YouthLaw
Tino Rangatiratanga Taitamariki

Free legal service for children and young people nationwide

www.youthlaw.co.nz | info@youthlaw.co.nz | 0800 UTHLAW

20 July 2013

Constitutional Advisory Panel

SUBMISSION TO	Secretariat, Constitutional Advisory Panel
REGARDING	The Constitution Conversation
SUBMISSION BY	YouthLaw Tino Rangatiratanga Taitamariki PO Box 7657, Wellesley Street, Auckland 1141
CONTACT PERSONS	Joanna Maskell, Solicitor 0274135009 Joanna@youthlaw.co.nz

1 INTRODUCTION

1.1 YouthLaw Tino Rangatiratanga Taitamariki ("YouthLaw") is a Community Law Centre vested under the Legal Services Act 2000. We were established in 1987 as a national centre providing free legal advice and advocacy for children and young people under 25 years of age. We also work to promote the interests of children and young people at local and national levels when decisions, laws or policies affecting them are being created.

1.2 The nature of our work means that we have significant engagement with children and young people and are familiar with many of the issues they face and their concerns in regards to existing law and policy. In efforts to understand youth perspectives on constitutional change we have also recently undertaken a series of workshops with people aged 12-24. The views sourced during these workshops are incorporated into these submissions.

YouthLaw undertook 9 full day workshops with young people between April and June 2013. In total, 168 young people from diverse backgrounds participated. Young people were invited from the networks of YouthLaw's partner organisations including YouthLine Youth Health Councils, local church and marae communities, North Shore Auckland Council youth board networks, Manurewa leisure centre school holiday programme, JustSpeak, Auckland Women's Centre, South Auckland youth worker networks, Strive community trust, Future Skills youth guarantees programme, Shakti Youth ambassadors network and two Auckland high schools, including both a Decile 1 and a private school. Youth ranged in age from 12-24 and drew from a range of backgrounds , students involved in local government, refugee and ethnic minority youth, Maori and Pasifika young people, Asian migrant youth, young people who were enrolled in training programmes but not attending high school and university students. Young people learned about the constitution using a variety of interactive games, role-plays, video and discussion then worked independently on their own creative submissions in a form of their choosing, including brainstorm, video, song, or written submission format.

1.3 YouthLaw's view is that New Zealand requires a constitution that is accessible to the public and importantly that acknowledges children and young people as "*subjects of rights* as opposed to being *objects of charity."*[1]

1.4 New Zealand should adopt a written constitution that as its basis brings together all current constitutional provisions within one document. This would include (but not be limited to): the Treaty of Waitangi (as the founding document of New Zealand), the Electoral Act 1993, the New Zealand Bill of Rights Act 1990, The Constitution Act 1986, The Supreme Court Act 2003 and the Human Rights Act 1993. In addition to the provisions in the aforementioned Acts we

i) adopt the approach to constitutional amendments suggested by UNICEF.[2] This approach seeks to include within the constitution both general human rights provisions, and specific provisions pertaining to children.[3] As modelled on international law, the provisions pertaining to children are found in the United Nations Convention on the Rights of the Child (UNCROC).

ii) propose that economic social and cultural rights be included with equal standing in the comprehensive constitutional document.

[1] Beatrice Duncan *Constitutional reforms in favor of children* (UNICEF, November 2008) at 7.

[2]

[3] Duncan, above n 1, at 7.

1.5 New Zealand should additionally entrench the constitution. Entrenchment would position the constitution as the supreme source of law in New Zealand, allowing it to supersede inconsistent enactments. This is necessary to guarantee the efficacy of the constitution and to recognise the codified rights as fundamental.

2 Responding to the needs of Children and Young People

2.1 There is no coherent body of law relating to children and young people in New Zealand. Instead, there are a number of statutes that regulate the legal rights and responsibilities of children, generally with the purpose of recognising children and young people as a distinct and vulnerable group within society. New Zealand has also ratified UNCROC, thereby giving further recognition to the special position of children.[4] UNCROC is the principle international instrument that recognises the unique position of children within society by providing a comprehensive set of children's rights. UNCROC is the most ratified human rights treaty today, and is regarded as one of the most important instruments pertaining to human rights.[5]

2.2 Children and young people under the age of 25 account for 36% of New Zealand's population.[6] All children are subject to vulnerabilities because of their reliance on others for basic needs, their size and standing in society however the Committee on the Rights of the Child has voiced their particular concerns about especially vulnerable groups of children.[7] The Committee recognised that despite the ratification of UNCROC in 1993, there was no national plan regarding children and young people, that not all domestic law was consistent with UNCROC, and that not all the provisions within UNCROC had been implemented. There was further concern that children from specific groups, specifically Maori and Pasifika, were under-performing in health and education outcomes. Additionally, it was recognised that 20% of New Zealand children lived below the poverty line, and that there appeared to be little efficacy in improving this statistic.

2.3 Whilst New Zealand has made steps towards recognising and giving effect to the rights and interests of children and young people, a number of concerns remain. We believe that the constitution needs to adopt rights that allow the legal and social position of children and young people to be strengthened, especially for children who are particularly vulnerable.

3 Constitutional Framework

3.1 YouthLaw recommends that New Zealand adopt a written constitution. This constitution would be a coherent document incorporating a number of current constitutional documents, such as the Constitution Act 1986, the Supreme Court Act 2003, the Electoral Act 1993, the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993. YouthLaw also suggests that the Treaty of Waitangi be incorporated, recognising the position of the Treaty as the founding document of New Zealand.

---

[4] This was ratified with some exceptions, see Ministry of Justice "United Nations Convention on the Rights of the Child" <www.justice.govt.nz/policy>.

[5] Ministry of Social Development *What is UNCROC?* <www.msd.govt.nz/what-we-can-do>.

[6] Ministry of Social Development *Children and Young People: Indicators of Wellbeing in New Zealand 2008* (Ministry of Social Development, November 2008) at 10.

[7] Committee on the Rights of the Child "Consideration of Reports Submitted by State Parties Under Article 44 of the Convention: Concluding Observations: New Zealand" (5 February 2011) Ministry of Justice <www.justice.govt.nz/policy>.

3.2 YouthLaw adopts UNICEF's recommendation that the constitution should reflect the interests of children and young people by operating at two levels: one containing general provisions of international human rights law, and the other containing specific provisions pertaining to children and young people.[8]

3.3 There are four general principles which should be explicitly contained within the constitution. These are: universality, inalienability, accountability and participation. Universality expands the protection of the law to all groups within society, and seeks to provide affirmative action to benefit groups that are especially vulnerable. Inalienability seeks to codify a coherent system of rights, whether political, economic, social, cultural or otherwise. This may include specific rights to education, nourishment, or other social services or necessities. Accountability aims to incorporate and expand upon compliance with international obligations, and introduce monitoring for this purpose. Participation strives to involve all groups in decision making, especially children and young people.

3.4 These four principles are necessary to create an umbrella of rights. The four elucidated principles are essential to protect the rights of children and young people, and allow their ongoing participation within society. While essential for society generally, this is especially relevant to children and young people who often rely upon those around them for protection.

4 Specific Rights for Children and Young People

4.1 YouthLaw suggests that specific rights pertaining to children and young people should be implemented under the broad framework of rights mentioned above. The framework for these specific rights exists in UNCROC. The implementation of UNCROC into the constitution would be consistent with New Zealand's ratification of the Convention in 1993. It would also alleviate the concerns of the Committee on the Rights of the Child, regarding New Zealand's continuing reservations to Articles 32(2) and 37(c).[9]

4.2 UNICEF recognises that broad rights and specific rights are mutually supportive. Specific rights relating to children and young people become the necessary means to recognise the requirements and needs of children and young people. These specific rights should become the necessary scale against which all enactments and policies are measured, so as to ensure consistency with the rights of children and young people. These specific rights would also serve as the appropriate avenue to accountability and redress should the rights of the child or young person be abrogated.

4.3 YouthLaw suggests the implementation of four main provisions relating to children: non-discrimination, recognition of the best interests of the child, the right to life, survival, development and protection, and respect for the views of the child. These are expanded upon below.

4.4 One preliminary concern is that of definition. UNCROC defines "children" as those under the age of eighteen.[10] New Zealand should adopt this definition within the constitution. This is principally relevant in the context of youth justice. New Zealand should raise the age of criminal responsibility from 17 to 18 so as to reflect the definition of "children" used within UNCROC. New Zealand should also seek to respect the rights of children in the criminal justice context by

[8] Duncan, above n 1, at 7.
[9] Committee on the Rights of the Child, above n 7, at 2.
[10] United Nations Convention on the Rights of the Child [UNCROC], art 1.

restricting trials and sentencing to the Youth Court. This would involve repealing s 283(o) of the Child, Young Persons, and Their Families Act 1989, which allows for children as young as 14 and 15 to be brought before the District Court. This is inconsistent with art 40(3) of UNCROC by failing to allow access to a court specifically tailored to the needs of children.

5 Non-Discrimination

5.1 UNCROC places the onus upon State parties to ensure the rights of children against discrimination,[11] and to protect children against discrimination or punishment.[12] UNCROC provides an expansive definition for the protection against discrimination in art 2, so that protection extends to all children irrespective of "the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

5.2 YouthLaw suggests that art 2 be adopted to ensure the protection of children from discrimination. Article 2 builds upon the current grounds of discrimination provided for in s 21 of the Human Rights Act 1993, by providing an open-ended definition for discrimination. By including "or other status" art 2 allows the protection against discrimination for any vulnerable groups, as or when they arise. While s 21 does explicitly recognise a considerable number of grounds, it is by no means exhaustive. Having an expansive definition as used in art 2 allows flexibility in responding to future situations and protecting the needs of marginalised groups and children.

6 Best Interests of the Child

6.1 Article 3 of UNCROC provides that the best interests of the child should be a primary consideration in all actions concerning children, whether they arise in the context of "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies".

6.2 YouthLaw suggests that this requires that children should be asked about their views and be able to present those views to the decision maker, either in person or through a representative or other appropriate medium. This is consistent with the approach suggested in art 12 of UNCROC. This would be subject to the child's age, maturity, and preference in the specific situation. YouthLaw further recognises that this would require that bodies making decisions about children employ professionals with the appropriate training and qualifications to ascertain decisions that require the input of children.

7 The Right to Life, Survival, Development and Protection

7.1 UNICEF recognises that this principle incorporates a range of rights under it, so as to protect children within society and allow children to have access to a full range of social services. YouthLaw suggests that there are three main contexts which should be focused on: health, education and poverty.

[11] UNCROC, art 2(1).
[12] UNCROC, art 2(2).

7.2 Rights to health seek to ensure that every child has an adequate standard of living to allow for holistic development,[13] that children enjoy the highest attainable standard of health and access to treatment,[14] that children with mental or physical disabilities enjoy a full, decent and dignified life,[15] and that disabled children, their care givers, and their family are supported and provided with special care where appropriate.[16] This provision is pivotal to the health and development of children in New Zealand. The Ministry of Social Development has provided data showing that 15% of the population have "very low" living standards, 54% of this group had dependent children.[17] The right to health goes beyond treatment, as art 27(1) makes clear, and this may influence policy. Whether explicitly or implicitly, YouthLaw recommends that the right to health expand to the provision of government funding and services to ensure that children are being raised in safe and healthy environments. This may see an onus to expand the "Warrant of Fitness" program for State Houses and rental properties, extending access to health services for all children, and guaranteeing the funding for service providers such as Whanau Ora. Whether these policies are specifically codified, or implicitly present as a means to assess policy, they are essential to ensure the development of children.

7.3 Education is a fundamental right. YouthLaw proposes that s 3 of the Education Act 1989 be included within the constitution. Section 3 provides for the right to free primary and secondary education for those aged from five to nineteen. YouthLaw further recommends that the constitution should give special regard to the rights of children with special needs. Accordingly we propose that s 8 and 9 of the Education Act 1989 be included to ensure the right to education for children with special needs. This position is affirmed by the United Nations Convention on the Rights of People with Disabilities, which New Zealand ratified in 2008.[18] Article 24(2) should be additionally adopted in law, so that children with disabilities are not excluded from the general education system and can access a free, inclusive and quality primary and secondary school education. Article 24(2) seeks to provide children with disabilities the support they need so to ensure their academic and social development.

7.4 Poverty is inherently connected to the aforementioned recommendations to codify art 27 of UNCROC, which ensures the right to an adequate standard of living. Poverty has also been mentioned a number of times, and has been recognised by the Committee on the Rights of the Child as one of the most concerning problems facing children in New Zealand.[19] The Committee also recognised that access to health and education is not equal, with Maori and Pasifika children less able to access and benefit from these services.[20] There is a compelling need to confront these problems directly. The constitution should adopt a framework that would allow the implementation of programs suggested to improve child poverty in New Zealand:[21]; removal of work-based rules for child financial assistance; ensuring access to high-quality child care, education and training; providing comprehensive access to free and high-quality health care;

[13] UNCROC, art 27(1).
[14] UNCROC, art 24(1).
[15] UNCROC, art 23(1).
[16] UNCROC, art 23(2).
[17] Centre for Social Research and Evaluation *Pockets of significant hardship and poverty* (Ministry of Social Development, June 2007) at 4.
[18] Office for Disability Issues "United Nations Convention on Rights of Persons with Disabilities" <www.odi.govt.nz/what-we-do/un-convention>.
[19] Committee on the Rights of the Child, above n 7, at 4.
[20] Committee on the Rights of the Child, above n 7, at 8.
[21] Child Poverty Action Group *CPAG's Budget Review 2013: An Analysis of the New Zealand Government's 2013 Budget* (Child Poverty Action Group, May 2013) at 3–4.

providing adequate additional funding to low-decile schools; and ensuring a concerted plan to address housing shortages, over-crowding and poor quality housing.

8 Respect for the Views of the Child

8.1 YouthLaw recommends that the constitution adopt art 12 of UNCROC, which recognises that children capable of forming their own views should be able to freely express those views in all matters affecting them, with "due weight in accordance with the age and maturity of the child".[22] This would see children being given the opportunity to present their views, and be heard, in any judicial or administrative proceeding that affects them, whether directly or through an appropriate individual or body.[23]

8.2 It is fundamental that this article be adopted into the constitution so as to guarantee participation with specific decisions that pertain to the child, and generally so as to participate within our democracy. The New Zealand government must recognise and give accord to the views of children, particularly when children are in difficult or vulnerable circumstances. Groups of children should be able to voice their opinions when enactments, policies or decisions affect them. In order to accommodate this, the state should allow children to either voice those views personally, or through a representative. This may be through family, another individual, or a group. This is consistent with UNICEF's recommendations.

8.3 YouthLaw also recognises that the right for children to present their views must occur alongside implementation of arts 13 and 14 of UNCROC, which allow children the right to freedom of expression,[24] and the right to freedom of thought, conscience and religion.[25] The cumulative effect of these articles is to recognise that children are not passive recipients of rights, but should be able to express their views and opinions when decisions are made which affect them. The constitution needs to recognise that when children are mature enough to express their views, those views should be heard and given serious consideration alongside other stakeholders within our society.

8.4 YouthLaw not only supports this, but has endeavoured to show the practicality and value of such a provision by including in this submission the views of children and young people that have been asked about their constitutional vision for New Zealand.

9 Monitoring and Redress

9.1 YouthLaw believes constitutional change is merely the first step in an ongoing process.[26] For the constitution to be effective there must be ongoing monitoring of compliance with its provisions, and the ability to seek redress and ensure accountability. The primary step post-implementation would be to ensure wide dissemination of the constitution, so that all groups within society, especially children and young people, become aware of how they are positioned within its legal framework. A constitution requires support and knowledge to be effective.

[22] UNCROC, art 12(1).
[23] UNCROC, art 12(2).
[24] UNCROC, art 13.
[25] UNCROC, art 14.
[26] Duncan, above n 1, at 53.

9.2 Monitoring will be essential. A new constitution will have to be regularly assessed to ensure its efficacy and impact upon society, and especially to ascertain whether there is compliance with its terms. This would be a role that could presumably be subsumed under pre-existing entities, such as the Children's Commissioner or various governmental departments or ministries. Alternatively, a new independent body could be established for the purpose. If there is no compliance with the codified terms then the constitution itself is undermined.

9.3 YouthLaw suggests that the constitution be entrenched. This would mean that constitutional provisions could only be changed by a two thirds majority in parliament, or majority in a referendum, so as to ensure that change could only be brought about by cross-party or national support. This is the same mechanism used in s 268 of the Electoral Act 1993 — which is not itself entrenched — but our proposal would elevate its legal position through entrenchment.

9.4 YouthLaw further suggests that the constitution be rendered as supreme law. This would see the constitutional provisions as able to supersede and "strike down" any inconsistent Acts or Regulations. The judiciary's role within this would be to assess enactments for consistency alongside rights contained within the constitution. If an inconsistency arose with an enactment, that enactment could be rendered illegal to the extent of any inconsistency. This would ensure that society remains under the protection of these codified rights, without exception. This would also radically improve the position of the New Zealand Bill of Rights Act 1990, which is currently subordinate to any inconsistent enactments.[27] New Zealand would therefore be in a position where the constitution is recognised as fundamental.

9.5 To suggest an entrenched constitution with the ability to invalidate the laws of Parliament may be perceived as undemocratic. Statutes are made by the democratically elected Parliament and thus reflect the views of the majority within society. To allow the judiciary to invalidate these laws seems inherently contradictory to such democratic ideals. This is a powerful argument that was recognised in 1985 in *A Bill of Rights for New Zealand: A White Paper*.[28] However, this is a role that is not new to the judiciary. Inconsistency between enactments and rights is already assessed under the New Zealand Bill of Rights Act 1990. The Courts have long sought to protect rights when conflicts between rights and Parliament's enactments arise.[29] The Courts have therefore been long involved in the protection of minority interests and rights. It must be recognised that the rights which would be contained in the constitution are rights which have been given support in New Zealand and internationally. These are rights based upon international instruments and current enactments, and so are already the subjects of widespread support. The rights themselves do not seek to impose burdens upon the majority, but simply allow the protection of minority interests when they are undermined or threatened.[30] These are broad provisions which protect interests. To allow the constitution as supreme law is not to supersede democracy, but to codify the principles which lie at the heart of democracy. These principles will remain open to change, albeit the burden to repeal or amend the constitution would be higher than for a regular enactment. Ultimately, the entrenchment of the constitution would recognise that in a plural society there are minority interests that must be

[27] New Zealand Bill of Rights Act 1990, s 4.
[28] Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6, at 22-23.
[29] Some examples include: *R v Pora* [2001] 2 NZLR 37 (CA) where the Court served to limit the application of a retrospective criminal penalty; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 where the Court ruled a prison management scheme illegal for breaching ss 9 and 23(5) of BORA; and *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) where the Court upheld the right to natural justice even though the Regulations explicitly prevented such procedural safeguards.
[30] D M Paciocco "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent Law Review 353 at 353.

protected. Those interests can be protected by allowing the judicial scrutiny of inconsistent enactments. New Zealand has had the benefit of BORA since 1990, however, to show a true commitment to human rights, especially for children, requires the entrenchment of the constitution.

9.6 Irrespective of whether the constitution is entrenched or given the status of supreme law, YouthLaw agrees with UNICEF's recommendation that litigation is essential to the enforcement and development of the constitution.[3132] Allowing interested parties to litigate when rights are breached is fundamental not only to ensure the efficacy of the constitution, but to allow the constitution to develop to new circumstances. In order to recognise this remedy there must be ongoing support for service providers who provide assistance to groups and individuals in this area, so that access to the law can be realistic for marginalised groups most likely to be at risk. The constitution must be a living document that can grow alongside the needs of New Zealand and remain consistent with the demand of international human rights.

10 Conclusion

10.1 YouthLaw recommends that New Zealand have a written Constitution, incorporating a number of current constitutional documents, such as the Constitution Act 1986, the Supreme Court Act 2003, the Electoral Act 1993, the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993. The Treaty of Waitangi would be recognised as having a special significance as the founding document of New Zealand.

10.2 The constitution should also reflect the interests of children and young people by operating at two levels: one containing general provisions of international human rights law, and the other containing specific provisions pertaining to children and young people.

10.3 The framework for these specific rights exists in UNCROC. YouthLaw suggests the implementation of four main provisions relating to children: non-discrimination, recognition of the best interests of the child, the right to life, survival, development and protection, and respect for the views of the child.

10.4 YouthLaw suggests that the constitution be entrenched and be rendered as supreme law. To allow the constitution as supreme law is not to supersede democracy, but to codify the principles which lie at the heart of democracy. Allowing interested parties to litigate when rights are breached is fundamental not only to ensure the efficacy of the constitution, but to allow the constitution to develop to new circumstances. The constitution must be a living document that can grow alongside the needs of New Zealand and remain consistent with the demand of international human rights.

[31] Duncan, above n 1, at 56.

REFERENCES

1. Beatrice Duncan “Constitutional reforms in favor of children” (UNICEF, November 2008)

2. Ministry of Social Development “What is UNCROC?” <www.msd.govt.nz/what-we-can-do>.

3. Ministry of Social Development “Children and Young People: Indicators of Wellbeing in New Zealand 2008” (Ministry of Social Development, November 2008) at 10.

4. Committee on the Rights of the Child “Consideration of Reports Submitted by State Parties Under Article 44 of the Convention: Concluding Observations: New Zealand” (5 February 2011) Ministry of Justice <www.justice.govt.nz/policy>.

5. United Nations Convention on the Rights of the Child

6. Centre for Social Research and Evaluation, “ Pockets of significant hardship and poverty” (Ministry of Social Development, June 2007)

7. Office for Disability Issues “United Nations Convention on Rights of Persons with Disabilities" <www.odi.govt.nz/what-we-do/un-convention>.

8. Child Poverty Action Group “CPAG’s Budget Review 2013: An Analysis of the New Zealand Government’s 2013 Budget” (Child Poverty Action Group, May 2013)

9. New Zealand Bill of Rights Act 1990

10. Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] I AJHR A6

11. D M Paciocco “The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill” [1990] NZ Recent Law Review 353 at 353.