

Family Court (Supporting Children in Court) Legislation Bill

Government Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Family Court (Supporting Children in Court) Legislation Bill and recommends, by majority, that it be passed with the amendments shown.

Introduction

The Family Court (Supporting Children in Court) Legislation Bill is an omnibus bill that would amend the Care of Children Act 2004 and the Family Dispute Resolution Act 2013.

Background

In April 2011, the Government directed a Ministry of Justice-led review of the Family Court, which resulted in major reforms to the family justice system in 2014. The reforms aimed to achieve a modern and accessible family justice system that is responsive to children and vulnerable people; that encourages individual responsibility, where appropriate; and is efficient and effective. The reforms introduced (among other things) the Family Disputes Resolution service, with the aim of minimising the harm caused to children by court proceedings.

In May 2018, the Minister of Justice established an independent panel to evaluate the 2014 reforms. The panel's report recommended a number of legislative changes to improve how the family justice system enables children's participation and considers safety in decisions about their care.

This bill responds to the recommendations made in the panel's report. It aims to enhance child wellbeing in proceedings about the care of children. It would elevate

the importance of listening to children and taking their views into consideration when decisions are being made about their care or contact.

Main aims of the bill

The bill seeks to:

- reinforce the expectation that a child should have reasonable opportunities to participate in decisions affecting their care and welfare
- ensure that lawyers appointed to represent children in proceedings are suitably qualified to represent the child or young person and that they explain proceedings to their clients
- require lawyers to facilitate the efficient resolution of disputes in order to minimise harm to children, families, and whānau
- reinforce the need for the court to recognise and respond appropriately to family violence, particularly the impact it has on children.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to the following two issues relating to clauses 7 and 9. We discuss some of these issues later in this commentary.

Right to freedom from discrimination

Clause 7 requires that: "When appointing a lawyer to represent a child, the court or Registrar must, so far as is reasonably practicable, appoint a lawyer who is, by reason of their personality, cultural background, training, and experience, suitably qualified to represent the child." We note that clause 7 appears to engage section 19 of the New Zealand Bill of Rights Act 1990 (NZBORA), which affirms the right to be free from discrimination. A conflict with the Act could occur if distinctions were made between otherwise equally qualified counsel solely because of their culture. The lawyer not appointed might consider that they had been disadvantaged.

We note that the appointment criteria for the lawyer for child, as specified in clause 7, has been adopted from section 159 of the Oranga Tamariki Act 1989. We also note that the NZBORA vet, completed by Crown Law, concluded that the bill does not limit the right to not be discriminated against affirmed by section 19 of the NZBORA. This is because culture is expressed as a matter to be taken into account rather than a decisive factor. Additionally, if one lawyer is appointed and the other is not purely on the basis of their cultural background, we consider that even if that were so, the limitation would be justified in order to facilitate the proper participation of children in court proceedings.

In considering how the appointment criteria for the lawyer for child would match with the children they represent, we sought demographic information about the lawyers for child. However, this information was not able to be compiled within the time

available to the committee, given that the information is held by each Family Court individually.

Duties of lawyer

Under clause 9, a lawyer would be required to take any steps that assist in promoting conciliation and enabling the issues in dispute to be resolved as fairly, inexpensively, simply, and speedily as is consistent with justice. The bill does not specify how compliance or non-compliance with this requirement would be assessed or enforced.

However, we note that statutory responsibility for the regulation of lawyers, including lawyer for child, sits with the New Zealand Law Society (NZLS), as prescribed in section 65 of the Lawyers and Conveyancers Act 2006. Any systemic issues that might arise in relation to compliance would be identified and addressed by the NZLS.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement

Clause 2 specifies that the bill would come into force the day after it receives Royal assent.

We note that the independent panel established to evaluate the 2014 reforms recommended a stocktake of appropriate models of child participation within the family justice system. The Ministry of Justice has begun the process for the stocktake and expects it to be completed by the end of 2021.

The stocktake is expected to include consideration of:

- key principles for children's participation, including requiring professionals to promote children's participation
- how children's views should be taken into account in cases where there is family violence
- how the needs of specific population groups should be accommodated, including children from cultural minorities, and children with disabilities
- how the needs of tamariki Māori and accountabilities to Te Tiriti o Waitangi should be met.

The stocktake will help in developing guidance and resources, and in identifying where further training for family justice professionals is needed. It aims to ensure that professionals in the family justice system facilitate children's participation in a safe and appropriate way.

We consider that the Act's clauses relating to child participation should not come into force before the development of tools and guidance from the stocktake. We recommend amending clause 2 to specify that the Act should come into force either on a date appointed by the Governor-General by Order in Council, or 2 years after the date

of Royal assent, whichever is earlier. We also recommend amending clause 2 to allow Orders in Council to be made appointing different dates for different provisions of the Act. This would ensure that the provisions relating to the stocktake can be implemented appropriately while allowing the Act's other provisions to come into force in a timely manner.

Opportunities for children to participate in decisions affecting them

Clause 4 would amend section 5 of the Care of Children Act to include a new principle that would specify that a child who is capable of forming their own views about any matter affecting their care and welfare should be given reasonable opportunities to participate in any decision affecting them. It would further specify that, commensurate with the child's age and maturity, their views should be taken into account.

We agree with submitters who argued that the principle should be strengthened, considering that the views of even very young children can significantly inform decision-making.

We recommend amending clause 4, section 5 of the Act, to specify that a child "must be given reasonable opportunities to participate in any decision affecting them".

Our proposed change to clause 4 would include removing the "age and maturity" component of the bill's new principle and the caveat that the child "is capable of forming their own views". We note that these components are already taken into consideration by the Family Court when deciding what weight should be given to the views of a child.

Duties of lawyer: promoting conciliation

Clause 9 of the bill would insert new section 7B(2)(a) into the Care of Children Act to require lawyers to take any steps that, in the opinion of the lawyer, assist in promoting conciliation before commencing proceedings. We agree with submitters that there are some cases where it would not be safe to pursue conciliation. They could include cases involving family and sexual violence, substance abuse or mental health issues, or cases where there are significant power imbalances.

We recommend amending clause 9 to remove the requirement that a lawyer must take any steps that assist in promoting conciliation. We note that the Family Court Act already promotes a duty of conciliation that applies to lawyers acting for a party before proceedings commence. Our amendment would ensure that promoting conciliation is not misapplied to cases where it would be unsafe or inappropriate to do so.

We also recommend amending clause 9 to amend new section 7B(2)(b). The new section would require lawyers, before commencing a proceeding under the Care of Children Act, to assist in enabling the issues in dispute to be resolved as fairly, inexpensively, simply, and speedily as is consistent with justice. Our amendment would include the requirement that lawyers also assist in enabling the issues in dispute to be resolved "safely". This acknowledges the risk of family and sexual violence issues in disputes about the care of children. It also strengthens our intention that a duty to pro-

mote conciliation cannot override the welfare and best interests of children where there are safety concerns.

Duties of Family Dispute Resolution providers

Clause 11 would amend section 11 of the Family Dispute Resolution Act. The amendment would require a Family Dispute Resolution (FDR) provider to make every endeavour to facilitate the participation in those discussions of the children involved in the dispute, to the extent that the FDR provider considers appropriate.

We recommend amending clause 11 to parallel the wording we proposed in clause 4 of the bill. Rather than requiring an FDR provider to facilitate children's participation in discussion, our amendment would "ensure that the children who are the subject of the dispute are given any reasonable opportunities to participate in the decisions affecting them that the FDR provider considers appropriate".

New Zealand National Party differing view

The National Party does not support this bill because, while improvements to children's participation are to be welcomed, this law would see more disputes in court and a more legalistic approach involving more lawyers. As many submitters noted, this would make things worse not better for children.

In relation to child participation, we would note we heard from multiple submitters that it is not in every instance in a child's welfare and best interests to actively participate. For example, where it involves confronting trauma or significant family acrimony it can be harmful. Additionally, over-exposure to multiple professionals and to the court case can lead to a sense of responsibility for the decisions made.

We also agree with the related concern that this bill is proceeding without the benefit of research from which to develop an evidence-based model for children's participation and guidelines about the circumstances where children should be involved.

This leads to concerns we have about lawyers for the child, given that this bill will lead to an even more central role for them. Many submitters raised concerns about the role and lack of training and lack of skills of lawyer for child when it comes to such important matters as child development and psychology or sexual violence. We agree with this concern. Other professionals with skills and training relevant to children could do a better job out of court. More court process and lawyers are not the answer.

Finally, in support of our view we point to the international practices we were made aware of during the select committee process. With this law, New Zealand will see more cases in court with more primacy provided to lawyers than in any of the several comparable jurisdictions we looked at. Almost invariably these jurisdictions use other professionals such as psychologists or social workers more than they do lawyers with variable training and knowledge of dealing with children.

Appendix

Committee process

The Family Court (Supporting Children in Court) Legislation Bill was referred to the committee on 8 December 2020. The closing date for submissions on the bill was 28 February 2021. We received and considered 67 submissions from interested groups and individuals. We heard oral evidence from 24 submitters.

We received advice on the bill from the Ministry of Justice. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Ginny Andersen (Chairperson)

Hon Simon Bridges

Simeon Brown

Dr Emily Henderson

Nicole McKee

Willow-Jean Prime

Hon Dr Nick Smith

Vanushi Walters

Arena Williams

**Family Court (Supporting Children in Court)
Legislation Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Kris Faafoi

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Family Court (Supporting Children in Court) Legislation Bill **2020**.

2 Commencement

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~~This Act comes into force on the day after the date of Royal assent.~~

(1) This Act comes into force on the earlier of—

(a) a date appointed by the Governor-General by Order in Council; and

(b) the date that is 2 years after the date on which this Act receives the Royal assent.

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(2) One or more Orders in Council may be made under **subsection (1)(a)** appointing different dates for different provisions.

(3) An Order in Council made under **subsection (1)(a)** is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Part 1

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Amendments to Care of Children Act 2004

3 Amendments to Care of Children Act 2004

This Part amends the Care of Children Act 2004.

4 Section 5 amended (Principles relating to child's welfare and best interests)

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After section 5(f), insert:

(g) ~~a child who is capable of forming their own views about any matter affecting their care and welfare should must be given reasonable opportunities to participate in any decision affecting them and that, commensurate with their age and maturity, their views should be taken into account.~~

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5 Section 5A amended (Family violence to be taken into account)

After section 5A(1), insert:

(1A) In taking into account the principle in section 5(a), the court must have regard to—

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(a) the purpose of the Family Violence Act 2018, under which an order specified in subsection (1)(b) was made; and

(b) the principles set out in section 4 of that Act guiding the achievement of that purpose.

6	Section 6 amended (Child’s views)	
	Before section 6(1), insert:	
	(1AAA) The purpose of this section is to implement in New Zealand Article 12 of the United Nations Convention on the Rights of the Child.	
7	Section 7 amended (Appointment of lawyer to represent child in proceedings)	5
	In section 7, insert as subsection (2):	
(2)	When appointing a lawyer to represent a child, the court or Registrar must, so far as is reasonably practicable, appoint a lawyer who is, by reason of their personality, cultural background, training, and experience, suitably qualified to represent the child.	10
8	New section 7AA inserted (Lawyer appointed to represent child must explain proceedings to child)	
	After section 7, insert:	
7AA	Lawyer appointed to represent child must explain proceedings to child	15
	A lawyer appointed under section 7 to represent a child must, if it is reasonably practicable to do so having regard to the age and maturity of the child, explain the nature of the proceedings to the child in a manner that the child is most likely to understand.	
9	Section 7B amended (Duties of lawyer when giving advice)	20
(1)	Replace the heading to section 7B with “ Duties of lawyers ”.	
(2)	In section 7B, insert as subsection (2):	
(2)	Before commencing a proceeding under this Act, a lawyer must take any steps that, in the opinion of the lawyer, assist—	
(a)	in promoting conciliation; and	25
(b)	in enabling the issues in dispute to be resolved as fairly, inexpensively, simply, and speedily as is consistent with justice.	
(2)	<u>Before commencing a proceeding under this Act, a lawyer must take any steps that, in the opinion of the lawyer, assist in enabling the issues in dispute to be resolved as safely, fairly, inexpensively, simply, and speedily as is consistent with justice.</u>	30

Part 2

Amendment to Family Dispute Resolution Act 2013

10	Amendment to Family Dispute Resolution Act 2013	
	This Part amends the Family Dispute Resolution Act 2013.	35

11 Section 11 amended (Duties of FDR providers)

After section 11(2)(b), insert:

- ~~(ba) facilitate the participation in those discussions of the children involved in the dispute, to the extent (if any) that the FDR provider considers appropriate; and~~
- (ba) ensure that the children who are the subject of the dispute are given any reasonable opportunities to participate in the decisions affecting them that the FDR provider considers appropriate; and

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Legislative history

6 August 2020
8 December 2020

Introduction (Bill 323–1)
First reading and referral to Justice Committee