



Strengthening the Family Justice System

SUBMISSION TO The Independent Panel on the Family Justice System: Review of the 2014 Reforms

REGARDING Strengthening the Family Justice System: a consultation document released by the Independent Panel examining the 2014 family justice reforms

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1 Introduction

- 1.1 YouthLaw Aotearoa (“YouthLaw Aotearoa”) is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty four community law centres throughout Aotearoa / New Zealand.
- 1.2 YouthLaw Aotearoa was established in 1987 as a national centre providing free legal advice and advocacy specifically for children and young people under 25 years of age. We provide four main services to children and young people:
 - Legal advice via our 0800 UTHLAW (884 529) advice line;
 - Legal information on our website and through other resources;
 - Education sessions for young people and those who work with them; and
 - We work to make law changes that will improve access to justice for children and young people.
- 1.3 We help with issues such as school suspensions, employment problems, family issues, debt, bullying, and minor criminal cases. Our lawyers can support children and young people with basic information and advice to help them resolve an issue themselves and, where the case is more complex, we may provide legal representation at hearings and tribunals. We run preventative legal education workshops and publish youth-friendly information resources we also make submissions on youth-related law.
- 1.4 This submission is informed by YouthLaw Aotearoa’s insights through working with children and young people across New Zealand.

2 Structure of the submission

- 2.1 In this submission YouthLaw Aotearoa will predominately be focusing on the children who are the subject of disputes and not their parents. However, because our service helps children and young people aged to 25 years old, our clients include both these children and young parents. As a result, there will also be some areas in this submission where YouthLaw Aotearoa will consider young parents and the aspects of the family justice system that affect them. Other Community Law Centres such as Waitemata Community Law Centre will be focusing on parents’ rights and we support those submissions. We also support the submissions of Auckland Disability Law in relation to the issues with the family justice system for people with disabilities.
- 2.2 The structure of this submission generally follows the panel’s suggested topics. However, the first section of this submission will address children’s right to participation under the United Nations Convention on the Rights of the Child (“UNCROC”). We are concerned that insufficient attention has been given to children’s right to participate in the family justice system and consider that this right should inform the proposed changes to the family justice system.

3 Right to participation

- 3.1 Articles 12.1 and 12.2 of UNCROC provide that a child has the right to freely express their views in all matters affecting them and, in particular, must be provided the opportunity to have their views heard in any judicial or administrative proceedings that will affect them. Although New Zealand ratified UNCROC in 1993, children in New Zealand are not fully accorded these rights.
- 3.2 YouthLaw Aotearoa acknowledge that there is provision for children’s voices in Section 6(2)(a) of the Care of Children Act (“COCA”) which states that a child must be given reasonable opportunities to express views on matters affecting the child. However, this provision falls short of these convention rights and leaves what is “reasonable” open to interpretation. Accordingly, we submit that Section 6(2)(a) should be amended to expressly provide for the child’s right to be heard.
- 3.3 It is crucial for children’s views to be heard and considered in the family justice system because it is here that decisions are made about what is most important to them: where they will live and who they will have contact with. YouthLaw Aotearoa consider that both adult scepticism about children’s capacity to express their views, and a lack of awareness amongst family justice system professionals about the child’s right to participation are serious threats to the family justice system. Quality decision-making simply cannot occur without the child’s views being heard, considered and acted on.
- 3.4 We submit that the successful implementation of Article 12 in the family justice system requires consideration of four separate factors:
- Space - children need to be given the opportunity to express a view.
 - Voice - children must be facilitated/encouraged to express their views.
 - Audience - children’s views must be listened to.
 - Influence - children’s view must be actively considered and acted on (as is appropriate).¹

Space

- 3.5 It is essential that space is created in the family justice system for children’s voices to be heard. Children need to be given the space to choose whether to participate or not. In the “Focus on Children” and “Family Disputes Resolution” we recommend changes to legislation to create this space for children to express their views and participate.²

Voice

- 3.6 Children need to be informed that they have a right to participate in decisions made about them and encouraged to give their views if they so choose. In the “Counselling and Therapeutic” section of this submission we recommend that children should attend educational programs and counselling aimed at educating them about the family justice system and their rights. We consider that educational programs and counselling will empower children to make a decision about whether they wish to share their views or not.
- 3.7 It is also necessary for the family justice system to be flexible to hear children’s voices in different ways. Some children may be able to verbally articulate their views and other children may feel more comfortable drawing a picture about what they want.³ The family justice system also needs to respect that some children may not wish to have direct input

¹ This model of understanding Article 12 of UNCROC draws from Laura Lundy “‘Voice’ is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child” (2007) 33(6) BERA 927.

² Please see section 4 “Focus on Children” and section 7 “Family Dispute Resolution”.

³ Law Commission *Dispute Resolution in the Family Court* (NZLC R82), 2003 at 29.

even if they have the capacity to participate.⁴ Respecting children’s wishes in this regard is also part of respecting their right to participate.

Audience

- 3.8 Children views need to be listened to in the family justice system because article 12 requires that children’s voices be given “due weight”, and because children need to feel listened to.⁵ In the “Lawyer for child” section of this submission we discuss how delay can undermine children’s feelings about being listened to. This is in regards to children giving their views to lawyer for child and then having no contact from their lawyer about how their views have been considered.

Influence

- 3.9 YouthLaw Aotearoa wish to emphasise that children’s participation in the family justice system does not and should not equate to children being given the burden of being the decision-makers. We also believe that children’s views should not necessarily be determinative of the outcome of the proceeding. However, we consider that there is a danger in adults discounting the views of children because of their beliefs about children and their lack of capacity.
- 3.10 We also acknowledge that there is a potential conflict in operation between the article 12 right to participation and article 3 which requires a child’s best interests to be a ‘primary consideration’ in all decisions affecting them. Although we agree that article 3 is the primary consideration we believe that a child’s article 12 right still needs to be honoured and upheld.⁶
- 3.11 YouthLaw Aotearoa consider that a critical challenge for the family justice system is to ensure that children’s voices are listened to in a non-tokenistic way and that the impact of those views are communicated back to the child.

4 Focus on Children

- 4.1 The family justice system must be child-centric. The child-centric approach needs to uphold children’s rights such as the right to participation and the right to be safe.

Safety and risk assessments

- 4.2 YouthLaw Aotearoa supports the reintroduction of a section 61 comprehensive list of mandatory factors to be considered in risk and safety assessments into legislation. This will ensure that judges and participants in the Family Court will always know what matters need to be assessed and will contribute to a consistent approach to safety and risk assessments. However, this section should also include a subsection that allows the court to consider any other factors that may be relevant because it is also acknowledged the over time other issues may arise that are not included in the statutory checklist but that are relevant to the assessment.

⁴ At 29-30.

⁵ Laura Lundy “‘Voice’ is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child” (2007) 33(6) BERA 927 at 936.

⁶ Laura Lundy “‘Voice’ is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child” (2007) 33(6) BERA 927 at 938.

Delayed specialist reports

- 4.3 YouthLaw Aotearoa consider that specialist reports are essential to assist decision-makers to make quality decisions about safety and risk assessments. However, we are concerned about accounts of delayed specialist reports.⁷
- 4.4 Under section 4(2) of COCA any person considering the welfare and best interests of the child must take into account that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child’s sense of time.⁸ The delays in the case of safety and risk assessments are detrimental to children because they have a different sense of time.⁹ Delays may also further traumatise children who have been exposed to abuse because they may be worried that they will have to live with/see a violent parent. On the other hand, delays may also stop parents who have been wrongly accused of violence from seeing a child, which could have an adverse effect on the child.
- 4.5 Section 133 requires decision-makers to only order a report if the report will not “unduly” delay proceedings and any delay will not have an unacceptable effect on the child.¹⁰ YouthLaw Aotearoa questions the meaning of “unduly”, and how this standard interacts with the requirement in section 4(2) of COCA that decisions should be appropriate to a child’s sense of time.¹¹ We are concerned that counsel to the parties involved in the proceedings may argue that reports should not be ordered because of the delay. To avoid this situation we recommend that steps be taken to ensure that specialist reports are available in a timeframe that does not lead to undue delay and cannot be refused on that basis.
- 4.6 YouthLaw Aotearoa submit that section 133 should be amended to require the court to consider whether reports should be requested at the very beginning of proceedings. We believe that requesting reports early in the process rather than at an advanced stage in the proceedings could reduce the delay caused by specialist reports.
- 4.7 YouthLaw Aotearoa understand that a shortage of specialist report writers, especially in the regions, discourages parties applying and courts granting specialist reports. We support the creation of a nationwide database of specialist report writers.

5 Quality Accessible Information

- 5.1 YouthLaw Aotearoa agree with the independent panel’s suggestion that the Ministry of Justice develop an information strategy. It is necessary for the Ministry of Justice to conduct a review of the information that they have provided about the family justice system to the public and consider what improvements need to be made to that information. The review should consider the adult-centric nature of the information and the accessibility of the information to people of different ages, cultures, sexual orientation and ability. The Ministry should also use co-design methodology to develop new information resources that meet the accessibility needs of all users of the family justice system. These points are discussed further below.

⁷ The Law Society in their submission to the independent panel raised that there is “significant delay” for the court to receive section 132 reports by social workers.

⁸ Care of Children Act 2004, s 4(2)(a)(i).

⁹ Helen M. Milojevich, Jodi A. Quas, and Jason Z. Yano “Children’s Participation in Legal Proceedings: Stress, Coping, and Consequences” in Brian H. Bornstein *Advances in Psychology and Law* (1st ed, Springer, Switzerland, 2016) at 196.

¹⁰ Care of Children Act 2004, s 133.

¹¹ Section 4(2).

Adult centric focus on information about the family justice system

- 5.2 Information about the family justice system is currently presented in an adult-centric format as it is addressed at adults who wish to access the family justice system and is focussed on information about their rights. We recognise the importance of information about the family justice system being available to adults as users. However, our concern is that all of the information currently provided by the Ministry is targeted at adults.

Accessibility of information

- 5.3 YouthLaw Aotearoa is concerned about the accessibility of information about the family justice system to people of different ages, cultures, sexual orientation and ability. The information currently provided by the Ministry is targeted at a particular audience, parents who speak English well and have the ability to read and process large amounts of information.¹² This audience is not representative of the diverse users of the family justice system.
- 5.4 It can be distressing for children not to be involved or have an awareness of what is occurring in the family justice system.¹³ Children need to be empowered with information about the processes of the family justice system in order to facilitate their right to participation.
- 5.5 The Ministry need to better cater to the diverse user group that are accessing the family justice system. YouthLaw Aotearoa supports the submission by Auckland Disability Law in regards to “Accessible Information and Resources”.

Co-design process

- 5.6 YouthLaw Aotearoa stress that amending current information or creating a “children’s website” is not enough. Any new information resources about the family justice system should instead be created using co-design methodology.¹⁴ In particular, the Ministry should engage with children who have been involved with the system about the information that would be most helpful to them and what the best and most appropriate ways to communicate information would be.
- 5.7 This also requires more than consultation. Actually including the intended users in a design process is more likely to result in an outcome that all parties agree on and that most importantly meets the needs of children and young people. It is also a practical way of giving effect to the right to participation and will help to ensure that children and young people are at the centre of the family justice system. Children of different cultures, ages, ability and gender need to be involved in the co-design process to ensure that the end product is accessible and meets the diverse needs of children accessing information about the family justice system.
- 5.8 We recognise that co-design can be a lengthy and intensive process but the product of co-design justifies the work put into it.
- 5.9 We also recognise that digital resources may exclude some people.¹⁵ We recommend that the Ministry fund out-reach programs aimed at educating children about the family justice system and their rights. These out-reach programs could be provided by external providers such as YouthLaw Aotearoa and could occur at schools, holiday programmes or community

¹² “Family” (20 February 2019) Ministry of Justice <<https://www.justice.govt.nz/family/>>.

¹³ Helen M. Milojevich , Jodi A. Quas , and Jason Z. Yano Children’s Participation in Legal Proceedings: Stress, Coping, and Consequences at 194.

¹⁴ Co-design or participatory design is an approach to design that actively involves all stakeholders in the design process of products or services to help ensure the result meets users’ needs.

¹⁵ Marianne Elliott *Out of the Maze Building digitally inclusive communities* (The Workshop, Wellington, 2018) at 36-37.

centres. Again, any such programmes should be developed through a co-design process with the children and young people that are their target audience.

Development of resources about the family justice system for children and young people

5.10 As set out above, we consider a co-design approach should be used to develop new resources. However, from our own experience with children and young people including developing legal information resources for children and young people and delivering legal education to them, we suggest the following information and formats would be accessible and/or useful:

- Information presented in different formats e.g. video, activities, pictures, games or legal education courses. It will be necessary for the same information to be presented in different formats to cater to different age groups. Consideration also needs to be given to accessibility for children who have disabilities or additional learning needs or for whom English is not their first language.
- Emotional toolkit – our team are often asked questions about the family justice system that are not legal but are just as important to the child. Some examples of questions that may be important to the child but not legal are: how long will it take? Is it my fault? Am I still loved?
- Safety toolkit – information about the ways that children can be safe if there is family violence.
- What happens in court – a representation of what court looks like and what their parents and their lawyer for child will be doing.
- What is a family – information about how families can look different in New Zealand. This information should normalise all different family structures and reflect that New Zealand is a multi-cultural and diverse country.
- Structure of information – the information needs to be structured in an easily accessible format so that children who have experienced/are experiencing emotional trauma can easily navigate through the relevant information.
- Need for information about children’s rights – it is imperative that information about the UNCROC and children’s rights in New Zealand under COCA, the Oranga Tamariki Act 1989, Family Courts Act 1980 and others is actively promoted and available to both children and adults. Children need to know what their rights are and need to feel empowered when engaging with the family justice system. Parents also need to be aware of their children’s rights in the family justice system.

Young parents navigating the family justice system

5.11 It is necessary to offer additional support and information to young parents who are navigating the family justice system. Resolving family issues quickly is essential for young parents and young children because their concept of time is different from older people and already lengthy court processes will feel even longer to them.

5.12 Young parents are also likely to be more vulnerable than older parents by virtue of their age and life situation. Young parents have had their children at a young age and they may have less resources and family support than older parents would have. This makes them more vulnerable in the family justice system than older parents. Young parents may require greater support to guide them through court processes. It would be beneficial for young parents to have legal support before their case enters the court system to enable them to navigate the family justice system.

6 Counselling, and therapeutic intervention

- 6.1 The independent panel have stated that they do not believe that it is worthwhile for children to receive counselling because the focus of counselling is to help parents resolve parenting disputes.¹⁶ Although YouthLaw Aotearoa agrees that the focus of counselling for parents needs to be about resolving parenting disputes, we do not believe that this means counselling for children is not of benefit. As set out above, children have the right to participate in decisions that affect them and it is essential that their 'Voice' is facilitated¹⁷ including receiving support to enable them to consider and express their views safely.
- 6.2 YouthLaw Aotearoa agree with the recommendations in the Law Commission's 2003 report on Family Dispute Resolution about counselling for children. In particular, we agree:
- Counselling should be available to children in order to help them process what they want, and to empower them to be better able to participate in the family justice system, if they so choose.¹⁸
 - The purpose of the counsellor should be to help a child determine whether they have views and whether they want to express these views or not.¹⁹ Counsellors should not be obligated to report on what the child has told them unless their professional obligations require them to (such as in the case of abuse)
 - Counselling should be available at the request of a child, parents, Family Court co-ordinator, counsel for the child, specialist report writer or judge.²⁰
- 6.3 YouthLaw Aotearoa also believe that it is essential for children to be offered counselling in the family justice system because proceedings can be emotionally fraught for children and delay is common. However, the main purpose of counselling for children should be about helping children process what they want and whether they want to express their views.
- 6.4 YouthLaw Aotearoa wish to emphasise the importance of educating parents about the need for counselling for children. Parents should be informed that the purpose of counselling is to help children through the family justice process and not because there is anything 'wrong' with their child. We also consider that parental support of counselling is essential if counselling is to be effective for children.

7 Family Dispute Resolution

- 7.1 The child's right to participation is not being upheld in the out of court dispute resolution practice of Family Dispute Resolution ("FDR"). In particular, YouthLaw Aotearoa is concerned about the lack of statutory protection of this right in the Family Dispute Resolution Act 2013, the operating guidelines for FDR, the ad hoc nature of child inclusive mediation, the need for child inclusive mediation specialists, and the need for the parent's consent to be given before child inclusive mediation can take place. Accordingly, we advocate for a review to be conducted into family dispute resolution to determine the best practice approach to child inclusive mediation with a view to the development of evidence based best practice guidelines and increased quality and consistency.

¹⁶ Strengthening the Family Justice system at 17.

¹⁷ Please see Section 3 - Right to Participation for information about the four part model of children's participation.

¹⁸ Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at 63.

¹⁹ At 63.

²⁰ At 64.

The Family Disputes Resolution Act 2013

- 7.2 In 2016 the United Nations Committee on the Rights of the Child recommended that the Family Disputes Resolution Act 2013 be amended to expressly provide for the right of the child to be heard.²¹ YouthLaw Aotearoa strongly endorse this recommendation and ask the independent review to recommend this to government. We believe that this amendment would create ‘Space’ for children to participate and have their views heard.²²

Operating guidelines for FDR

- 7.3 In response to the United Nations Committee on the Rights of the Child recommendation about the need for statutory recognition of the child’s right to participate in FDR the Ministry of Justice created operating guidelines about FDR. The guidelines provide that every FDR supplier must have processes in place to ensure that children’s voices are represented at mediation.²³
- 7.4 The guidelines state that there are “many different models” that can be used by FDR suppliers to hear the child’s voice in FDR.²⁴ The guidelines provide the example of interviewing the child separately and then communicating the child’s view back to parents, or having a child’s representative present during mediation sessions. The guidelines also state that FDR providers do not have to seek direct input from children but can ask parents to advise what their child’s views are. The model that the FDR provider intends to use must be approved by the Ministry.
- 7.5 YouthLaw Aotearoa is concerned that FDR suppliers do not have to seek direct input from the child. YouthLaw Aotearoa believes that in order to uphold the obligations under UNCROC in relation to children’s participation, direct input must be sought from the child.
- 7.6 YouthLaw Aotearoa are particularly concerned by the suggestion that parents can advise what their children’s views are. Parents have a direct interest in the child’s response and children may be unwilling to tell their parent what their views are for fear of hurting that parent. Encouraging parents to obtain the view of their child for the purpose of mediation could also inflict emotional trauma on the child which undermines the child’s right to safety.
- 7.7 We also have some concerns about the child safety practices of some FDR providers that require an adult to be present when a mediator is talking to a child, in particular, that parents will be invited to be present when their child is being questioned by the mediator. This risks creating a stressful and pressured situation for the child as they may not want to express views that do not favour the parent present or that they may simply be worried will upset their parent. We are also concerned that having another adult, such as a teacher or relative, present when a mediator speaks to a child may not be appropriate either. A child may not want their teacher to know all about their family situation and their feelings about it and other relatives will have a personal connection to one of their parents. It is important that a child is interviewed in a context where they feel safe and are able to speak freely and openly about their views.

²¹ UN Committee on the Rights of a Child (CRC), *UN Committee on the Rights of a Child: Concluding observations on the fifth periodic report of New Zealand*, 15 and 16 September 2016, CRC/C/NZL/Q/5/Add.1, available at https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NZL/INT_CRC_COC_NZL_25459_E.pdf [accessed 22 February 2019].

²² Please see section 3 for more information about the need for space to participate.

²³ *Family Dispute Resolution Operating Guidelines* (Ministry of Justice, Justice Centre, 2018) at 13.

²⁴ At 13.

Ad hoc nature of child inclusive mediation

- 7.8 YouthLaw Aotearoa is concerned that there is no code of practice that specifies when and how it is appropriate for a child to be included in mediation and this decision appears to be left to individual mediators.²⁵ Although the mediator is likely to be the best person to assess whether child inclusive mediation would be appropriate, in the absence of any guidelines or moderation there is a risk of inconsistency.

Need for skilled child-inclusive mediation experts

- 7.9 The Ministry of Justice Guidelines on FDR provide that if a FDR provider is to seek direct input from a child that the provider must ensure that they have “suitably qualified and experienced FDR providers or some other qualified professional competent in capturing the child’s voice, to deliver their model”.²⁶
- 7.10 The guidelines do not specifically state who a “suitably qualified” person would be. YouthLaw Aotearoa consider that the guidelines need to be amended to expand on the meaning of “suitably qualified”. In our view, to be “suitably qualified” FDR providers need to be aware of children’s rights to be heard, to be included in proceedings that involve them and to be accessible to children of different cultures, ages and ability. It is also essential for mediators to be appropriately trained to facilitate child inclusive mediation so that children are not harmed by their involvement in the process.
- 7.11 More guidance is also needed on who “some other qualified professional” would be. We are concerned that the guidance about “some other qualified professional” could lead to situations where different people speak to the parents and the children. We recommend that the same mediator should speak to both the parents and the children. It is important that the mediator who relays the children’s views to the parents, has heard those views first-hand.

Parents’ consent for the voice of the child to be heard

- 7.12 YouthLaw Aotearoa is concerned that FDR providers will only seek to involve children when their parents agree. Children have the right to have their view heard in proceedings that affect them. Parents having the ability to either stop that voice from being heard, or interfering with that voice, are a limitation on that right. However, we are also mindful of the practical reality that if parents do not support their children’s views being ascertained that seeking those views may create additional conflict and/or children may not feel comfortable to share their views.
- 7.13 Accordingly, we consider that there should be a presumption in FDR that a child’s voice will be sought and heard and that both parents and children need to be informed of this presumption. In particular, parents should be supported to understand the reason for seeking their children’s views and what those views are. We suggest that the Ministry develop guidelines in relation to this process including when this presumption can be rebutted.

Review of child participation in FDR

- 7.14 YouthLaw Aotearoa support research being conducted into child participation practices in FDR in order to identify the different models that FDR providers use. Best practice guidelines could be drawn from that research in relation to:

²⁵ “Voice of the Child”(2018) FDR Centre <<https://www.fdrc.co.nz/parenting-and-guardianship-fdr-meditation/voice-of-the-child/>>

²⁶ Ministry of Justice *Family Dispute Resolution Operating Guidelines* (Ministry of Justice, Justice Centre, 2018) at 13.

- When the views of the child are sought and who is responsible for seeking those views;
- Practices/models for ensuring that the voice of the child is heard and considered in mediation;
- The role of the mediator in child inclusive mediation;
- Child safety policies including whether direct input can only be sought from a child when another adult is present; and
- How can children complain about FDR.

8 Legal Advice and Representation

- 8.1 YouthLaw Aotearoa is concerned about the large increase in without notice applications and support the conclusion drawn by other submitters that this increase is due to the removal of legal representation from earlier stages in the family justice system. In particular, we are concerned that many of the without notice applications are not genuine and that there are cases going to the Family Court that could possibly be resolved quicker through out of court processes. We are also concerned about the delay caused by the significant amount of without notice applications and the impact that this will have on children. Accordingly, we consider that legal advice and representation needs to be available at every stage in the family justice system.
- 8.2 We also believe that the legal aid system is inadequate. It is difficult for children under the age of 16 to apply for legal aid. We often have children under the age of 16 approach us and ask about what they can do to change the parenting orders that apply to them. Children may make an application under section 56(3)(a) of COCA to apply for a variation to an order, but practically this is can be very difficult because of legal aid requirements. Under the Legal Services Regulations 2011 an adult being a parent, or a guardian, or a person providing day to day care of the child has to apply for legal aid on the child's behalf if they are under 16, and guarantee that the legal aid payments will be paid back.²⁷ It is unfair that children have to take on debt to change an order that potentially has been made that did not reflect their views. It also places an unfair burden on the adults in the child's life to apply and guarantee the legal aid provided to the young person.
- 8.3 YouthLaw Aotearoa recommend that the Legal Services Regulations 2011 be amended to:
- allow other persons to apply for legal aid on the child's behalf
 - remove legal aid being a loan for under 16 year olds, and
 - abolish the requirement for guaranteeing of legal aid funds by adults.

9 Lawyer for Child

- 9.1 YouthLaw Aotearoa consider that improvements need to be made to the statutory appointment criteria for lawyer for child and the complaint process. We also consider that research needs to be conducted into the effectiveness of the lawyer for child.

Appointment of lawyer for child

²⁷ Legal Services Regulations 2011, r 16.

- 9.2 YouthLaw Aotearoa consider that the former appointment criteria of lawyer for child should be reinstated, namely, that a lawyer for child should always be appointed unless it serves no useful purpose. Children have the right to be heard in any administrative or judicial proceedings that affect them, and lawyer for child can help to ensure that a child's voice is heard and considered in Family Court proceedings. It is not sufficient to say that judges are still appointing lawyers for the child when they think one is needed. The point is that this is part of a child's right to be heard and that this right applies in all cases.
- 9.3 YouthLaw Aotearoa agrees with the proposal to introduce statutory criteria for the appointment of lawyer for child that is inclusive of the lawyer's personality, cultural background, training and experience. We also wish to emphasise the importance of appointing lawyers for child who have the training and experience required to communicate effectively with children who have disabilities or learning needs.

Complaints process

- 9.4 YouthLaw Aotearoa is concerned about the current complaints process for lawyer for child. On the Ministry website there is a section on the lawyer for child page about what to do if there are problems with the lawyer for child.²⁸ However, there is no in depth information about how the complaints process works or the steps that need to be taken to make a complaint. The website recommends that if there is an issue with lawyer for child a party to the proceeding or the child can let the Family Court coordinator, family court staff or the parties own lawyer know.²⁹ The complaint process for lawyer for child needs to be more clearly explained by the judge, lawyer for child and in information provided from the Ministry about lawyer for child.
- 9.5 YouthLaw Aotearoa also wish to acknowledge the inequality in power between a child reporting their lawyer for child and that lawyer for child.. The complaint process for complaining has been detailed in a practice note released by the Chambers of the Chief Family Court Judge.³⁰ The practice note states that a child may make a complaint about the lawyer for child to the presiding judge if the proceedings are ongoing or to the administrative family court judge responsible for the court where the proceedings were filed, if the proceedings have concluded.³¹ It is up to this judge to determine whether the complaint should be followed through. We believe that children need to be better supported throughout the complaints process and we recommend that a family court professional be appointed to support the child throughout the complaints process.
- 9.6 There are three grounds in the guidelines on which a lawyer for child can be removed from the list. The first ground is that the lawyer for child has committed professional misconduct in carrying out their duties as lawyer for child.³² The second ground is that the lawyer for child has not abided by the lawyer for child best practice document or by some other failure has not carried out their duties responsibly and competently.³³ The third ground is that the lawyer has conducted themselves in such a way that they are likely to bring the office of lawyer for child into disrepute.³⁴ YouthLaw Aotearoa submit that an additional ground be

²⁸ "Lawyer for the child" (20 February 2019) Ministry of Justice
<<https://www.justice.govt.nz/family/about/lawyer-for-child/>>

²⁹ "Lawyer for the child" (20 February 2019) Ministry of Justice
<<https://www.justice.govt.nz/family/about/lawyer-for-child/>>

³⁰ *Family Court Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters* (Principal Family Court Judge's Chambers, 26 March 2015) at 9.

³¹ At 9.

³² At 9.(13.2).

³³ At 10 (13.2)(b).

³⁴ At 10 (13.2)(c).

added that states that a lawyers for child can be removed if there is a failure to uphold the child's right to participation or/and a failed to consider the child's cultural background.

Research into lawyer for child

- 9.7 We support research being conducted into the practices of lawyer for child including how often lawyer for child meets with the child and how well children feel that the lawyer for child represented their views.
- 9.8 We agree with the concern raised by our colleagues at Waitemata Community Law that lawyers for child should not be censured for showing their memoranda to their clients. It is necessary for children to have knowledge about what is being said about them in order to ensure that the child's voice has been accurately recorded. If there are other aspects of the memo that should be withheld this should be determined by the lawyer's discretion.
- 9.9 Research also needs to be undertaken into how the outcomes of the Family Court proceedings are communicated to the child. The Lawyer for the Child guidelines contain a requirement that lawyer for child must provide advice to the child about the outcome, the right to appeal and the merits of an appeal. However, there is no proposed means of how this is to be achieved.³⁵ We believe that lawyer for child should speak to children at the end of the proceedings to advise them of the influence that their view had on the proceedings. As explained in Section 3, it is essential for children to feel that they have been listened to and for their views have been given 'due weight' as is required under article 12 of UNCROC.
- 9.10 We are also concerned about the power that is given to lawyer for child to determine whether it is appropriate for the child's views to be ascertained.³⁶ YouthLaw Aotearoa believe that lawyers for child need to receive extensive training about children and the different ways that they communicate before they are allowed to make this very important assessment.
- 9.11 YouthLaw Aotearoa also recommend that research be undertaken to determine whether it is more appropriate for lawyer for child to be focused on ascertaining the views of the child, if appropriate, rather than considering the best interests of the child. We submit that it should be the Family Court who determines what the best interests of the child are and the role of lawyer for child should be to facilitate the child's right to participation. Other family justice system professionals such as report writers will be more able to advise about what would be in the best interests of the child.

Delay impacting effectiveness lawyer for child

- 9.12 YouthLaw Aotearoa is concerned about delay impacting on the effectiveness of lawyer for child. When a lawyer for child meets with the child that they are representing it may be many months before the lawyer for child can meet with the child again to update them. Additional reports being requested may also lengthen that time.
- 9.13 It is not consistent with children's sense of time for them to give their views to their lawyer for child and then wait months for an update. This delay may disempower children because their views are being given but not being seen as being heard or considered.

Additional Advocate

- 9.14 YouthLaw Aoteaoa consider that an additional advocate with child development expertise to work together with the lawyer for the child would be valuable support for the child.

³⁵ At 3 (6.7).

³⁶ *Family Court Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters* (Principal Family Court Judge's Chambers, 26 March 2015) at 3.

10 Psychologists Reports

- 10.1 YouthLaw Aotearoa are concerned about reports of delay to family court proceedings caused by obtaining psychologists reports, and we support delay reducing mechanisms.
- 10.2 YouthLaw Aotearoa also supports the creation of a list of psychologists who are approved report writers as a delay reducing mechanism. We also encourage the panel to consider using the same appointment standard as has been recommended for lawyer for child, namely that the psychologist's personality, cultural background, training and experience be considered by the court when appointing a psychologist.

11 Cultural Reports

- 11.1 YouthLaw is concerned that cultural reports under section 133 and the power for the court to hear from a cultural speaker under section 136 of COCA, are under-utilised by the Family Court. YouthLaw submit that these powers could be better used if:
- information about them was easily accessible,
 - there was a list of approved cultural report writers, and;
 - section 136 was amended to allow people other than those parties to the proceeding to make a request to hear from a cultural speaker.
- 11.2 New Zealand is increasingly becoming a multi-cultural society, and people of many cultures will be and are accessing the family justice system. Cultural reports and the power under section 136 are essential for ensuring that the Family Court makes quality decisions about care of children that adhere to section 5(f) of COCA and Article 30 of UNCROC.³⁷

Information about cultural reports and cultural speakers

- 11.3 There is limited information available online about what cultural reports and cultural speakers are. The information that is available is adult-centric.³⁸
- 11.4 YouthLaw Aotearoa emphasise that information about the family justice system needs to be accessible to children and young people of all different ages, ethnicity, religion and ability. Information needs to be accessible so that children's right to participation can be upheld.

Availability of cultural report writers

- 11.5 YouthLaw Aotearoa is concerned about the availability of culture report writers. The independent review should consider whether creating a family court database of cultural report writers would address this problem.

Section 136

- 11.6 Under section 136 of COCA a party to the proceedings may ask the court to hear a person (the cultural speaker) speak on the child's cultural background or any other part of their background that could be useful to the proceedings before a date is set for a hearing. If no request is made the court can "suggest" to a party that it may be useful to hear from a person about the child's cultural background. YouthLaw Aotearoa recognises that a cultural

³⁷ Section 5(f) of COCA provides that the child's identity (including his or her culture, language and religion) should be preserved and strengthened. Article 30 of UNCROC also provides that indigenous children and children of ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture to practice their own religion and to use their own language.

³⁸ "Cultural reports in the Family Court" (20 February 2019) Ministry of Justice

<<https://www.justice.govt.nz/assets/Documents/Publications/cultural-reports-in-the-family-court.pdf>>

speaker under section 136 is different from a person who has provided a cultural report under section 133. Under section 133 cultural report writers are independent experts and are bound by the rules governing expert witnesses and as such can be called by the court as a witness and examined and cross-examined.

- 11.7 YouthLaw Aotearoa is concerned that under section 136 only a party to a proceeding can ask the court to hear a speaker on the child's cultural background. This means that the court, the cultural speaker, the child or the lawyer for child are excluded from being able to make a request. YouthLaw Aotearoa recommend that section 136 be amended to allow the child, the lawyer for child and the court to be able to make a request to hear from a cultural speaker. This amendment would uphold the child's right to be heard and participate in proceedings that involve that child.
- 11.8 We note that the court can ask for the cultural speaker to attend the proceeding to speak as a witness under section 129.³⁹ However, we have concerns about the appropriateness of this option because the cultural speaker is not technically a witness, and they will then be able to be examined and cross-examined by counsel. We are also concerned that speakers under this section could give inaccurate or biased information to the court. Given these concerns, we recommend that section 136 should be amended to allow the presiding Family Court Judge to lead the questioning of the cultural speaker. The judge is the best person to question the cultural speaker in a neutral way and for an information-gathering purpose. Counsel to the parties of the proceedings should be allowed to submit questions to be asked of the cultural speaker to the judge but the judge should be the one allowed to decide what questions will be asked.

12 Obligation to uphold the Treaty of Waitangi

- 12.1 We submit that every proposed change to the Family Justice system needs to be considered in light of the Crown's existing obligations under Te Tiriti o Waitangi / the Treaty of Waitangi.
- 12.2 In particular, the Crown already has obligations under Te Tiriti o Waitangi which should be reflected in the Family Justice legislation. These include:
- The principle of equity which means that the Family Justice system must meet the needs of whānau, hapū and iwi, rather than just New Zealanders in general.
 - The resulting duty to reduce disparities. This requires positive action to be taken by the Crown to reduce those disparities.
 - The obligation to work in partnership with Māori to design changes to the family justice system. To paraphrase the Waitangi Tribunal in the Napier Hospital report this means enabling the Māori voice to be heard; allowing Māori perspectives to influence the type of services delivered to Māori people and the way in which they are delivered; and empowering Māori to design and provide services for Māori.
- 12.3 We have had the opportunity to read and consider the draft submission of Waitemata Community Law Centre. We support their submissions in response to questions five and eight in the consultation document in relation to the obligations and associated targets that should be placed on the Ministry, piloting holding the Family Court on marae and in relation to a tikanga Maori based family justice system.

³⁹ Care of Children Act 2004, s 129.

13 Summary

13.1 YouthLaw Aotearoa offers the following reflections and recommendations to the independent panel for consideration:

- a) We recommend that all proposed changes to the family justice system are considered in light of:
 - i. Te Tiriti o Waitangi.
 - ii. The child's right to participation in matters that affect them.

Focus on Children

- b) We agree with the report's focus on children's participation and safety in the Family Justice system.
- c) We agree that more research needs to be done about children's participation in the family justice system in New Zealand and advocate for a child inclusive model. We believe that the current family justice system is adult-centric and children's UNCROC right to participation is not being upheld.
- d) We support the reintroduction of a section 61 list of mandatory factors to be considered in risk and safety assessments.
- e) We are concerned by the delay caused by obtaining specialist reports for risk and safety assessments.
- f) We support delay-reducing mechanisms for specialist reports.

Quality Accessible Information

- g) We are concerned about the accessibility and adult-centric nature of information about the family justice system currently provided by the Ministry of Justice.
- h) We support a review being undertaken of the Ministry of Justice information available about the family justice system.
- i) We strongly believe that a co-design process should be used when developing resources for the Ministry of Justice about the family justice system.
- j) We recommend that information about children's rights under international and domestic law be easily accessible to children and adults.
- k) We advocate for better support for young parents navigating the family justice system.

Counselling and Therapeutic Intervention

- l) We believe that counselling should also be available to children in order to help children process what is happening, and to determine whether they have views and whether they would like to express those views.
- m) We recommend that parents be educated about the importance of counselling as a tool for facilitating a child's right to participation.

Family Disputes resolution

- n) We support the recommendation of the United Nations Committee on the Rights of the Child that the Family Disputes Resolution Act 2013 be amended to expressly provide for the right of the child to be heard.
- o) We support a review of child participation practices in FDR because we are concerned about the ad-hoc nature of child-inclusive mediation. We are also concerned about the

suggestion in the FDR Ministry of Justice guidelines that parents asking for, and then providing their children views in mediation satisfies the right of the child to be heard.

- p) We believe that a review needs to be undertaken into different FDR child-inclusive practices and recommendations need to be drawn about best practices. These best practice recommendations should then inform the creation of comprehensive guidelines about child inclusive mediation.

Legal Advice and Representation

- q) We support legal advice and representation being available at all stages in the family justice system to facilitate early resolution of disputes regarding children. Early resolution of disputes is beneficial to children because it better reflects their sense of time and minimises the distress and trauma resulting from disputes.
- r) YouthLaw Aotearoa recommend that the Legal Services Regulations 2011 be amended to allow other persons, to apply for legal aid on the child's behalf, the removal of legal aid being a loan for under 16 year olds, and for the guaranteeing of legal aid funds by adults to be abolished.

Lawyer for Child

- s) We advocate for the former appointment criteria of lawyer for child to be reinstated, namely, that a lawyer for child should always be appointed unless it serves no useful purpose. Children have the right to be heard in any administrative or judicial proceedings that affect them, and lawyer for child can help to ensure that a child's voice is heard and considered in Family Court proceedings.
- t) We agree with the recommendation that the statutory criteria for the appointment to be inclusive of the lawyer's personality, cultural background, training and experience.
- u) We are supportive of research being conducted into the practices of lawyer for child such as:
 - i. how often lawyer for child meets with the child, and;
 - ii. how well children feel that the lawyer for child represented their views.
- v) We agree with the concern raised by our colleagues at Waitemata Community Law that Lawyers for the Child should not be censured for showing their memoranda to their clients. This is necessary to ensuring that the child's voice has been accurately recorded and should be standard practice. If there are aspects of the memo that should be withheld this can be dealt with through the lawyer's discretion.
- w) We are concerned that delay impacts the effectiveness of lawyer for child.

Psychologist Reports

- x) We are concerned about the delay caused by obtaining psychologist reports because delay in family court proceedings can be detrimental to children.
- y) We support the creation of a list of psychologists who can write reports and who are approved report writers as a delay reducing mechanism.

Cultural reports

- z) We are concerned about the limited number of cultural reports that are made because this means that the Court does not have the information it needs about the families and whanau about whom they are making decisions.

- aa) Section 136 should be amended to allow the child, lawyer for child, the court and the cultural speaker to request that the cultural speaker speak to the court. This amendment better facilitates the child's right to be heard by the court and to have their cultural, religious and/or ethnic background considered.
- bb) Section 136 should also be amended to state that the Family Court Judge will lead questioning of the cultural speaker.