



Submission to the Social Services Committee on the Children, Young Person and their Families (Advocacy, Workforce and Age Settings) Amendment Bill

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Submission of the Human Rights Commission on the Children, Young Persons and their Families (Advocacy, Workforce and Age Settings) Amendment Bill

To: Social Services Committee

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Introduction

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide this submission to the Social Services Committee on the Children, Young Persons and their Families (Advocacy, Workforce and Age Settings) Amendment Bill ('the Bill').
2. The Bill is the first tranche of legislation to arise from the recommendations of the Modernising Child, Youth and Family Expert Panel. It seeks to introduce the following amendments to the Children, Young Persons and their Families Act 1989 ('CYPF Act'):
 - a. Extension of the provisions of the care and protection system under Part 2 of the CYPF Act to young persons aged 17 years;
 - b. Strengthened obligations to support the participation of children and young persons:
 - c. A new duty imposed on the Chief Executive of the Ministry of Social Development to support the establishment of independent advocacy services, with a particular focus on children and young persons in care;
 - d. Provisions that enable a broader range of professionals to perform a wider set of functions.

Summary of the Commission's positions and recommendations

3. The Bill is the first stage in the development of a reformed statutory framework for the child protection and youth justice sectors. It therefore has significant human rights implications, most notably as regards New Zealand's obligations under the UN Convention on the Rights of the Child (UNCROC).
4. However, as result of its preliminary nature, the Bill is somewhat lacking in detail. The Commission understands that further CYPF Amendment Bills are likely to follow which

will provide the detail necessary to fully implement the reforms arising from the Expert Panel's reports.

5. The Commission makes a number of recommendations aimed at bringing the Bill into greater alignment with UNCROC. These recommendations can be summarised as follows:
 - a. **That the Committee ascertain whether the Government can confirm that it will bring the upper age of the youth justice system into conformity with UNCROC. If such confirmation is received it is recommended that the Committee note this assurance in their report on the Bill.**
 - b. **That, if the Government will not confirm any commitment to raise the upper age of the youth justice system, that the Committee amend Clause 4(b) of the Bill to bring the upper age into conformity with UNCROC.**
 - c. **That the Committee amend Clause 8 of the Bill in order to better reflect the participation right of the child under Article 12 of UNCROC and introduce a basis for the development of practice guidelines and training programmes for persons who undertake functions under the CYPF Act.**
 - d. **The Commission recommends that Clause 6 of the Bill is amended to provide that the independent advocacy service is both accessible to children and young people and confidential. The Commission also endorses the recommendations of the Office of the Children's Commissioner as regards the specific functions of that service.**
 - e. **The Commission endorses the submission of the Office of the Children's Commissioner that a publicly transparent mechanism should be established to ensure a professional's competence to exercise delegated statutory powers under new section 7C(2)(a). The Commission recommends that such a mechanism contains Child Rights Impact Assessment and human rights due diligence components.**

Raising the upper age of the CYPF Act

6. The Commission welcomes the Bill's extension of the provisions of the care and protection system to young persons aged 17 years. The upper age of the CYPF Act has been out of step with New Zealand's international obligations under the UN Convention on the Rights of the Child (UNCROC) for over two decades, ever since the UNCROC was ratified by the New Zealand Government in 1993.
7. There have been previous attempts to rectify this fundamental inconsistency. The Children, Young Persons and the Families (No 6) Amendment Bill (No.6 Bill), introduced in 2007, attempted to bring the upper age of the CYPF Act into conformity with UNCROC (in respect of both the care and protection and youth justice jurisdictions). However, despite the UN Committee on the Rights of the Child's statement of concern at the delay in enacting the No. 6 Bill¹, the Bill failed to progress beyond its second reading in the House and it was eventually removed from the Parliamentary Order Paper.
8. While the Bill is a step in the right direction, the Commission considers that urgency must be given to bringing the upper age of the youth justice system into line with the UNCROC. Failure to do so will not only perpetuate an UNCROC inconsistency in respect of the youth justice system, it will have obvious problematic implications for initiatives such as the "interface" case management approach developed by the Youth Court in order to effectively respond to the complex needs of young people with dual care and protection and youth justice status under the CYPF Act.
9. Furthermore, the Courts have affirmed the application of UNCROC principles when interpreting criminal law legislation. In the recent case of *DP v R*², the Court of Appeal found that "the UNCROC principles [mandate] a different approach"³. The Court went on to hold that when the High Court (or the District Court) is dealing with a child or young person under its criminal jurisdiction, the Court must recognise the rights of the child or young person to special protection under both the UNCROC and under s 25(i) of the New Zealand Bill of Rights Act 1990 (BORA), which provides for the right to dealt with in accordance with their age.⁴ The Court of Appeal also found that the articles of the UNCROC should be adopted when interpreting criminal law legislation within the

¹ Committee on the Rights of the Child, Concluding Observations: New Zealand, CRC/C/NZL/3-4, 4 February 2011, para 10

² *DP v R* [2015] NZCA 476 [2016] 3 NZLR 206

³ *DP v R* at [38]

⁴ At [10]

terms of section s 25(i) of the BORA, noting that “Courts can be expected to interpret legislation consistently with international treaties”.

10. The English case of *CC v Secretary of State for the Home Department and Commissioner of Metropolitan Police*⁵ has similar significance. In this case, the Queen’s Bench division of the High Court ruled that the failure to accord differential youth justice protections to 17 year olds in police custody⁶ was unlawful on the basis that the State’s human rights obligations⁷ “requires a 17 year-old in detention to be treated in conformity with the principle that his best interests were a primary consideration”⁸.

11. The Queen’s Bench also noted that the failure to extend youth justice protections to 17 year olds has serious systemic implications. Not only does it “undermine the very purpose” of a youth justice system⁹, it is indicative of an incoherent approach to policy leading to “an uncomfortable dissonance” amongst the relevant legal and policy instruments¹⁰.

12. Against this context, the Commission notes that in September 2016 the New Zealand Government will appear before the UN Committee on the Rights of the Child as part of the UN Committee’s examination of New Zealand’s 5th periodic report under the UNCRC. In its List of Issues for the New Zealand Government, the UN Committee has asked for “updated information on measures taken to ensure the compliance with the Convention of the State party’s juvenile justice legislation and policies” including “information on measures taken to raise the minimum age of criminal responsibility and... the age limit under the Children, Young Persons, and Their Families Act”¹¹.

13. In its response to the UN Committee, the Government has stated it is:

“investigating the benefits and costs of extending the youth justice jurisdiction to include 17 year olds. This will better align the youth justice jurisdiction with the

⁵ *CC v Secretary of State for the Home Department and Commissioner of Metropolitan Police* High Court, Queens Bench, 25 April 2013, per Moses LJ and Parker J

⁶ UK Police and Criminal Evidence Act 1984, and the Code of Practice that sits underneath it

⁷ Article 8 of the European Convention on Human Rights, read together with UNCROC

⁸ *Ibid* at [98]

⁹ At [93]

¹⁰ At [37]

¹¹

Convention which recognises that children under 18 require special protection. The Minister of Justice and the Minister for Social Development will report back to Cabinet in June 2016 on operational, funding, policy, and legislative changes necessary to give effect to any future decisions to amend age settings for the youth justice system.”

14. While the Commission is encouraged by the Government’s commitment to investigate this matter further, this Bill (as its title indicates) is clearly an appropriate vehicle with which to raise the upper age of the youth justice jurisdiction. It is crucial that the opportunity is not missed.

15. The Commission accordingly recommends that the Committee:

a. Ascertain from the Ministry of Social Development and Justice whether the Government has committed to raising the upper age of the youth justice system following the Ministerial report to Cabinet of June 2016.

b. If such a commitment has been made, to reference this assurance in its report on the Bill and note the need to ensure future CYPF Act reform measures give effect to the change.

c. If not convinced that the matter will be addressed in further upcoming tranches of CYPF Act reform, amend clause 4(b) of the Bill to state “*young person...in Parts 4 and 5, means a person of or over the age of 14 years but under the age of 18 years.*”

Strengthened obligations to support the participation of children and young persons

16. Clause 8 amends s 11 of the CYPF Act to introduce a duty to encourage and assist the participation of children and young people in processes under the CYPF Act that directly regard them, such as court proceedings, family group conferences, meetings and hearings to prepare and review care or youth justice plans and other statutory interventions that “significantly affect” them.

17. Clause 8 goes on to provide that the duty to do so rests with the presiding Judge or the child/young persons’ lawyer (in court proceedings), with the FGC Co-ordinator (in

FGCs), with the social worker (in respect of plans) and, in respect of other matters, the responsible statutory officer.

18. The Commission broadly supports the intention of clause 8, which is aligned with the right of the child to participate in judicial and administrative proceedings that affect them under Article 12 of UNCROC. The right of the child to participate and have their views ascertained and heard is a fundamental UNCROC principle, one that has been described by the Courts as the “linchpin” of the Convention.¹²

19. However, it is important that clause 8 is not used as a means to compel participation from a child or young person in circumstances where they clearly do not wish to participate, or where doing so may be contrary to their best interests (for example, as a result of the child or young person’s psychological profile, or their experience of trauma arising from the subject matter of the proceeding). Children and young people also have the right under Article 12 *not* to participate or express their views in this respect. In their General Comment No. 12 on the right of the child to be heard, the UN Committee on the Rights of the Child state that:

The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interest¹³

20. In its current form, clause 8 does not contain a best interests provision, nor a provision that expressly acknowledges the right of the child to decline from expressing their views. As such, implementation of clause 8 in its current form may have the unintended consequence of enabling practices that are contrary to the rights and best interests of children and young people who are subject to it.

21. The Commission accordingly recommends that:

a. Clause 8 (in respect of new s11(2)(a)) is amended to state: *“the child or young person is encouraged and assisted to participate in the proceedings*

¹² *Hollins v Crozier* [2000] NZFLR

¹³ UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12 at [16].

or process to the degree appropriate for his or her age and level of maturity unless:

- (i) the child or young person declines to participate; or*
- (ii) in the view of a person specified in subsection (3), that participation is not appropriate, having regard to the best interests of the child or young person and the matters to be heard or considered.”*

- b. That practice guidelines for supporting the child or young person to participate are developed for the persons specified in new s11(3) of the CYPF Act**
- c. That training programmes are developed for the persons specified in new s11(3) of the CYPF Act to ensure best practice.**

Establishment of a new independent advocacy service

22. Clause 6 of the Bill introduces new s7(2)(bb) to impose a duty upon the Chief Executive of MSD to establish “independent services” for children and young people subject to the jurisdiction of the CYPF Act (Parts 2 to 7 inclusive) to provide them with an opportunity to express their views on “matters that are important to them” in relation to actions or services provided under the Act and “the operation and effectiveness of processes and services under this Act, for the purpose of contributing to the improvement of these.”

23. The Explanatory Note provides some context, indicating that the Bill avoids “constraining the design of the service, which is currently being developed in partnership with the philanthropic sector”. The Explanatory Note then goes on to state “Any additional legislative amendments to establish the advocacy service will be considered once the design of the service is more advanced.”

24. However, the Commission notes that Clause 6 of the Bill does not provide any further elaboration on the status, functions or constitution of the service or services. For example, there is no indication as to how the proposed new service will intersect with the complaints and Grievance Panel procedures under the Children, Young Persons and their Families (Residential Care) Regulations 1996¹⁴.

¹⁴ Clauses 15-16, Children, Young Persons and their Families (Residential Care) Regulations 1996

25. In addition, Clause 6 does not prescribe any requirements concerning the confidentiality or accessibility of those services, nor any requirement that the advocacy service operate a child-centred/child rights compliant practice model.
26. **The Commission accordingly recommends that Clause 6 (new section 7(2)(bb)) is amended to state that:...***confidential and accessible services are available to children and young persons who are subject to any action or receiving any service under Parts 2 to 7 (with particular consideration to be given to the needs of those in care) that provide them with an opportunity and support to express their views...*
27. **Furthermore, the Commission endorses the recommendations of the Office of the Children's Commissioner that:**
- a. **The service includes the functions of connecting children in care together, advocating for individual children, and empowering children in care.**
 - b. **The second tranche of CYPF Act legislation includes the establishment of a fully child-centred complaints mechanism, separate from, but connected to, the new advocacy services.**
 - c. **Clause 6 (new section 7(2)(bb)) is amended to include a specific provision to enable children to express concerns about their experience in the care and protection and youth justice systems, including maltreatment, abuse, neglect or miscarriage of justice.**

Providing for a broader range of professionals

28. Clause 7 of the Bill (new sections 7A-7E) provide that the Chief Executive of MSD may delegate his or her statutory responsibilities under the CYPF Act to persons who are not social workers, by virtue of their powers of delegation under s 41 of the State Sector Act 1988.

29. Clause 7 of the Bill has potentially significant implications, the main being the potential outsourcing of statutory child protection and youth justice operations outside the state sector. This follows the terms of reference of the Modernising Child, Youth and Family Expert Panel which included, within its scope, outsourcing of some CYF services and stronger partnerships between CYF and external government and non-government organisations.¹⁵ The Bill has attempted to address the clear accountability issues that arise by providing that any delegate is “appropriately qualified to perform the function or exercise the power, taking into account the person’s training, experience, and interpersonal skills” and, if the delegate is outside the state services, they “will be bound by contractual obligations that are sufficient to support the appropriate exercise of the delegation.”
30. The rationale provided in the Bill’s Explanatory Note is that this amendment enables “other professionals to play core roles in helping to identify and meet the needs of vulnerable children and young persons where they are equally or better placed to do so.” However, the Bill provides scant detail as to how this would occur in practice.
31. It is therefore likely that the use of delegations will be primarily guided by non-legislative policies that establish the fiscal and operational criteria. The Commission accordingly endorses the recommendation of the Office of the Children’s Commissioner that a publicly transparent mechanism is developed to ensure a professional’s competence to exercise delegated statutory powers under new section 7C(2)(a).
32. Such a mechanism ought to include a child’s rights impact assessment (CRIA), in order to ensure that the rights, welfare and best interests of the child are the primary consideration in the use of delegations. This could be built into clause 7 of the Bill, via a new section 7(2)(c) that requires the Chief Executive to consider the impact of the delegation on the welfare and best interests of the child. The Commission notes that the UN Committee on the Rights of the Child have considered that CRIsAs have an important function in ensuring that budgetary and fiscal decision-making focused on vulnerable children is rights-consistent.¹⁶

¹⁵ Terms of Reference for the Modernising Child, Youth and Family Expert Panel, pages 2-3

¹⁶ General Comment No 19 (2016): *On Public Spending and the Rights of the Child*, Draft Version 11 June 2015, CRC/C/GC/19 paragraph 55

33. The mechanism could also include a children’s rights due diligence and monitoring components to assess and monitor the competence of delegates outside the State sector to meet the State’s human rights obligations as regards children, young people and their families. This would broadly accord with the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs provide that:

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.¹⁷

34. The UNGPs further provide that:

“States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights”.¹⁸

35. It is difficult to think of a social service operating environment that poses more risk to human rights outcomes in New Zealand than child protection. Due diligence on the human rights competence of delegates will therefore be essential.

36. It is notable that the UN Committee on the Rights of the Child has observed that the New Zealand Government is yet to adopt corporate social responsibility parameters based on the UNGPs and has encouraged the establishment of regulations to do so. In its 2016 List of Issues for the New Zealand Government, the UN Committee has reiterated this concern, and has sought “information on measures taken to ensure that the State party’s possible outsourcing of the provision of essential services...is compliant with the provisions of the Convention.”

37. The New Zealand Government is yet to take any concrete steps towards enabling the incorporation of the UNGPs within its policy and regulatory frameworks. Many other States have developed National Plans of Actions for Business and Human Rights or

¹⁷ UN Guiding Principles on Business and Human Rights, Pillar 1 p 8

¹⁸ Ibid p 7

for Responsible Business. New Zealand has not. These reforms, insofar as they may result in outsourcing of services, provide a basis to consider doing so.

38. In addition, in 2015 New Zealand agreed to the 2030 Agenda for Sustainable Development (the SDG Agenda). The New Zealand Government has identified the need to develop a clear plan for the implementation of the SDG Agenda, that “identifies actions, builds ownership and measures results”.¹⁹

39. Many of the SDG Agenda’s Goals, Targets and Indicators are directly relevant to the realisation of children’s human rights in New Zealand and, more specifically, outcomes for children and young people who have contact with the care and protection and youth justice systems. These SDG targets include:

- agreeing a national definition of poverty and to reducing poverty as so defined by at least 50% by 2030²⁰;
- ensuring access for all to adequate, safe and affordable housing²¹,
- reducing under five mortality rate²²,
- reducing victims of intentional homicide²³
- reducing proportion of the population subjected to physical, psychological or sexual violence,²⁴
- reducing the percentage of children that have experienced any physical punishment and/or physiological aggression from caregivers,²⁵
- increasing the proportion of victims of violence who reported the victimization to competent authorities,²⁶
- meeting education related targets in SDG Goal 4,
- meeting gender equality targets in SDG Goal 5, and;
- meeting the targets related to unemployment and youth not engaged in education, employment or training in SDG Goal 8.

¹⁹ Speech of Minister Bennett - <https://www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/statement-on-achieving-sustainable-development-goals/>

²⁰ SDG Target 1.2

²¹ SDG Target 11.1

²² SDG Target 3.2.1

²³ SDG Target 16.1.1

²⁴ SDG Target 16.1.3

²⁵ SDG Target 16.2.1

²⁶ SDG Target 16.3.1

40. The Commission considers that the development of a plan to implement the SDG Agenda in New Zealand's policy and legislative framework has considerable potential to drive enhanced outcomes for children, particularly vulnerable children. The Commission recommends that the Committee give consideration to this matter as part of its examination of the Bill and subsequent reforms of the CYPF Act that are to follow.

41. **The Commission therefore:**

- a. **Endorses the recommendation of the Office of the Children's Commissioner that a publicly transparent mechanism is developed to ensure a professional's competence to exercise delegated statutory powers under new section 7C(2)(a).**
- b. **Recommends that such a mechanism contains Child Rights Impact Assessment and human rights due diligence and monitoring components.**
- c. **Requests the Select Committee to consider and recommend the development of a plan, with a particular focus on improving outcomes for improved outcomes for children, that identifies actions, builds ownership and measures results and enables the implementation of the UNGPs and the SDG Agenda within New Zealand's policy and regulatory frameworks.**
- d. **Recommends that new section 7C(2) is amended as follows: *Before making a delegation to a person who is not a social worker, the chief executive must be satisfied that, in addition to any relevant requirements of section 41 of the State Sector Act 1988 being met -***
 - (a) That the person is appropriately qualified to perform the function or exercise the power, taking into account the person's training, experience, interpersonal skills and capacity to respect, uphold and promote children's rights in the course of their duties; and***
 - (b) That the delegation will not adversely impact on the rights, welfare and best interests of children and young people; and***
 - (c) if the person is outside the State services, the person will be bound by contractual obligations that are sufficient to support the appropriate exercise of the delegation, including an obligation to meet the State's relevant human rights commitments.***

