386AAD does not specifically state this: section 386AAD(2) says only that the request must be made before the young person turns 21. The Law Society recommends that the wording of section 386AAD be reviewed to see whether it should be made more explicit that the entitlement to live with a caregiver ceases when the young person turns 21.

Recommendations

195. That:

(a) new section 386AAD(1) be amended in respect of the age requirement as suggested above;

(b) the drafting of new section 386AAD(1)(a) be reviewed to ensure that young persons previously in care pursuant to an agreement under section 141 are not inadvertently prejudiced by the amendment to section 361(a);

(c) a new subsection is included in this part of the legislation to set out what is meant by "entitled to be supported", what this support will entail and how it will be provided;

(d) the Law Society be consulted on draft regulations;

(e) new section 386AAD(2) be amended to enable the chief executive to provide, or at least offer, support where he or she will be aware that a young person will be in need of support whether or not such a request is initiated by a young person; and

(f) that the wording of section 386AAD be reviewed to see whether it should be made more explicit that the entitlement to live with a caregiver ceases when the young person turns 21.

New section 386AAE Providing advice and support to young persons and monitoring of support arrangements

196. New section 386AAE requires the chief executive to advise the young person, before they leave care or turn 18 years, that they are entitled to live with a caregiver up to age 21 years and they are able to request to do so at any time up to age 21 years.

197. There does not seem to be any onus on the chief executive to advise the young person of the level of assistance, financial and otherwise, that will follow that young person's decision to leave care. For a young person to be fully informed about making such a decision, they ought to also be informed of the level of support that would be provided if they elected to remain living with a caregiver.

198. New section 386AAE should be amended to place an obligation on the chief executive to inform a young person of the level of assistance available to them, before they make a decision to either leave care or remain living with a caregiver.

199. New section 386AAE(3) provides that the agreed terms of the "support arrangement" must be recorded in writing. The new section should be amended to provide that a copy of the "support arrangement" be provided to the young person.

200. New section 386AAE(5) provides that the chief executive must monitor the operation of all support arrangements against standards set in regulations made under section 447 (see clause 119). There is no detail as to what those regulations will provide. The Law Society wishes to be consulted on draft regulations.

201. The Law Society notes that, whether or not new section 386AAE is amended, there will be an increased workload on social workers to fulfil these obligations and additional resources will be required.

Recommendations

202. That:

  (a) new section 386AAE be amended to place an obligation on the chief executive to inform a young person of the level of assistance available to them, before they make a decision to either leave care or remain living with a caregiver; and

  (b) the Law Society be consulted on any draft regulations setting standards for support arrangements.

Clause 116 Section 386A replaced (Advice and assistance for people moving from care to independence)

203. New section 386A(1) is difficult to follow and should be amended to read "… been at any time for a continuous period of at least 3 months after the age of 14 years and 9 months, in one or more of the following circumstances:".

204. Section 386A(1)(c) confers rights on young persons who are at, or were in the past for, the qualifying time in care or custody under an order or agreement referred to in section 361(a), (c) or (d). Section 361(a) currently refers to agreements made under sections 139, 140 and 141. Clause 68 of the Bill will repeal section 141 and clause 110 will amend section 361(a) by deleting the reference to section 141 in it. Depending on when these provisions in the Bill come into effect, there may be an impact on the entitlements of young persons previously in

care pursuant to an agreement under section 141 because they may not meet the prerequisites for entitlements under section 386AAD.

205. The drafting of new section 386A creates some uncertainty about how it will operate.

206. First, new section 386A(2) suggests the person or entity with care or custody of the young person (which may or may not be the chief executive) must address the issue of advice or assistance aimed at promoting independence and must then provide or arrange for that support to be provided. However, section 386A(3) says that, if the young person requests support, the request must be referred to the chief executive, who is the decision maker pursuant to new section 386A(4), applying section 386B(2) and (3), which may result in no support (at least by way of financial assistance) being provided. It is not clear why the provision of support following a request (pursuant to section 386A(3)) is treated differently from the provision of support pursuant to section 386A(2) in terms of both the relevant decision maker and the young person's entitlement (section 386B(2) applies only to decisions of the chief executive). It may be intended that, if the chief executive is the custodian or caregiver, he or she must provide the support, and if some other person or entity is the caregiver or custodian he, she or it must arrange for the chief executive to provide it: if so, this should be stated more explicitly.

207. Second, the relationship between sections 386A(2) and 386B(1) is unclear. Pursuant to the latter, the chief executive is required to tell the young person of their entitlement to request support; pursuant to the former, the person or entity with care or custody of the young person does not have to do this, but does have to turn its mind to what support the young person will need.

208. As with section 386AAD, sections 386A and 386B do not explicitly state that the support will (subject to new section 386B(6)) cease when the young person reaches the relevant age (25 years in this case). Section 386B(1) says the young person must be advised of their entitlement to request support before the young person turns 25: this ties the age of 25 to the entitlement to make a request rather than to the provision of support. The Law Society recommends that the wording of sections 386A and 386B be reviewed to see whether it should be made more explicit that the entitlement to support ceases generally when the young person turns 25.

Recommendations

209. That:

(a) new section 386A(1) be amended by deleting "… at any time for a continuous period of at least 3 months after the date that is 3 months before the person's 15th birthday" and replace it with "… been at any time for a continuous period of at least 3 months after the age of 14 years and 9 months, in one or more of the following circumstances:";

(b) the drafting of new section 386AAD(1)(a) be reviewed to ensure that young persons previously in care pursuant to an agreement under section 141 are not inadvertently prejudiced by the amendment to section 361(a); and

(c) that the drafting of section 386A and 386B be reviewed to make it clear what roles (a) the chief executive and (b) other persons or entities with care or custody of the young person have in relation to the provision of support under those sections; and

(d) the wording of sections 386A and 386B be reviewed to see whether it should be made more explicit that the entitlement to support ceases generally when the young person turns 25.

Clause 116 New section 386B (Providing advice and assistance to young persons)

210. New section 386B(2)(b) gives the chief executive discretion to provide financial assistance as the chief executive considers necessary to enable the young person to achieve independence, but only if the chief executive has first considered what other financial assistance is available to the young person. New section 386B(2)(b) should be amended to provide greater clarity about the circumstances in which financial assistance may be provided to the young person.

211. New section 386B(3) provides that the chief executive must give particular consideration to whether a young person has high or complex needs, when deciding whether to provide financial assistance to the young person. There is no definition of “high or complex needs” or what factors might meet these criteria. New section 386B(3) should be amended in this respect.

212. Section 386B(6) provides that, if the chief executive is

> providing financial assistance to a young person that includes making a contribution or grant for a course of education or training, the chief executive may—
>
> (a) continue to do so even if the young person reaches the age of 25 years before completing the course; and
>
> (b) disregard any interruption in the young person’s attendance at the course if they resume it as soon as practicable.

213. It is not entirely clear what “continue to do so” in new section 386B(6)(a) relates to: the provision of financial assistance generally, or just the contribution or grant for the course. Most probably it is the former, but the Law Society recommends reviewing the wording of section 386B(6)(a) to ensure any doubt is removed.

214. The Law Society welcomes the provisions in new section 386B(6). While it is reasonable to presume that the chief executive would continue to provide financial assistance if, for example, the young person has been hospitalised, it is less clear whether a decision to continue to provide financial assistance if the interruption in the attendance of the course is caused by, for example, criminal offending resulting in a remand in custody. New section 386B should be amended to include a list of considerations the chief executive should take into account when exercising this discretion.

Recommendations

215. That:

(a) new section 386B(2) be amended to provide greater clarity about the circumstances in which financial assistance may be provided to the young person;

(b) new section 386B(3) be amended to define “high or complex needs”; and

(c) new section 386B(6) be:

- reviewed to ensure any doubt is removed about what "continue to do so" in new section 386B(6)(a) relates to, and
- amended to include a list of considerations the chief executive must take into account when exercising discretion.

Clause 117 New section 386C (Chief executive to maintain contact with young persons up to age 21 years)

216. It is a welcome provision that the chief executive must take reasonable steps to maintain contact with the young person up to the age of 21. Fulfilling this obligation in practice will however require additional funding and resources.

Clause 119 Section 447 amended (Regulations)

217. As noted throughout this submission, a number of provisions are subject to the making of regulations. The Law Society wishes to be consulted on the draft regulations.

Recommendation

218. That the Law Society be consulted on the draft regulations.

Subpart 4 – Amendments to Vulnerable Children Act 2014

Clause 132 Section 8 amended (Preparation of vulnerable children's plan)

219. Clause 132 amends section 8(1) of the Vulnerable Children Act 2014. It is the only place in the Bill (or in the Vulnerable Children Act) where the Ministry for Vulnerable Children, Oranga Tamariki is cited. The Law Society notes that the Māori name of the new Ministry translates to the "health/well-being of children". Family lawyers consider that the use of the word "vulnerable" in the new legislation and name of the new Ministry is likely to stigmatise the children, young people and their families/whanau that the legislation is intended to help. The new approach is a child-centred one and it would be appropriate for the name of the new Ministry to reflect that child-centred approach. The Law Society suggests that the new Ministry be called the Ministry for Children, Oranga Tamariki. If this is accepted, section 8(1) of the Vulnerable Children Act should be amended to remove "Vulnerable".

Recommendation

220. That clause 132 be amended to delete the word "Vulnerable".

The definition of vulnerable children

221. As the Bill amends the Vulnerable Children Act 2014, there is an opportunity to also amend the definition of "vulnerable child" in that Act. In the Law Society's view, it is imperative that the legislation clearly sets out the criteria by which a child is determined to be vulnerable. The importance of this cannot be understated, particularly when this Bill contains a fundamental shift in philosophy from "minimum intervention" to a child-centred focus

where state intervention can occur even when there is no declaration made that a child or young person is in need of care and protection.

222. The current definition in section 5(1) of the Vulnerable Children Act is:

> *vulnerable children means 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.*

223. The Law Society repeats the recommendation it made in its submission on the Vulnerable Children Bill.[7] While the desire for flexibility is appreciated in terms of identifying at-risk children, the current definition is central to the legislation and it is important that ministers and government agencies making decisions are given adequate guidance. The Law Society recommends that the definition of vulnerable children in section 5 be amended. A possible wording is to adopt the definition from the White Paper:[8]

> "Vulnerable children means 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."

224. A further explanation of what counts as "a consequence of the environment" might then follow. 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 the wider community."

Recommendation

225. That section 5 of the Vulnerable Children Act 2014 be amended as suggested above.

Clause 133 Section 9 amended (Content of vulnerable children's plan)

226. Clause 133 inserts new section 9(2) into the Vulnerable Children Act 2014. The Law Society supports the additional content that must be included in a vulnerable children's plan. New section 9(2)(a) includes the phrase "early risk factors for future involvement ….". In the absence of a definition or the inclusion of guidance or a list of "early risk factors" the clause as currently drafted is too vague. The Law Society suggests that new section 9(2)(a) be amended by either including a definition of "early risk factors" or alternatively, the addition of a new subsection that sets out considerations "included but not limited to" that might constitute "early risk factors".

Recommendation

227. That new section 9(2)(a) be amended by either including a definition of "early risk factors" or, alternatively, the addition of a new subsection that sets out considerations "included but not limited to" that might constitute "early risk factors".

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7 See page 5 of the Law Society's submission on the Vulnerable Children Bill.

8 See The White Paper for Vulnerable Children 2012, Volume II, at page 31.

PART B: INFORMATION-SHARING

Executive Summary

228. The Bill inserts a new information-sharing framework into the CYPF Act, to "facilitate the timely and consistent exchange of personal information about individual vulnerable children and young persons to promote their safety and well-being".[9] The Law Society supports that objective, and agrees that the law should not be a barrier to appropriate information-sharing between the relevant agencies and professionals where there are concerns regarding child safety and welfare, subject to appropriate safeguards.

229. However, the Law Society has serious reservations about the efficacy of the framework introduced by clause 38 (proposed new sections 65A, 66, 66A – 66O), and questions whether the amendments as currently drafted support the policy objective of better protecting vulnerable children and young people. The Law Society also understands that the Family Violence Bill will shortly be introduced to Parliament, and that it will contain a statutory scheme for information-sharing for agencies providing services related to family violence. It is important that this scheme be aligned with the clause 38 framework. The Law Society therefore recommends the proposed framework be reconsidered and the provisions substantially redrafted in this Bill, or deferred and introduced (with the recommended revisions) in the Family Violence Bill. The reasons for this are outlined below.

Comments

230. In the Law Society's view, the clause 38 provisions as currently drafted are complex, inconsistent and unlikely to be workable in practice.

231. The core components of the new framework are briefly summarised below, and a number of problems with the provisions identified.

New section 66: compulsory disclosure

232. Clause 38 replaces the current section 66, which requires government departments to supply information for care and protection purposes, with a new section 66. The effect of the new section is that social workers will be able to compel almost all individuals and agencies in New Zealand to disclose a wide range of information about children/young people and their families. The new section would allow care and protection coordinators or constables to compulsorily acquire information relating to a child or young person from "every agency", defined very broadly to include any person or body of persons in either the public or private sectors, for a broad range of care and protection purposes (new section 66(1)(a) – (b)). All of the new information-sharing provisions, including new section 66, are subject to the over-riding principle in new section 13(2)(j) that the well-being and interests of the child/young person "take precedence over any duty of confidentiality owed" by any person.

Section 66A: on-sharing

233. New section 66A enables information obtained under section 66 to be shared with any of 13 "child welfare and protection agencies" (including DHBs, school boards and early childhood

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[9] Explanatory Note to the Bill, p8.

services) or an "independent person" (as defined in clause 4) – unless the information was provided in breach of a professional duty of confidence (new section 66B).

Section 66C: information-sharing enabled

234. New section 66C also enables those child welfare and protection agencies and independent persons to use and disclose information they hold about a child/young person for a wide range of purposes relating to child protection (s 66C(a)(i) – (vi)).

Sections 66E – 66F: compliance with information requests

235. Under new sections 66E and 66F, the agencies and independent persons must also comply with requests for any information held relating to child safety, welfare or well-being, unless one of the withholding grounds in section 66G apply. The grounds for withholding are that the holder of the information is not satisfied that disclosure will help to fulfil the purposes set out in section 66A(1)(a) – (f) (such as "preventing or lessening the risk of a child or young person being subject to harm, ill-treatment, abuse, neglect, or deprivation") or reasonably believes that disclosure is undesirable for the reasons set out in section 66G(b)(i) – (v), including that disclosure is likely to increase the risks of harm, ill-treatment or abuse of the child/young person or is not in the child/young person's best interests.

Section 66I: consultation regarding information requests

236. New section 66I requires that, before disclosing information under any of sections 66A – 66F, the discloser must (unless it is impracticable "or inappropriate" to do so) inform the child/young person (or their representative) of the purposes and recipients of the disclosure, and seek and consider the child/young person's views.

Inconsistent grounds for refusal

237. The information-sharing provisions are complex and likely to be difficult for agencies and individuals to understand and apply in practice. A significant difficulty arises from the fact that, for example, there are different grounds for refusing to disclose information depending on the section under which the information is requested. If the request for information is made under section 66E, the holder can refuse to disclose it if they believe that disclosure will, for example, increase the risk of harm to the child (s 66G(b)(i)) or is not in the child's best interests (s 66G(b)(v)). However, if the request is made under section 66, there are no such grounds for withholding, even if the person has reasonable grounds to believe that disclosure is not in the child's best interests.

Inconsistent restrictions on on-sharing

238. Agencies requesting information will need to be clear about the specific authority they rely on, as this will have significant implications for the subsequent permissible use of the information. For example, if a doctor chooses to breach their duty of confidence and share information under section 66C with a social worker, the social worker can use and further disclose that information where necessary for the purposes of section 66C. In contrast, if the same information was collected by the social worker from the doctor in breach of the professional duty of confidence under section 66, further disclosure is restricted by section 66B.

Inconsistent restrictions on use

239. Another example of inconsistency is that information collected under section 66 cannot be used for the purpose of investigating an offence, but this does not apply to information disclosed under section 66C(b) or section 66E. The justification (if there is one) for the difference in approach is unclear.

240. The inconsistent approaches outlined above create significant difficulties in practice. For example, agencies and individuals subject to the information-sharing framework will need to be careful to record the provision under which information has been collected, and that record will (somehow) need to accompany the information if it is disclosed to others. It is unclear how the various restrictions will be given effect to in practical terms, in relation to documentation, filing, storage, use and disclosure. For instance, is an agency required to record restricted information and non-restricted information in separate documents/files?

241. The concern is that these different standards and restrictions may hinder rather than facilitate information-sharing in practice.

Risks of mandatory information-sharing

242. There are potentially significant risks associated with mandatory information-sharing in a child welfare context, as acknowledged in the Regulatory Impact Statement (RIS):[10]

- "the social stigma that may arise from being the subject of any inquiry or statutory response,
- the harm that may arise from false accusations or inferences of being a perpetrator of child neglect or abuse,
- the risk some families may be less inclined to engage with social services and other supports due to concerns about how their personal information will be used."

243. It is notable that Treasury considers the RIS does not fully explore or address the potential risks associated with mandatory information-sharing, "due to the lack of consultation with all the agencies and representative professional bodies affected by the proposed framework".[11]

244. The Departmental Disclosure Statement (DDS) records the Privacy Commissioner's serious concerns about clause 38 of the Bill: "the Commissioner believes the information sharing provisions are complex and fragmented, and will be harder, rather than easier, to understand than the current legislative regime".[12]

245. The DDS concludes by noting that "the [post-implementation] evaluations will assess whether the information sharing framework has had any unintended adverse effects, such as materially increasing the disengagement of vulnerable children and their families from accessing and using public services".[13] In the Law Society's view it is not acceptable to adopt a 'wait and see' approach, given the potentially serious risks (as noted above) to vulnerable children and their families.

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10 *Regulatory Impact Statement – Investing in Children: Information Sharing*, 7 September 2016, at [44].

11 Departmental Disclosure Statement, 8 December 2016, at p21.

12 Ibid, at p25.

13 Ibid, at p26.

An alternative approach

246. The Law Society understands that a Family Violence Bill will shortly be introduced to Parliament, and that it will contain a statutory scheme for information-sharing for agencies providing services related to family violence. There will be significant overlap between the family violence information-sharing scheme and the vulnerable children scheme in the current Bill, and between the agencies delivering services under the two schemes. If there are different approaches taken, that will exacerbate the difficulties and confusion for agencies and families. It would be preferable for the information-sharing framework in the Bill to be aligned with that contained in the impending Family Violence Bill.

Recommendations

247. The Law Society therefore recommends that clause 38 is removed from the Bill for the time being and that the proposed child protection information-sharing framework be introduced in the Family Violence Bill.

248. In the alternative, if clause 38 is to be retained, the proposed new sections 65A, 66 and 66A – 66O should be redrafted to provide a clear, consistent and coherent basis for information-sharing. In the event that the framework is redrafted, the Law Society recommends that the recognition in new sections 66(2) and 66G(b)(iv) of legal professional privilege as a ground for withholding information be retained.

PART C: YOUTH JUSTICE

Executive Summary

249. The Law Society supports the changes in the Bill to extend the youth justice jurisdiction to include 17-year-olds. This addresses the recommendation of the United Nations Committee on the Rights of the Child (UNCROC) that New Zealand should consider setting the age of criminal majority at 18 years. However, it is unacceptably diluted by the provisions of the Bill that require 17-year-olds to be treated differently than other young persons, particularly those that require the automatic transfer of proceedings where a 17-year-old is charged with serious offending.

250. The Law Society has serious concerns regarding these provisions. The automatic transfer of proceedings based on the seriousness of the offence is inconsistent with the purpose of, and rationale for, the Bill's provisions to include 17-year-olds in the youth justice jurisdiction. It would have a disproportionate effect on Māori, may lead to inequality through Police charging decisions, and may not have the intended effects in terms of deterrence or public confidence in the justice system. In the Law Society's view, the current provisions of the Act more than adequately cover the range of circumstances, and provide sufficient judicial discretion, to ensure that the interests of justice and the needs of the young person are met.

251. In the Law Society's view, the provisions that give priority to additional factors the Youth Court must take into account when considering transfer to the District or High Court for sentencing or decision are inconsistent with a number of the youth justice principles in section 208 of the Act. The Law Society considers the current provisions are comprehensive, and work well to identify the serious, recidivist offender and most egregious offending, and ensure the offender is dealt with in the most appropriate jurisdiction.

252. The Law Society is also concerned that provisions to detain 17-year-olds in prison where there is a safety risk may put further pressure on already insufficient facilities in youth units in prison, and considers that the issues should be addressed through the provision of youth justice facilities that are better equipped to meet the needs of all young persons.

253. The Law Society considers that provisions to enable application to the Youth Court to cancel a supervision with residence order where a young person's behaviour and compliance with obligations under a plan are unsatisfactory are overly broad. The provisions should be narrowed, with guidance on the severity and nature of the behaviour and non-compliance included in the Act.

254. The Law Society considers that youth advocates should be appointed prior to all Intention to Charge Family Group Conferences and not just where the offence is punishable by imprisonment of 10 years or more. Access to adequate legal advice in such limited circumstances is inequitable and inconsistent with New Zealand's obligations under UNCROC and the New Zealand Bill of Rights Act 1990. Appointment should continue to be the responsibility of the Youth Court, and administered by the Ministry of Justice.

255. Young persons should be provided with legal advice when considering whether, and to what extent, they wish the department to maintain contact with them when transitioning out of care or youth justice residence.

PART C: YOUTH JUSTICE

Comments

Extension of the Act to include 17-year-olds

256. Clause 4(2) amends section 2 of the Act to redefine "young person" in order to extend the youth justice provisions of the Act to include 17-year-olds.

257. The Law Society supports extending the age of the youth justice jurisdiction to include 17-year-olds. As noted in the Law Society's letter to Ministers Adams and Tolley dated 19 April 2016,[14] this measure is consistent with overseas jurisdictions and would address the recommendation of the United Nations Committee on the Rights of the Child (UNCROC) that New Zealand should consider setting the age of criminal majority at 18 years.[15]

258. The Law Society also noted in its 19 April 2016 letter, that:

> "including 17-year-olds in the youth justice jurisdiction takes into account developments in brain science and our understanding of how teenagers mature. Significant benefits are likely to accrue to both a young person who offends at this critical age and society as a whole, if the young person is managed in the youth jurisdiction rather than the adult jurisdiction."

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14 http://www.lawsociety.org.nz/__data/assets/pdf_file/0016/101662/l-Ministers-Adams-and-Tolley-Youth-Justice-19-4-16.pdf

15 United Nations, Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: New Zealand, CRC/C/NZL/CO/34, 11 April 2011, at [56(b)].

259. The Law Society agrees with the analysis regarding inclusion of 17-year-olds in the youth justice system provided in the Regulatory Impact Statement: Including 17-year-olds.[16]

260. However, the effectiveness of bringing New Zealand into line with our UNCROC obligations is unacceptably diluted by the provisions of the Bill that require 17-year-olds to be treated differently than other young persons, discussed below, particularly those that require the automatic transfer of proceedings where a 17-year-old is charged with serious offending.

<u>Automatic transfer of proceedings where 17-year-old charged with serious offending</u>

261. Clauses 102 – 104 and 123 amend sections 272 – 273 of the Act and insert new section 276A and Schedule 1A to provide for the automatic transfer of proceedings from the Youth Court into the District Court or High Court where a 17-year-old is charged with an offence specified in Schedule 1A. Those offences are currently punishable by a maximum term of imprisonment of 14 years or more.

262. The Law Society has serious concerns regarding these provisions, for the reasons outlined below. In its view, the current provisions of the Act – section 277 (which relates to situations where a young person is jointly charged with an adult) and section 283(o) (transfer to District or High Court for sentencing) – more than adequately cover the range of circumstances, and provide sufficient judicial discretion, to ensure that the interests of justice and the needs of the young person are met.

<u>Inconsistency with UNCROC obligations</u>

263. The Law Society agrees with the statement in the first table in the Regulatory Impact Statement — Addendum that the proposed automatic transfer of proceedings under these provisions does not align with the child-centred reforms, as it is proposing that children (as defined by UNCROC) are to be treated as adults.[17] The proposals therefore undermine New Zealand's commitment to comply with UNCROC.

264. In addition, the Law Society does not agree with the Regulatory Impact Statement that "given the importance of retaining public confidence in the justice system while implementing such a significant change, including 17-year-olds in the youth system while transferring this small number of 17-year-olds to the adult system represents a justifiable trade-off." As already noted, no such 'trade-off' is required, since the current provisions in the Act are more than adequate to address the interests of justice and needs of the young person.

265. Other concerns about the provisions are discussed below.

Inconsistency with the purpose and rationale for including 17-year-olds in the youth justice jurisdiction

266. The automatic transfer of proceedings based on the seriousness of the offence is inconsistent with the purpose of, and rationale for, the Bill's provisions to include 17-year-olds in the youth justice jurisdiction. The background papers to the Bill acknowledge that young people have different neurological development at adolescence, and there is a

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16 Regulatory Impact Statement: Including 17-year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system [17-22] and [30-57].

17 Regulatory Impact Statement — Addendum: Including 17-year-olds, and non-imprisonable traffic offences that can result in a conviction, in the youth justice system.

resulting effect on behaviour, impulse control, understanding and consideration of consequences, and susceptibility to peer influence (as indicated in paragraphs 19, 36 and 37 of the RIS: Including 17-year-olds). There is no basis for concluding that those factors require special consideration and treatment of some young persons, but not others.

267. The proposals in the Bill will capture first offenders charged with a serious crime, and not just serious **recidivist** offenders, which was the focus of the Regulatory Impact Statement: Including 17-year-olds. In practice, it is not unusual for a first-time offender to be involved in a serious offence, such as being involved at the fringes of a multiple offender street attack, robbery or violent dispute, simply by virtue of family connections, peers and associates.

268. The provisions do not take into account the ability of a 17-year-old to participate effectively in a trial in the adult setting. Although the District or High Court may make arrangements to address a young person's needs, this can go only so far to mitigate the effects of adolescent neuro-development. It should be a last resort to place a young person in a District or High Court trial. As noted, that is already recognised in the legislation: a Youth Court considering an application to transfer a Schedule 1A case to the District or High Court for sentencing under section 283(o) will give appropriate weight and consideration to all material factors.

Disproportionate effect on Māori

269. As noted in the Regulatory Impact Statement — Addendum, the provision for automatic transfer to the District or High Court would disproportionately affect Māori. The statistical evidence establishes that Māori are over-represented in the criminal justice system. The provision is also contrary to the Bill's purpose, which proposes to amend the purposes of the Act to promote the well-being of children, young persons, and their families and family groups by –

   (k) recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for Māori children and young persons who come to the attention of the department; and

   (l) promoting an approach that supports capability building at the whānau level to improve life course outcomes for Māori children and young persons and their whānau. (clause 6: new section 4(k) and (l)).

Police charging decisions

270. As recognised in in the Regulatory Impact Statement — Addendum there is a significant risk that Police decisions in relation to the offending specified in the charging document could result in significantly different consequences for 17-year-olds for similar offences, especially where a charge is transferred to the District or High Court but is reduced to a lesser charge at a later date. The decision whether a charge should be transferred to the District or High Court should lie with the judge through the existing legislative provisions, and not with the Police through their decision what charge to lay.

271. The risk may be mitigated to a certain extent through charging guidelines and training, but the Law Society considers there remains an unacceptable risk of inequality, particularly given the serious consequences that would result.

272. It is also unclear how 17-year-olds initially charged with serious charges (and automatically transferred to the District or High Court) will be dealt with if the charges are subsequently reduced. The Bill does not make provision for the District or High Court to remit those cases

back to the Youth Court. In addition, the provisions of the Act relating to the transfer of cases involving murder or manslaughter charges suggest that once proceedings are transferred to the District or High Court, the Youth Court jurisdiction no longer applies.[18] In this case, the 17-year-old would be dealt with as an adult, even on a lesser charge. As it is common practice for an initially serious charge to be later reduced, the provisions for automatic transfer of proceedings to the District or High Court as currently drafted present an unacceptable risk of inequality resulting from "overcharging".

Discrimination on grounds of age

273. Section 19(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) affirms the right to be free from discrimination, including on the grounds of age. The Law Society notes that the Ministry of Justice, in its advice dated 5 December 2016 on the NZBORA aspects of the Bill, has concluded that the provisions requiring the Youth Court to transfer 17 year-olds accused of committing serious offences to the adult jurisdiction is a prima facie limitation on the right to be free from discrimination on the grounds of age. The Law Society agrees with this view.

274. The Ministry of Justice has also concluded the proposal limits the relevant right in a way that is justified and proportionate. However, the advice expresses reservations about whether the proposal will have the intended effects in terms of deterrence or public confidence in the justice system (paragraphs 29-30). The Law Society shares those reservations as well as having the concerns identified above.

Recommendations

275. That:

- clauses 104 and 123 be deleted, and consequential amendments be made to clauses 102 and 103 of the Bill, and any other relevant clauses; or
- if these clauses are retained, the Bill provide for the situation where the charges that required the transfer to the District or High Court are subsequently reduced.

Factors to be taken into account on sentencing (clause 107)

276. Clause 107 amends section 284 to add, and requires greater weight to be given to, certain factors that a Youth Court must have regard to in deciding whether to make an order to transfer a proceeding to another court for sentence or decision under section 283(o) of the Act. The proposed new factors are:

(a) the seriousness of the offending;

(b) the criminal history of the young person;

(c) the interests of the victim; and

(d) the risk posed by the young person to other people.

277. The priority of factors to be considered in proposed section 284(1A) is inconsistent with a number of the Youth Justice principles in section 208 of the Act. The current provisions of section 284 are comprehensive and appropriately focussed on the offence and the offender

[18] Section 275.

within their wider whanau and circumstances, which is consistent with the scheme and principles of the Act. The current provisions work well to identify the serious, recidivist offender and most egregious offending, and ensure the offender is dealt with in the most appropriate jurisdiction. The Law Society considers that the current provisions should be retained and recommends that clause 107 be deleted.

Recommendation

278. That the current provisions should be retained and clause 107 deleted.

<u>Detention of 17-year-olds in prison where safety risk</u>

Section 238 – application for detention in prison pending hearing

279. Clauses 93 – 94 amend sections 238 – 239 of the Act to provide for the detention of a 17-year-old in a youth unit of an adult facility when necessary to ensure the safety of young persons in youth justice residences. The chief executive of the department responsible for administering the Act and the chief executive of the Department of Corrections must jointly apply to the Youth Court for the order and the Court must be satisfied that (proposed section 239(2A)(b)):

    (a) the order is necessary to ensure the safety of any young person (as defined in section 2(1)) who is in the custody of the chief executive; and

    (b) a youth unit within a prison is available for the young person to stay in.

280. Under this provision, a young person could be remanded to prison on the basis of their characteristics rather than on the circumstances of the alleged offending and nature and seriousness of the charge, which could be relatively minor. A decision to remand a young person to prison should be based on the seriousness of the charge and circumstances of the alleged offending, not just on the characteristics of the young person. This is the approach taken in section 8 of the Bail Act 2000 (Consideration of just cause for continued detention).

281. Section 241 of the Act provides that the Youth Court or High Court "may, from time to time" review orders under section 238, which include orders for detention in adult facilities or youth justice residences. There is no requirement for a review to take place. Clause 95 amends section 238 to require an order under section 238(1)(e) (for detention in Police custody) to be reviewed at least every 24 hours unless this is clearly impracticable. There is no proposed requirement to review orders for detention in a youth unit. For serious offences, it is common that a young person could wait up to a year for trial, and sometimes up to two years, due to pressures within the justice system. This is an unacceptable period for a 17-year-old to be on remand in a prison setting, irrespective of whether this is in a youth unit.

282. The Law Society notes that New Zealand maintains formal reservations on Article 37(c) of UNCROC, and Article 10(2)(b) and (3) of the International Covenant on Civil and Political Rights in order to enable the mixing of juveniles and adults where a shortage of suitable facilities makes this unavoidable. The United Nations Human Rights Committee continues to express concern over the slow progress made towards withdrawing this reservation and

invites New Zealand to proceed speedily with its withdrawal.[19] The Law Society is concerned that the provisions of the Bill will put further pressure on the already insufficient facilities in youth units in prison.

283. The Law Society considers that the issues should more appropriately be addressed through the provision of youth justice facilities that are better equipped to meet the needs of all young persons, rather than the proposals in clauses 93 – 94.

Recommendation

284. That clauses 93 and 94 be deleted, and that the issues be addressed through the provision of youth justice facilities that are better equipped to meet the needs of all young persons.

Clause 126: Section 175 [Criminal Procedure Act 2011] amended (Remand of defendants aged 17 to 20 years)

285. Clause 126 amends section 175 of the Criminal Procedure Act 2011 to provide for the detention of a 17-year-old in prison (rather than in the custody of the chief executive responsible for the administration of the Act) if the chief executive and the chief executive of the Department of Corrections agree that the young person poses a safety risk. Proposed section 175(1B) states:

> (1B) The matter that must be agreed by the 2 chief executives is that the assessed risk posed by the person to younger or more vulnerable young persons is high and requires the person to be detained in a youth unit of a prison.

286. The provisions in clause 126 are different, and require a higher level of risk to safety, than the provisions of proposed section 239(2A)(b) (the order is necessary to ensure the safety of any young person). It is unclear if this is intended.

Recommendation

287. That the provisions of proposed section 175(1B) of the Criminal Procedure Act 2011 be reviewed in light of the apparent inconsistency with proposed section 239(2A)(b) of the principal Act.

Clause 108: Section 316 amended (Court may cancel supervision with residence order if young person absconds)

288. Clause 108 amends section 316 to enable the chief executive to apply to the Youth Court to cancel a supervision with residence order made under section 11 of the Act placing a 17-year-old in the custody of the chief executive. The Court may do so if it is satisfied that the young person's behaviour and compliance with any obligations placed on them by a plan prepared under section 335 or the order itself have been unsatisfactory to a more than

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19 UN Human Rights Committee, *Concluding observations on the sixth periodic report of New Zealand* CCPR/C/NZL/CO/6 (28 April 2016), at [5], "The Committee regrets the slow progress made by the State party toward withdrawing its reservation to article 10 (2) (b) and (3**), although it notes the information provided by the State party regarding measures to separate youth detainees from adult detainees and, in particular, the establishment by the Department of Corrections of dedicated youth units**. The Committee also notes the intention of the State party to maintain its other reservations (art. 2)." (emphasis added) http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhstky1HJJMM0R%2Bg124Xadhh68naPWV2k8dZAlFF8ilyRoMnuWaZwXPzS4G12gLHCuxo3kapjnqxVj1ST7pjwRrUxquesCZpHp9rIKn1%2FjgaVr:

minor extent. Currently, the Court may only cancel an order (on the application of the chief executive) if a young person has absconded from custody.

289. The Law Society is concerned that the provision is overly broad, and fails to define the nature of the breach and what is considered "minor". The Regulatory Impact Statement — Addendum states in the analysis of the proposal that "a District Court sentence is likely to only be appropriate if the 17-year-old is violent" but this is not reflected in clause 108. Potentially, insubordination to staff at the residence and stealing, in addition to technical non-compliance with a youth justice plan, could be captured. The Law Society notes that the Youth Court retains the discretion to cancel the supervision with residence order. However, clear guidance should be provided within the Act about the severity and nature of the behaviour and non-compliance needed to trigger this action.

290. As a supervision with residence order is at the top end of options available to the Youth Court, it is likely that the offending is serious, or the offender is recidivist. Breaches are to be expected, as the therapeutic input from residence takes time to be effective. The provision fails to take into account the evidence of neurological development and effects on behaviour which underpin the proposal to include 17-year-olds in the youth justice jurisdiction.

291. Seventeen-year-olds should not be penalised for the purpose of protecting other residents. As noted above, the Law Society considers that the issues should more appropriately be addressed through the provision of youth justice facilities that are better equipped to meet the needs of all young persons. This sentence should be permitted to run its course if at all possible to have the best chance of reducing further offending.

Recommendation

292. That clause 108 be amended so that section 316 provides narrower limits on, and clear guidance on the severity and nature of, the behaviour and non-compliance needed to trigger cancellation pursuant to proposed section 316(1A).

<u>Appointment of youth advocate where offence is punishable by imprisonment of 10 years or more</u>

293. Clauses 97 and 109 amend the Act to enable the chief executive to appoint a youth advocate to represent a child or young person at a family group conference convened under section 247(b) of the Act (an intention to charge family group conference (ITC FGC)) where the offence is punishable by imprisonment of 10 years or more.

Representation limited to serious offences

294. The Law Society recommended in its submission on the Children Young Persons and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill that youth advocates should be appointed prior to **all** ITC FGCs to ensure that all children and young persons are afforded legal representation and the ability to participate fully,[20] for these reasons:

> ITC FGCs have a specific purpose and carry potentially serious consequences. The child or young person will be expected to respond to alleged criminal activity and

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[20] NZLS submission dated 28.7.16 on the Children Young Persons and Their Families (Advocacy, Workforce, and Age Settings) Amendment Bill http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/103684/CYPF-Advocacy-Workforce-Age-Settings-Amendment-Bill-28-7-16.pdf, at [10].

penalties will be imposed. The victim is also likely to be present. ITC FGCs take place before a Youth Advocate is appointed by the court under section 323 of the Act. There is a significant risk that, without legal representation at ITC FGCs, a child or young person may admit to an offence they did not commit or to which they have a substantive defence, or may be incorrectly charged. The child or young person may not have the communication skills or be sufficiently assertive to indicate that they did not commit an offence, especially in the presence of police. They will not know the law relating to that offence.

295. There is no justification for only providing a young person with access to adequate legal advice in such limited circumstances. Such measures are inequitable and inconsistent with New Zealand's obligations under the UNCROC. Section 24 of the New Zealand Bill of Rights Act 1990 and case law also suggest that the intention to charge stage triggers a right to counsel.[21]

296. Although there is an opportunity to promote diversion at an ITC FGC, the statement at [84] of the Regulatory Impact Statement: Investing in Children that an ITC FGC has a diversionary purpose (and therefore the cost of state funding is not warranted) is not correct.[22] Section 247(b) states that a youth justice co-ordinator shall convene a family group conference where:

> after any consultations under section 245(1)b) in relation to any offence alleged to have been committed by a young person, a youth justice co-ordinator is notified by an enforcement officer that the person intending to commence the proceedings **desires that the young person be charged with that offence.** [emphasis added]

297. The ITC FGC takes place after Police-led diversion, including warnings or alternative action, should have been considered. There is therefore a very strong likelihood the matter will result in formal charges being filed in the Youth Court.

298. In many cases, the young person and their family are able to understand the ITC process only as a result of legal advice provided by a youth advocate. Lack of understanding often contributes to charges being laid in Court. If the youth advocate is appointed at the ITC FGC stage, it may reduce the charge being laid in Court and avoid the need for Court appearances by the young person and his or her family.

The mechanism for appointment and functions of youth advocates

299. Proposed sections 248A(2) and (3) (clause 97) provide that the chief executive of the department responsible for the administration of the Act appoints the youth advocate, and that the appointment (including any eligibility criteria that will apply) and payment of a youth advocate must be made in accordance with any regulations made under proposed section 447(db).

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21 Ziyad Hopkins, at p62; see also at p69: "limiting access to counsel at ITC FGC's to certain categories of cases (based on lower age or more serious charges) could easily mask the impact of increased access to counsel for lower level cases – sometimes the ones that most often lead to unnecessary escalation. The facts of the case and the condition of the young person are more important to evaluate than a superficial distinction based on age or charges." http://fulbright.org.nz/wp-content/uploads/2016/07/HOPKINS-Ziyad-complete-report.pdf

22 Regulatory Impact Statement: Investing in Children: Enhancing Youth Justice Provisions.

300. Currently, youth advocates are appointed by the Youth Court under section 323 of the Act where a child or young person appears before the Youth Court charged with an offence and legal representation has not been arranged. Section 324 provides for the youth advocate's rights, powers, duties, privileges and immunities, and section 325 provides for the payment of the youth advocate. Youth advocates are appointed in accordance with criteria and procedures developed by the Youth Court.[23] The Ministry of Justice administers the youth advocate's appointment and payment.

301. It is unclear how the provisions of proposed section 248A and regulations made under proposed section 447(db) will relate to the current provisions in sections 323-325 as there is no cross-reference in the Bill to the current provisions. In particular, the Law Society notes that proposed section 248A(2) requires the chief executive to appoint a youth advocate to represent the child at the ITC FGC. However, section 324(3) provides that a youth advocate may attend any family group conference held under Part 4 (which includes an ITC FGC) **if requested to do so by the child or young person** (emphasis added).

302. It is desirable that provisions relating to the appointment, powers and functions of youth advocates are consistent.

303. The Law Society recommends that appointment of youth advocates continues to be the responsibility of the Court, and administered by the Ministry of Justice. This would avoid perceived and actual conflicts of interest that may result through the involvement of the department, and would ensure the integrity of, and confidence in, the legal process. Administration by the Ministry of Justice would also maintain the standards and oversight currently applied to youth advocates.

Recommendations:

304. That clause 97 be amended so that:

- youth advocates are appointed before all family group conferences convened under section 247(b) of the Act, whether or not the offence is punishable by imprisonment of 10 years or more; and
- appointment of youth advocates continues to be the responsibility of the Youth Court, and administered by the Ministry of Justice.

<u>Young people transitioning out of care or youth justice residence</u>

305. Clause 116 amends section 386A to extend the provision of advice and assistance for young persons transitioning out of care or youth justice residence up to the age of 25 years. Advice and assistance may include legal advice (proposed section 386B(4)(c)). In addition, clause 117 inserts new section 386C to require the chief executive to take reasonable steps to maintain contact with those young persons up to the age of 21 years. This is irrespective of whether the young person is being provided with any advice or assistance under section 386A (proposed section 386C(2)).

306. A young person should be provided with legal advice when considering whether, and to what extent, they wish the department to maintain contact with them. The young person should be independently informed of options and the possible consequences of this contact,

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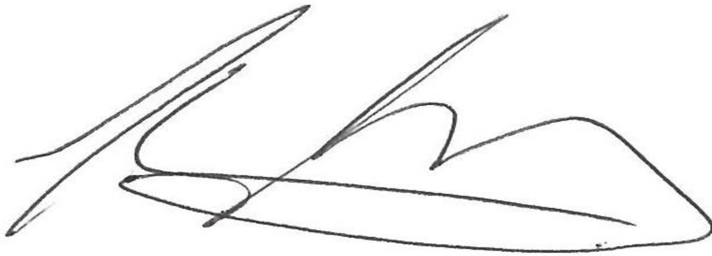
23 http://www.lawsociety.org.nz/__data/assets/pdf_file/0006/69765/YthAdvocates.pdf

including whether remaining engaged with the department will result in the continued sharing of information about the young person.

Recommendation

307. That clause 117 be amended so that a young person is provided with legal advice when considering whether, and to what extent, they wish the department to maintain contact with them.



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3 March 2017