New Zealand Law Society
Te Kāhui Ture o Aotearoa

Oranga Tamariki Amendment Bill

17/02/2022

Submission on the Oranga Tamariki Amendment Bill 2022

1 Introduction

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Oranga Tamariki Amendment Bill (Bill). This submission has been prepared by the Law Society's Family Law Section (FLS).

1.2 The Law Society supports the changes proposed by this Bill. However, there are three main areas where we suggest further amendment:

a. The special guardianship provisions.

b. The subsequent child provisions.

c. Reference to 'protection order.'

1.3 The Law Society wishes to be heard on this submission.

2 General comment on fees for youth advocates

2.1 Court-appointed fees in the Family Court are the subject of ongoing discussion between FLS and the Ministry of Justice.

2.2 The lawyer for the child has recently received two of four 2.5% increases, following a 25-year period in which fees had not been reviewed or adjusted. The FLS continues to seek the establishment of a process for regular review of all court-appointed remuneration rates in the Family Court, so that fees do not go another 25 years without review and adjustment. The outcome of these discussions may well impact the fees for youth advocates in the Youth Court.

3 Clause-by-clause analysis

Clause 4 – Section 11 amended (Child or young person's participation and views)

3.1 Clause 4 amends section 11 of the Act so that *'the decision and reasons for it* [the process or proceeding] *must be provided to the child or young person* ***in a manner and in language appropriate for their age and level of understanding****'* (emphasis added).

3.2 The Law Society supports the proposed amendment. It seeks to enhance children's participation by de-mystifying decisions made about them, so that they understand why a particular decision has been made. This will also enhance their ability to receive legal advice about decisions concerning them.

3.3 The Law Society filed submissions on 25 February 2021 on the Family Court (Supporting Children in Court) Legislation Bill 2020. The submissions detail in length the importance of the "voice of the child." We refer to paragraphs 8 to 15 of those submissions, **attached**.

Clause 5 – Section 17 amended (Investigation of report of ill-treatment or neglect of child or young person)

3.4 Clause 5, which concerns the investigation of reports regarding the treatment of children and young persons, replaces the phrase 'ill-treatment or neglect' with the phrase 'concerns about safety or well-being.'

3.5 The Law Society supports this amendment. Ill-treatment or neglect have specific meanings and relate directly to cruel or inhumane treatment and the failure to care for children properly. In our experience, this can be a high threshold to meet, simply in order to trigger investigation. The amended language will also improve consistency with section 15, which provides that concerns about well-being (not just ill-treatment or neglect) can be reported to Oranga Tamariki.

3.6 However, lowering the threshold will potentially mean a larger number of reports require investigation. While the amendment is positive, it is likely to increase the workload of Oranga Tamariki. Appropriate resource will be essential to ensure a timely response to this anticipated increase.

Clause 6 – Section 18B replaced (person described in this section) – the subsequent child provisions

3.7 Clause 6 proposes that section 18B is amended to restrict its application to persons who have been convicted of the murder, manslaughter, or infanticide of a child or young person who was in the person's care or custody at the time of the child's or young person's death. The amendment removes persons described in section 18B as including those who have previously had children in the care of Oranga Tamariki pursuant to a declaration and custody order.

3.8 Sections 18A and 18B have not operated as anticipated. Instead, they have resulted in disregard for the steps parents may have taken following the removal of a child, set whānau up for failure, restricted engagement with family and whānau because a Family Group Conference (FGC) is not required before subsequent child court proceedings, and Family Court oversight of decisions relating to a subsequent child even where there are no care and protection concerns.

3.9 The deficit model under which the current provisions operate is not remedied by the proposed restriction of the definition of 'Person described in this section.' While the new definition will capture only a very limited group of parents, the process it triggers still does not put whānau and tamariki first:

a. The Chief Executive is still required to either apply for a care and protection order following assessment, or apply to the court under section 18C for confirmation of the decision not to apply for a care and protection order (section 18A(4)). In many cases where FGCs are held, Oranga Tamariki decides that orders are not needed.[1]

[1] A decision by Oranga Tamariki not to pursue orders is consistent with the Family Court's obligation under section 73 not to make a care and protection order unless it is satisfied that it is not practicable or appropriate to provide care or protection for the child or young person by any other means, including the implementation of any decision, recommendation, or plan made or formulated by an FGC.

b. There is still no requirement for an FGC before Oranga Tamariki applies for a care and protection order (or seeks the court to confirm the decision not to apply under section 18C).

3.10 The Law Society remains concerned that the proposed amendment to this section does not go far enough, given the process issues that have arisen. In fact, the existing definition could instead be used to provide greater support and protection to children and their whānau, provided that the section 18A process is altered so that Court orders or approval are not mandatory, and an FGC is required.

3.11 The mandatory requirement to make an application or seek the court's approval not to make an application has the effect of disempowering families, whānau, hapū and iwi, who ought to be able to come together to identify solutions to issues of possible safety risk.

3.12 We consider that the decision to make an application for a care and protection order should be made by Oranga Tamariki in the usual way, following an FGC and robust consultation with family and whānau. Oranga Tamariki should not then require the approval of the court if it elects not to make an application.

3.13 The protection of the original provision, which was intended to ensure that Oranga Tamariki turns its mind to the safety of a subsequent child, where the parent had previous involvement and orders for the child, should remain in place so that Oranga Tamariki must make an active inquiry about a subsequent child. However, the application of orders should not be mandatorily triggered.

3.14 The requirement in section 70 that no care and protection application be made unless an FGC has been held should also apply under section 18A. This would support and strengthen whānau capacity and capability to decide[2] whether an order is needed. It would allow for a whānau-centric plan which may sufficiently mitigate risk so that a care and protection order is not needed. Oranga Tamariki already monitors FGC plans and continues to support tamariki and whānau in many cases where orders are not needed.

3.15 In addition, requiring an FGC to be held helps Oranga Tamariki's processes to reflect kaupapa Māori, and to give effect to how a Treaty partnership should operate (by ensuring processes and policies better align with tikanga and kaupapa Māori).

3.16 Oranga Tamariki would retain the ability to make a without notice application where absolutely essential, if all other options have been exhausted and the immediate safety or threat to a child or young person was imminent.[3]

3.17 The Law Society encourages proper consultation with Māori to ensure that these proposed amendments reduce harm to tamariki Māori and positively strengthen family, whānau, hapū and iwi, as required under section 7AA of the Act.

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2 One of the key recommendations that came out of the report *Ko te wā whakawhiti – it's time for change: Summary report of the Māori inquiry into Oranga Tamariki* (Wellington: Whānau Ora, February 2020).

3 However, we also note the calls in various reports for the abolotion of without notice applications entirely in care and protection matters, for example, in *Ko te wā whakawhiti – it's time for change: Summary report of the Māori inquiry into Oranga Tamariki*.

3.18 The Law Society also refers to its comment under clause 13 which relates to the special guardianship provisions.

Recommendation

a. Section 18B is retained in its current form, so that Oranga Tamariki can continue to inquire into the safety of any subsequent children and provide supports for that child and their whānau and hold an FGC when required.

b. The 'subsequent child' process in section 18A be significantly amended by requiring FGCs to be held in all cases (except where a without notice application is required due to urgency or immediate risk of harm), with Oranga Tamariki retaining its current discretion about whether to apply for a care and protection order or whether to provide support and monitor safety of a child/children under an FGC plan.

Specifically, section 18A be amended by:

(i) Repealing section 18(A)(1)(d) and replacing it with, 'is not a person who has previously been assessed in relation to a subsequent child as meeting the requirements of subsection (3).'

(ii) Repealing section 18A(4) to (7).

(iii) Inserting new section 18A(4):

18A(4) Following the assessment the matter must be referred for a Family Group Conference under section 18, unless:

(i) the Chief Executive determines that safety considerations require a without notice application to the Family Court for a care and protection order; or

(ii) the Chief Executive is satisfied that the person, following assessment under this section, has demonstrated that the person meets the requirements of subsection (3).

c. Sections 18C and 18D are repealed, so that the Court is not required to approve any decision made by Oranga Tamariki about whether to apply for care and protection orders after an FGC has been held. There would also be other consequential amendments required to give effect these changes, such as 14(1)(c) and repealing 83(1A).

Clause 8 – Section 83 amended (Care or protection order)

3.19 Clause 8 repeals section 83(2A) and (2B).

3.20 The proposed changes have the effect of repealing the provisions which allow the court to make a finding that there is no realistic prospect of a child returning home when it is making a care and protection order.

3.21 The Law Society supports the repeal of sections 83(2A) and (2B) on the assumption that section 18B is amended as proposed in the bill.

Clause 9 – Section 87 amended (Restraining orders)

3.22 Clause 9 amends section 87(1) to clarify that the court can only exercise its discretion to make certain restraining orders if "satisfied the child or young person is in need of care or protection".

3.23 The Law Society supports this amendment as it clarifies when this discretion can be exercised. However, we refer to comments below regarding the phrases 'protection order' and 'restraining order' under clause 24.

Clause 10 – Section 95 amended (Conditions of support order or interim support order)

3.24 Clause 10 amends section 95 as a consequence of the repeal of section 67. The amendment replaces the reference to a declaration in section 95(d) with a reference to the court being satisfied that a child or young person is in need of care and protection. The Law Society supports this amendment.

Clause 11 – Section 104 amended (Effects of custody order)

3.25 Clause 11 replaces section 104(3)(c), adding a requirement that before exercising the authority to 'enter and search' into an increased range of places (all of which seem appropriate) the person entering must produce evidence of their identity and disclose that they are exercising authority to take the steps under the Act.

3.26 The Law Society supports this amendment. It is sensible to have the relevant entry and search provisions in this section, rather than requiring reference to other provisions in the Act.

Clause 12 – Section 110 amended (Guardianship order)

3.27 Clause 12 repeals section 110(4) as the substance of the provision is incorporated into new section 113A(1AA) (see clause 13). The Law Society supports this amendment.

Clause 13 – Section 113A amended (Special guardianship orders)

3.28 Clause 13 makes two amendments to section 113A, which provides that that court may make special guardianship orders:

a. Clause 13(1) inserts new section 113A(1AA) to clarify that the jurisdiction to make a special guardianship order arises under section 113A.

b. Clause 13(2) amends section 113A(1) to reflect the repeal of section 110(4).

3.29 Special guardianship was introduced in June 2016 by section 22 of the Children Young Persons and Their Families (Vulnerable Children) Amendment Act 2014 (originating from the Vulnerable Children's Bill). The explanatory note to the Vulnerable Children's Bill stated at page 31 that '*it is expected the appointments of special guardians under new section 110A will be relatively unusual*.'

3.30 The Law Society understands that since special guardianship was introduced, approximately 200 orders have been made. Given that recent judicial decision-making (referred to below) indicates it would be a rare occurrence that a special guardianship order would be made, this seems a high number of orders. There is no analysis available as to which children these

orders have been made in respect of but given the significant proportion of tamariki Māori in state care, it can be assumed that these orders have been made in respect of a significant number of tamariki Māori.

3.31 The Law Society is disappointed that the opportunity to review the overall appropriateness of special guardianship has not been taken. In 2021, two Family Court judgments considered the issues surrounding special guardianship in depth. Those judgments make clear that there is a divergence of views in the judiciary when it comes to the applicability of the special guardianship provisions to tamariki Māori.

3.32 Judge Otene in *Re I* [2021] NZFC 210 (also referred to as *Chief Executive of Oranga Tamariki – Ministry for Children v BH*) stated:

> *Having regard to those definitions* [of mana tamaiti, Tikanga Māori, whakapapa and whanaungatanga] *the legal status afforded by special guardianship undermines the principles referred to because in disabling the kinship group's contribution to important matters affecting the child, it fails to recognise the group's whanaungatanga responsibilities. Similarly, the narrowed opportunity to seek the court's relief in guardianship custody and access matters reduces protection of the child's kinship ties.*
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> *In conclusion, I consider that for Māori children at least, special guardianship is fundamentally irreconcilable with principles of wellbeing that speak to mana, whakapapa and whanaungatanga. The conflict is to such a significant extent that the application of those principles will inevitably weigh heavily against the making of an order. This position holds objectively. It does not render a special guardianship order unavailable in relation to a Māori child if the evaluation of the subjective circumstances leads to the conclusion that an order is to the child's wellbeing and best interests. But that evaluation must factor the weight of conflict that exists by virtue of essence, irrespective of circumstance.*

3.33 Judge Southwick's decision in *Re WH* [2021] NZFC 4090 came after the decision of *Re I*. Her Honour stated that where she differed from Judge Otene's approach was in the suggestion that the principles referred to bear such weight that they will in almost all cases prevent the making of a special guardianship order '*by virtue of essence irrespective of circumstance*.' The judgment then provides an analysis as to why the judge considered that could not be the case.

3.34 In addition to the divergence of views among the judiciary, there are also divergent views among the profession in terms of the appropriateness of special guardianship. Some practitioners are of the view that special guardianship should be repealed as it no longer has a place in Aotearoa New Zealand's law. Others are of the view that the special guardianship provisions leave Oranga Tamariki, whānau and legal practitioners in an untenable position about the ongoing use of the provision.

3.35 The Law Society consider the special guardianship provisions need to be carefully considered as to their appropriateness in relation to tamariki Māori, as well as children of other

cultures, for the reason articulated by Judge Otene. Wide consultation with the judiciary and profession should take place as to their repeal, replacement, or amendment.

Recommendation

If the special guardianship provisions are completely reviewed to determine whether they should be retained, as we have proposed, then the amendments proposed in the Bill are likely unnecessary.

However, if the special guardianship provisions in section 113A are retained, the Law Society supported the proposed amendment, which avoids the circuitous appointment of a caregiver as a sole guardian under section 110(4) before an order for special guardianship can be made.

Clause 14 – Section 121 amended (Court may make orders for access and exercise of other rights by parents and other persons)

3.36 Clause 14 replaces section 121(c) and (ca) with new section 121(2)(c) to include a cross-reference. The Law Society supports this amendment.

Clause 15 – Section 126 amended (Persons who may apply for variation or discharge of order)

3.37 Clause 15 replaces section 126(f) with new section 126(f), as a consequence of the repeal of section 67 (see clause 10). The amendment replaces the current reference to a declaration with a reference to a care or protection order. The Law Society supports this amendment but note the comments under clause 24 in terms of the phrase 'protection order.'

Clause 16 – Section 137 amended (Court to consider report and make directions)

3.38 Clause 16 amends section 137(1)(f), as a consequence of the repeal of section 67 (see clause 10). The amendment replaces the current reference to a declaration with a reference to a care or protection order. The Law Society supports this amendment but note the comments under clause 24 in terms of the phrase 'protection order.'

Clause 17 – Section 144 amended (Agreement not to be made without consent of child or young person)

3.39 Clause 17 replaces section 144(1) with new section 144(1), which relates to certain agreements that require the consent of a child over the age of 12 years or a young person. New section 144(1) provides that certain agreements may not be made unless the child or young person concerned consents and changes the requirement for written consent to a requirement for recorded consent.

3.40 The Law Society supports this amendment. It is sensible to record the consent of a young person or child, given that a child over the age of 12 or a young person is a minor and cannot sign legal documents. Actively supporting a child's participation in proceedings they are the subject of gives more meaningful effect to a child's rights as articulated in the United Nations Convention on the Rights of the Child.

Clause 18 – Section 158 amended (Applications may be heard together)

3.41 Clause 18 amends section 158, which relates to applications that may be heard together. The amendment repeals section 158(2) and (3) as a consequence of the replacement of section 18B(2) (see clause 6). The Law Society supports this amendment.

Clause 19 – Section 165 amended (Payment of lay advocate)

3.42 Clause 19 amends section 165, by replacing section 165(1) to provide that the Registrar of the court may, in the absence of relevant regulations, determine the fees and expenses for a lay advocate appointed under section 163. The Law Society supports this proposed amendment, subject to the comments at 2.1, above.

Clause 20 – Section 186 amended (Report by social worker)

3.43 Clause 20 amends section 186(1), as a consequence of the repeal of section 67. The proposed amendment simplifies the provision and deletes reference to a declaration. The Law Society supports this proposed amendment.

Clause 21 – Section 187 amended (Cultural and community reports)

3.44 Clause 21 amends section 187(1), as a consequence of the repeal of section 67. The proposed amendment simplifies the provision and deletes reference to a declaration. It also provides that where a court is satisfied a child is in need of care and protection, the court can seek the report, removing reference to the court having first made a care or protection order that a child is in need of care or protection. The Law Society supports this proposed amendment.

Clause 22 – Section 196 replaced (Special provisions applying to disclosure of communications to medical practitioner or clinical psychologist)

3.45 Clause 22 replaces section 196 with new section 196, as the privilege relating to the disclosure in proceedings of protected communications to a medical practitioner or clinical psychologist set out in section 32 of the Evidence Amendment Act (No 2) 1980 has been repealed. New section 196 provides that if a court is, in relation to a child or young person, asked to exercise its discretion under section 69 of the Evidence Act 2006, the court must give the lawyer appointed under section 159 of the principal Act to represent the child or young person an opportunity to be heard on the matter.

3.46 The Law Society supports this proposed amendment. Section 69 of the Evidence Act 2006 allows for disclosure of confidential information in certain circumstances, and provides the court with an overriding discretion, whilst setting out factors for the court to consider. It is appropriate that a lawyer for the child be heard on applications under this section.

Clause 23 – Section 198 amended (Specific provisions apply for applications for care or protection order on ground of child's offending)

3.47 Clause 23 replaces section 198(2) with new section 198(2), which provides that nothing in section 197 applies to any application for a care or protection order on the ground specified in section 14(1)(e). The Law Society supports this proposed amendment which is a result of the repeal of section 195 and 67 and brings section 198 in line with those changes.

Clause 24 – Section 207B amended (Interpretation)

3.48 Clause 24 amends the definition of protection proceedings in section 207B, as a consequence of the repeal of section 67 (see clause 10). The amendment replaces the reference to a declaration with reference to a care or protection order. While the Law Society supports this proposed change, the use of the term 'protection order' is unfortunate, even if defined in section 207C. Family lawyers already deal with 'protection orders' in terms of the Family Violence Act 2018. There is also a risk of 'restraining orders' being 'read into' the term protection order, as a restraining order is similar to a protection order under the Family Violence Act.

3.49 Parliament has stated a clear goal to make legislation more understandable and less confusing to lay litigants and lawyers alike, and there are guidelines published by the Parliamentary Counsel Office to promote clearer drafting. Using identical terminology for different orders under different Acts may be confusing for all.[4] While the context of the terms protection proceedings and protection order may indicate that it is nothing to do with the Family Violence Act 2018, this will not be immediately apparent and may cause confusion.

3.50 The Law Society suggests the term 'child protection order' to differentiate that order from a protection order under the Family Violence Act.

Recommendation

That the phrase 'protection order' throughout the Act is replaced with the term 'child protection order.'

Clause 25 – Section 207) amended (Appeal against order for transfer)

Clause 26 – Section 207U amended (Appeal against order for transfer)

3.51 These clauses amend sections 207O and 207U to correct errors by removing references to sections and subsections which have been repealed.

3.52 The Law Society supports these amendments.

Clause 27 – Section 207ZC amended (Aboriginal or Torres Strait Islander children or young persons)

3.53 Clause 27 amends section 207ZC to correct a cross-reference. The amendment replaces the principle referred to in the previous section 5(b) with the updated applicable principle and section. The Law Society supports this amendment.

Clause 28 – Section 214 amended (Arrest of a child or young person without warrant)

3.54 Clause 28 amends section 214 by removing a 'subject to' provision and inserting a new subsection to ensure that it is clear to those applying the Act that the requirements under section 214 relating to the limited circumstances under which a child or young person cannot be arrested without a warrant do not prevent a constable arresting without warrant for current breaches of bail under section 214A. The Law Society supports this amendment.

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[4] Section 5(1) of the Interpretation Act 1999 states that the "meaning of an enactment must be ascertained from its text and in the light of its purpose."

Clause 29 – Section 214A amended (Arrest of a child or young person in breach of bail condition)

3.55 Current section 214A(b)(i) is limited to a constable arresting without warrant when the child or young person *has breached* a condition of that bail. Abbott and Thompson's District Court Practice (Criminal) on Lexis Advance notes of this section:

> *Sections 214 and 214A are limitations on the power to arrest with protections in place for children and young people. The particular vulnerabilities of children and young people are recognised as warranting of extra protections by the United Nations Convention on the Rights of the Child (UNCROC), see in particular: article 40(3).*
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> *Where a child or young person has been released on bail and subsequently breaches a condition of that bail, arrest is not an option unless the police officer believes on reasonable grounds that it is the third occasion in which they have breached a condition of that bail (whether or not it is the same condition). This means that no young person should be arrested and placed in police cells to come before a judge on one bail breach alone.*
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> *Non-compliance with bail conditions may result in the court reconsidering whether bail should continue. A possible result is detention in a custodial remand.*

3.56 Clause 29 amends section 214A to ensure that the circumstances under which a child or young person may be arrested without warrant must relate to current and not past breaches, so that the circumstances that trigger the arrest without warrant are where the child or young person is in breach of or has recently breached a condition of that bail.

3.57 Section 214A(b)(ii) remains in place. This provides that the above circumstances must also include the situation where the child or young person has on two or more previous occasions breached a condition of that bail (whether or not the same condition).

3.58 The effect of the change is to include a situation where a child or young person is currently breaching the condition as well as a situation where they have recently breached a condition. The inclusion of the word "recently" will ensure that the police are only able to arrest without a warrant where they have acted without delay in deciding to arrest without warrant or the breach is ongoing.

3.59 The combination of those clauses will mean that a child or young person can only be arrested without warrant where there is a current or recent breach of a condition plus two previous breaches.

3.60 The clause also inserts a further subsection (2) and (3). Subsection (2) provides that once a child or young person has appeared before the court in respect of a breach of bail under section 214A, no breach of bail condition occurring before that appearance may be used to support a subsequent arrest. This amendment has the effect of creating a "clean slate" from previous bail condition breaches for a child or young person once the appearance under section 214A has been made, so that previous breaches cannot continue to provide a foundation for a further arrest without warrant on a further single bail breach.

3.61 The Law Society supports this amendment.

Clause 30 – Section 239A repealed (Expiry of sections 238(1A) to (1C) and 239(3))

3.62 Clause 30 repeals section 239A because it has expired. The Law Society supports this amendment.

Clause 31 – Section 242 amended (Order under section 238 sufficient authority for detention of child or young person)

3.63 Clause 31 amends section 242 to adjust a cross-reference. The Law Society supports this amendment.

Clause 32 – section 248A amended (Chief executive to appoint youth advocate to represent child or young person if offence punishable by imprisonment of 10 years or more)

3.64 Clause 32 replaces section 248A(1) with a new section, which appears to be identical except that it includes the clause broken down to make it more readable, and to ensure that the conjunctive interpretation is noted so both subclause (a) and (b) must apply.

3.65 Clause 32 also replaces section 248A(2) with a new clause adding that a youth advocate must be appointed by the chief executive '*unless the chief executive is satisfied that legal representation has been arranged (or is to be arranged) for the child or young person in relation to the family group conference.'*

3.66 The effect of this amendment is that:

a. A youth advocate must be appointed for an intention to charge for serious offences carrying a penalty of 10 years or more imprisonment.

b. The chief executive is not required to appoint a youth advocate if there are other arrangements in place for legal representation for that child or young person in relation to a family group conference.

3.67 The Law Society supports this amendment, which will help ensure that a child or young person has access to legal assistance throughout the entirety of the youth justice process and when attending a pre-charging Family Group Conference for serious offences carrying imprisonment penalties of 10 years or more.

3.68 The Law Society also considers it is important for the chief executive to liaise with the Youth Court to ensure that a youth advocate with current experience in serious criminal matters is appointed for a child or young person where there is an intention to charge, and an FGC is to be held for those more serious 'intention to charge' offences (such as sexual offending).

Clause 33 – Section 258 amended (Functions of family group conference)

Clause 34 – Section 261 amended (Family group conference may make decisions, recommendations, and plans relating to care or protection of child or young person)

3.69 Clauses 33 and 34 amend sections 258 and 261 by including reference to decisions regarding children who are in need of 'assistance,' in addition to holding an FGC when there are care and protection concerns.

3.70 In principle, the Law Society supports these amendments, however clarification is required on what is meant by the term 'assistance.' This could be defined in section 2 of the Act.

While there are several references to 'assist' and 'assisting' within the Act they are not in the context of an FGC. By leaving 'assistance' undefined, there may be confusion about what the threshold is (or whether the threshold has been met) to hold an FGC.

Recommendation

That the term 'assistance' is defined in section 2 of the Act.

Clause 35 – Section 272 amended (Jurisdiction of Youth Court and children's liability to be prosecuted for criminal offences)

3.71 Clause 35 amends section 272 as a consequence of the repeal of section 67 (see clause 10). This is a technical amendment given there is no longer reference to a 'declaration.' The Law Society supports the proposed amendment.

Clause 36 – Section 273 amended (Manner of dealing with offences (other than murder or manslaughter))

3.72 Section 36 replaces section 273(1) to clarify that section 273, which concerns the manner of dealing with offences, applies to certain young persons who are charged with certain offences. This is a technical amendment and provides better reading of the section. The key change is the reference to Schedule 1A being added to the heading of the section. The Law Society supports the proposed amendment.

Clause 37 – Section 311 amended (Supervision with residence order)

3.73 Clause 37 amends section 311, which provides that if a charge against a young person is proved before the Youth Court, the court may make an order placing the young person in the custody of the chief executive of Oranga Tamariki. The amendment replaces section 311(3) with new section 311(3). New section 311(3) provides that a super vision order may be made on the same date that a young person is released from the custody of the chief executive.

3.74 The Law Society supports this amendment. It makes it easier to understand the sentence provision and allows for the young person to be sentenced on a supervision order on the same date as being released from the custody of the chief executive.

Clause 38 – Section 325 amended (Payment of youth advocate)

3.75 Clause 38 amends section 325 to provide that the Registrar of the court may, in the absence of relevant regulations determine the fees and expenses of a youth advocate appointed under section 323. The Law Society supports the proposed amendment, subject to the comments above regarding ongoing discussions with the Ministry of Justice about regular review of court-appointed counsel fees.

Clause 39 – Section 328A amended (Payment of lay advocate)

3.76 Clause 38 amends section 328A to provide that the Registrar of the court may, in the absence of relevant regulations determine the fees and expenses of a lay advocate appointed under section 326. The Law Society supports the proposed amendment.

Clause 40 – Section 350 amended (Decision of High Court and Family Court to be sent to chief executive)

3.77 Clause 40 amends the heading to section 350 to replace the words 'chief executive' with 'principal manager.' The explanatory note to the bill states that the amendment is '*to better align it with the content of the provision*.'

3.78 The Law Society supports the proposed amendment, as aside from the heading, there is no reference to the chief executive in section 350. However, the 'principal manager' of the department is currently referred to as the 'site manager.' Consideration should be given to replacing the word 'principal' with the word 'site.'

Recommendation

That consideration be given to amending section 350 to replace the word 'principal' with the word 'site.'

Clause 41 – Section 365 amended (Chief executive may place children and young persons in residence)

3.79 Clause 41 amends section 365 to expressly provide that, when placing a child or young person in a residence, the chief executive must comply with requirements in regulations. The amendments also change the term 'guardianship' to 'sole guardianship.' The Law Society supports these amendments.

Clause 42 – Section 386A amended (Advice and assistance for young persons up to age 25 years)

3.80 Clause 42 amends section 386A, which concerns advice and assistance for young persons up to age 25. The amendment extends post-care support to young persons who are over the age of 17 and in the adult wing of a prison (under section 238(1)(f)) and excludes young people under 236 and 238(1(e).

3.81 The Law Society supports the proposed extension of post care support; however, we suggest that the word 'or' is added so that the sentence can be read conjunctively (as 'or' is previously used in this subsection to provide a list of circumstances under which post care support should be provided).

Recommendation

That section 386A(1)(a) is amended by replacing '311' with '311, or detention in a youth unit of a prison under section 238(1)(f).'

Clause 43 – Section 447 amended (Regulations)

3.82 Clause 43 amends section 447, which provides for the making of regulations under the Act. The amendments replace section 447(1)(fa)(iii) with new section 447(1)(fa)(iii) and insert new section 447(1)(fa)(v) to add the power to make regulations providing for the training and support of caregivers and care providers and for assessing the safety and suitability of caregivers and other persons living in certain residences. In the current provisions, the assessment, training and support of caregivers are in one provision.

3.83 The Law Society supports the proposed amendment as it expands the meaning of assessment to include the safety and suitability of caregivers.

Clause 44 – Schedule 1AA amended

3.84 Clause 44 amends Schedule 1AA, which sets out transitional provisions, to correct several cross-references and to provide for the continuation of determinations made before the commencement date of the bill. The Law Society supports this proposed amendment as it refers to applications for declaration made under section 67 prior to section 68 coming into force. Those applications are to be dealt with under the previous legislation.

Frazer Barton
Vice President
17 February 2022