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Ministry of Justice
Justice Centre
19 Aitken Street
Wellington

BY EMAIL: adoptionlaw@justice.govt.nz

Tēnā koe

RE: YouthLaw Aotearoa Submission on Adoption Law Reform

Thank you for the opportunity to provide feedback on the discussion document “A new adoption system for Aotearoa New Zealand”. We have chosen to focus our submission on children’s participation in adoption proceedings. Our comments are set out below.

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. We are a national service providing free legal advice and advocacy specifically for children and young people under 25 years of age. We also develop legal information resources and deliver legal education to children and young people and those working with them.

YouthLaw Aotearoa’s legal team advises and assists in a wide range of legal matters. We often advise children and young people about their rights in Family Court proceedings. A pain point we have observed, is that it is difficult for children and young people to participate in Family Court proceedings. Unfortunately, often by the time we are contacted (by a parent, or guardian, or caregiver, or the child), orders have already been granted, and it is difficult for us to provide much meaningful support. It is also difficult for children under the age of sixteen to apply for legal aid. 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 must apply for legal aid on the child’s behalf if they are under sixteen, and guarantee that the legal aid payments will be paid back. It is unfair that children must 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.

Children’s participation in adoption processes

It is crucial for children’s views to be heard and considered in the family justice system as 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. Quality decision-making simply cannot occur without the child’s views being heard, considered, and acted on. The difficulty with children’s participation

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in adoption proceedings is that children may be adopted as infants and are therefore unable to verbally express their views.

The legal basis for children's participation in the Family Court system is:

a) Article 12 of the United Nations Convention on the Rights of a Child

Articles 12.1 and 12.2 of United Nations Convention on the Rights of a Child ("UNCROC") provide that a child has the right to freely express their views in all matters affecting them and 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. 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).

Space

It is essential that space is created in the family justice system for children's voices to be heard about adoptions. Children need to be given the space to choose whether to participate or not.

Voice

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. We consider that educational programs and counselling will empower children to decide whether they wish to share their views or not.

It is also necessary for the family justice system to be flexible to hear children's voices in different ways. For example, some children may be able to verbally articulate their views and other children may feel more comfortable drawing a picture about what they want.

The family justice system also needs to respect that some children may not wish to have direct input even if they have the capacity to participate. Respecting children's wishes in this regard is also part of respecting their right to participate.

Audience

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. Delay can undermine children's feelings about being listened to.

Influence

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 and assumptions about children. 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 submit that a child's article 12 right still needs to be honoured and upheld.

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.

Comments on Specific Proposals Through a Children and Young Persons Participation Lens

As YouthLaw Aotearoa provides advice and assistance to children and young people under the age of twenty-five, we help both the children that are subject to the adoption and young birth parents. We offer the following comments on specific proposals through a children and young person's participation lens:

- *Right to participate but not be decision-maker* - We share concerns about the need to balance the child's right to participate, but not be decision-maker. We support the requirement that children do not need to consent to their own adoption, but their views, should be a key consideration for the court. We submit that there must be safeguards, in the form of social workers and lawyers, to ascertain the child's views on the adoption. We are concerned how a child's consent or refusal to be adopted will be communicated to the court and the birth and adoptive parents. If a child communicates to their social worker or lawyer that they do not want to be adopted and then this is communicated to the adoptive parents, this could negatively impact the child. We question whether an outright refusal from the child to be adopted could be communicated to the judge privately from the social worker or lawyer or child themselves. The judge could then "soften" this outright refusal by determining that the adoption would not be in the child's best interests. Provision should be made in the Act for this to occur. The regulations should provide the specifics of how this can occur. For example, conversations about the child's willingness to be adopted only occur in the judges' private chambers.
- *Social worker* - We share concerns that children's views are not adequately considered during adoption proceedings. We support the proposal to have a social worker appointed to represent the child who is subject to the adoption. We support the proposal that the social worker would support the child through the adoption process, including to help them participate and share their views. We agree that social workers should also be required to ensure that the child has age-appropriate information about the adoption, and their rights. The social workers role and interaction with the child will need to be clearly outlined in regulations or in Oranga Tamariki policy. When a lawyer for child is appointed, they are required to explain the proceedings and their role to the child before proceedings and then the outcome of the proceedings after. Similar obligations should be imposed on the social worker to meet the child at least once prior to the adoption and then once after. We support the creation of guidelines about what the role of the social worker should be. We also ask that a public consultation be undertaken about these regulations.
- *Lawyer appointed to represent child* – We support lawyers being appointed to represent the child in adoption proceedings if the judge believes it to be necessary. We are mindful of "overwhelming" the child with professionals if both a social worker and a lawyer are appointed. We submit that social workers should always be appointed, but lawyers only if there are legitimate concerns about the child's best interests and the need for the child to understand the legal proceedings. Regulations or guidelines will also need to be created about how the lawyer for child should interact with the child in adoption proceedings (e.g. when will they meet with the child, where will they meet with the child, what are they explaining to the child, and what are the follow up requirements).

- *Alternative care arrangements* – We support the obligation that social workers must tell birth parents about alternative arrangements to adoption. We also strongly recommend that birth parents be given the opportunity to discuss the alternative arrangements and the legal implications with a lawyer. We suggest that Oranga Tamariki facilitate this legal engagement for birth parents, as they may not have the resources to arrange such an appointment for themselves. If appropriate, children who are the subject of the adoption proceedings should also be given information about alternative arrangements. Children’s participation in proceedings about them should always be facilitated. Giving them information about other options will empower and inform children’s voices.

- *Child entitled to speak at adoption proceedings* – Provision should be made for children to speak and participate in adoption proceedings, but only if the child wishes to. Social workers and lawyers should be required to inform children that they can choose to participate in adoption proceedings by speaking to the court or to the judge in their private chambers. If children speak in court, changes will be required to be made to the court processes to make them more understandable, more accessible, and less intimidating to children. For example, lawyers and judges will need to use plain language that can be understood by children.

- *Birth parents’ participation in court* – We support the proposal that birth parents can be involved in adoption court proceedings. However, children who have been abused by their birth parents should be protected from interactions at court if they so wish, or if the adoptive parents, the social worker, or the lawyer for child believe it to be necessary. Birth parents should not be precluded from participation if they are younger than eighteen. However, extra support and time may be needed for younger birth parents to understand proceedings, their rights, and other available alternatives.

- *Social worker reports* – We agree that the law should set out specific requirements for social worker reports for adoption proceedings. We support the report requirements for:
 - Information about how the child participated, including any views expressed by the child.
 - The views of birth family and whanau.
 - Cultural information about the child – including hapu and iwi perspectives.

- *Varying adoption orders* – We are strongly opposed to children and young people (under 18) being barred from applying to a variation to their adoption order. Young people (under 18) should be able to apply to have an adoption order changed. Unfortunately, it is currently very difficult for young people to apply to the Family Court, as they must have a litigation guardian, they are not acknowledged as a party to the dispute, and it is difficult for them to access civil legal aid (e.g. a guardian must apply on their behalf and guarantee that they will pay back the legal aid). We submit that under 18-year-olds should be able to apply to have the adoption order varied and should not be required to have a litigation guardian. We have advised children as young as ten, who have decided to leave their

guardians care, these young people should not be barred from going to court to apply for variations or reversals.

Other Comments

We also offer the following comments on other aspects of the discussion document:

- *Purposes and principles* - We support the creation of a purposes and principles section about adoption. This would align with the Care of Children Act 2004 sections 4,5, and 6. We also submit that there should be principles requiring
 - “That consideration be given to the principles of Te Tiriti o Waitangi.”
 - “That consideration be given to the UNCROC.”
 - “That consideration be given to the child’s sense of time and a recognition that delay can be detrimental to the child.”
- *Age of adoption* – We support the age of adoption being eighteen as this aligns with New Zealand’s UNCROC obligations.
- *Who can adopt* – We support 18 being the minimum age to adopt. We are concerned about current discriminatory restrictions imposed on adoptions. We support the removal of the discriminatory restrictions.
- *Oranga Tamariki involvement* – We support the requirement for all adoptive parents to engage with Oranga Tamariki before they adopt a child. The benefit of this is that Oranga Tamariki can deliver training about the need for contact with the birth family and for assessments to be done about the suitability of the adoptive parents.
- *Support social workers ability to organise placement before adoption order* – We support social workers being able to organise a placement for the child before the adoption order is made. We understand that this already occurs/did occur with “home for life” arrangements.
- *Ongoing contact between birth parents and child* – We support post-adoption contact arrangements being made before the adoption order is finalised.
- *Wider hapu/iwi participation* – YouthLaw Aotearoa supports the submissions of Māori organisations. We also support the proposals that:
 - Birth family and whānau views on the adoption must be included in a social worker’s report to the Court, unless it would cause unwarranted distress to the child or birth parents.
 - Birth family and whānau can attend adoption proceedings with the right to be heard unless it would cause unwarranted distress to the child or birth parents.
 - We also support there being two birth certificates for the child – one with the birth parents and one with the adoptive parents. Having the birth parents recognised

on a birth certificate will uphold the principle of active protection as children's birth identity will be recognised.

- *Other information* – We strongly support the court having the power to order cultural reports or psychological reports. To be consistent with Te Tiriti principle of active protection, the importance of whakapapa, whanaungatanga responsibilities, and family and whānau in the lives of tamariki must be recognised.
- *Changing name* – We support the proposal that the Judge can consider changing an adopted person's surname at the time of the adoption, where they deem it appropriate. We support first name changes only when it is in the child's best interests.
- *Accessing adoption information* – We support adopted people being able to access their adoption information at any age.

We thank you for the opportunity to provide feedback on this important topic. If you have any questions, please contact the writers.

Nāku noa, nā

Sarah Butterfield / Neil Shaw
Solicitor / General Manager

YouthLaw Aotearoa