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The CYPF Act Update team
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By email and post

YouthLaw Tino Rangatiratanga Taitamariki/Action for Children and Youth Aotearoa response - MSD Discussion Document *Safeguarding our Children: Updating the Children Young Persons and their Families Act 1989*

Introduction

1. YouthLaw Tino Rangatiratanga Taitamariki ('YouthLaw') is an Auckland-based national community law centre vested under the Legal Services Act 2000 that provides a free legal service to children and young people throughout Aotearoa New Zealand.
2. Action for Children and Youth Aotearoa (ACYA) is a coalition of NGOs and individuals with an interest in children's rights issues with a primary focus on the implementation of the UN Convention on the Rights of the Child (UNCROC) in New Zealand. ACYA is the NGO that submitted the NGO Report on New Zealand's compliance with UNCROC, *Children and Youth in Aotearoa 2003*, to the UN Committee on the Rights of the Child in June 2003.
3. YouthLaw is a member of ACYA. The writer is Senior Solicitor at YouthLaw and an ACYA Committee member. This submission is accordingly made on behalf of both organisations.

Theme One: Technical Amendment and Drafting

1. Given the Act's purpose and ambit, we consider that a prescriptive approach is essential to ensure that minimum practice requirements and organisational obligations and duties are sufficiently concrete and accountable. This is very important, given that the Act deals with the administration of the most vulnerable demographic in our society.

2. We would therefore not support the dilution of any of the practice requirements under the Act in favour of a more general set of obligations. We are of the view that specific statutory practice guidelines safeguard best practice. We are concerned that if the Act's practice responsibilities are diluted in favour of generalist provisions backed up with non-legislative departmental guidelines, practice could become more expedient with potential adverse consequences for children and young people at risk. We consider that it is fundamental that any legislation charged with protecting vulnerable children and young person must set out clear, unambiguous, detailed obligations upon the agencies responsible for their welfare.
3. To illustrate our point above, we refer to the Education Act 1989 as an example of legislation that, in our view, fails to give effect to its core principles and purpose due a very general practice framework. The Education Act sets a couple of clear core principles; that all children between the ages of 5 and 19 have a right to free education¹ and that all children aged from 6 to 16 must attend school². However, the Education Act's provisions regarding the suspension, exclusion and expulsion of students subverts these core objectives due to a lack of adequate prescriptive responsibilities on schools and the Ministry of Education, and a lack of any specific review system.
4. This has led to almost a third of all suspended students being excluded or expelled from school, little over half of which are able to return to a mainstream school³. Figures released to YouthLaw in 2006 indicate that on average it takes 8 weeks, nearly a whole school term, to arrange an excluded student (aged under 16 and therefore legally required by the Act to be enrolled at school) a new "legal educational environment", a term which includes alternative education, correspondence and exemption from school⁴. Most worrying, however, is that the data indicates that over 20% of excluded students exist outside the coverage of the education system altogether, which in itself has obvious ramifications for the care and protection and youth justice systems⁵.
5. We are concerned that a simplified CYPF Act that removes specific operational responsibilities in favour of more nebulous standards could have the same result, namely more children and young people falling through systemic cracks.
6. This is not to say, however, that the drafting or structure of the CYPF Act does not need review. The Act tends from suffer from long, compounded sentences which can make reading and interpretation of the Act difficult. There are also inconsistent and confusing approaches in the drafting of subsections.

¹ s3 Education Act1989

² s20 ibid

³ Ministry of Education Stand down, Suspension Exclusion and Expulsion Report 2005

⁴ Ministry of Education figures disclosed pursuant to YouthLaw OIA Request 2006

⁵ ibid

7. Section 48 is a good illustration of the Act's shortcomings in this regard (see attached). The section begins with a long, overly complicated compound sentence before breaking into subsections framed around inconsistent and often confusing paragraph structure. The section is difficult to read and tends to obscure a provision which should be relatively simple to follow, as it simply sets out to provide for police powers and duties in respect of unaccompanied minors.
8. This is a common problem with the drafting and does not assist with easy interpretation or implementation of the Act. We consider that sections and subsections should ideally be drafted with consistent paragraph structures and simple sentence structure.
9. The structure of the Act could be improved by adding a separate specific Part dealing with child offenders. Another suggestion that has been mooted is to have separate CYPF Acts for the care and protection and youth justice systems. This would make sense, as each system is administered by different specialist Courts. In addition, the youth justice principle under s208(b) currently delineates between the respective purposes of the youth justice and care and protection systems, providing that criminal proceedings should not be instituted against a child or young person solely to advance the welfare of a child or young person.

Theme Two: Care and Protection

Interagency Collaboration and Information Sharing

10. We consider that a joined-up services approach can be very beneficial in matters involving a child or young person's well-being. The Strengthening Families model is a good way of getting agencies to collaborate effectively and we would support its further development so that it is used more frequently. In our view, the Strengthening Families process helps to foster a sense of mutual accountability between agencies, which is a vital factor in ensuring collaboration.
11. It may be helpful to reinforce a duty for agencies to work collaboratively in legislation, as the Australian examples referred to in the discussion document purport to do. It would certainly add some formality to the process, which could be helpful for best practice. The High and Complex Needs funding scheme is an example of inter-agency collaboration and it is our view that the administration of a detailed multi-agency scheme of this nature would benefit from having legislative principles at the basis of the collaborative process.

Information Sharing

12. Whilst we accept that information sharing is often valuable, and that best interests and welfare of a child is always of paramount importance, we feel that the rights of the child or young person to informed consent, and to be consulted, should be a starting

point when considering this issue. Articles 12 and 16 of UNCROC are of direct application in this respect.

Upper Age of the Act

13. We support the scope of the CYPF Act to be extended in order to cover 17 year olds for the reasons set out below.
14. Such an amendment would bring the Act into line with UNCROC. New Zealand ratified the UNCROC in 1993 and by doing so committed to implementing its principles. The Government entered no reservation on this issue. We endorse the recommendation of the UN Committee on the Rights of the Child that New Zealand raise the coverage of the CYPF Act to include 17 year olds, thereby extending to those young people the special protections of the care and protection and youth justice services, special protections that our Government is committed to providing them by virtue of Articles 19, 20, 37 and 40 of the Convention.
15. It would also improve the CYPF Act's consistency with the Care of Children Act, which provides that legal guardianship remains in place until a child turns 18⁶, bringing New Zealand's guardianship jurisdiction in line with UNCROC. The Department of Child Youth and Family can itself seek guardianship orders under the CYPF Act that extend to when a child turns 20⁷. It is therefore, in our view, illogical that 17 year olds, who are at all times subject to legal guardianship and able to be the subject of guardianship orders, cannot access the services of the Department should their welfare be at risk.
16. Whilst a young person is legally empowered to make a number of decisions for themselves at age 16, it is our view that a person reaches effective autonomous adulthood at 18. This is reflected by 18 being the legal age for voting, entering into binding contractual relations, being a director of a company, going to war, purchasing alcohol or tobacco – to name a few examples.
17. We consider that, for the reasons outlined in paragraphs 16 and 17 above, that there is little justification in retaining the current application of the adult criminal justice system to 17 year olds. We note the discussion document notes concern that such a change would have “significant implications” for the CYF, the police and the Ministry of Justice. Whilst we would agree that such a change may entail additional legislative amendment, administrative costs and services costs (particularly with respect to residences), it is not a radical systemic change and does not introduce anything new in itself, other than extend the coverage of the youth justice jurisdiction to cover 17 year olds. The overall cost to Government would probably reduce in the long run, as there would probably be a mild cost reduction in the administration of the adult criminal process through the removal 17 year olds from that jurisdiction.

⁶ ss8, 15, 16 Care of Children Act 2004

⁷ s117 CYPF Act

Transition from Care

18. We consider that the Act should be amended to incorporate specific responsibilities upon CYF to provide meaningful support and assistance to a young person who is transitioning from CYF care to independence. Such an amendment is long overdue. The New South Wales example included in the discussion document provides a useful template.
19. It is very important that significant consultation take place with young people who have made this transition. Young people who have made this transition have generally informed us that they received very little in the way of support from CYF during what is very challenging time for them.

Children's and Young People's Participation

20. We would support any move to strengthen the participation and voice of children and young people in the administration of the CYPF Act. Article 12 of UNCROC provides that children and young people have the right to express their views freely in *all* matters affecting them and the right to be heard in any judicial or administrative procedure affecting them.
21. Whilst the CYPF Act presently goes some way to meeting those objectives, the New South Wales example again provides a useful template for expanding the principles of child participation into a more fulsome set of criteria that can be applied in practice. We consider that the responsibility to keep a child or young person fully informed of the process that is affecting them, and of all the rights and options they have in respect of that process, is particularly important.
22. The administration of FGCs should be re-assessed with a view to improving the ability of a child or young person to participate or have their views considered. FGCs tend to be dominated by adult family members and professionals and it requires a skilful and sensitive Co-ordinator to ensure that a child's views are heard and considered if the child in question is without advocacy support.
23. We accordingly support Robert Ludbrook's recommendation that section 22(2) of the Act be amended to ensure that the lawyer for the child is entitled to be present during all aspects of an FGC, should that child request, and should be required to attend where the child or young person is not present at the FGC.
24. We also consider that provision should be considered to allow a child or young person subject to an investigation under section 17 of the Act to access a support person, should they require one, for the purposes of any interviews or other investigation procedures that directly affect them. We acknowledge that such a support person would have to be sufficiently independent from the subject matter of the investigation.

Theme Three: Disabled Children

25. Whilst we don't have sufficient knowledge of the s141-145 processes, we consider that any review of the Act in its application to disabled children should have at its foundations Article 23 of UNCROC, which provides a prescriptive set of principles concerning the rights of disabled children. We consider that there would be merit in separating the provisions concerning care of severely disabled children into a separate Part of the Act to reflect the distinctive issues, concerns and processes involved.

Theme Four: Child Offending and Youth Justice

Child Offenders

Lowering the age of criminal prosecution to 12

1. We do not support lowering the age of criminal prosecution to 12. We are strongly opposed to the Young Offenders (Serious Crimes) Bill currently before Parliament that seeks to achieve this purpose.
2. Perhaps in light of the Bill, much of the public debate on the issue of child and youth offending appears to us to have been focussed on broadening the scope for criminal liability, prosecution and punitive punishment of children and young people, with comparatively little attention spent analysing or addressing its root causes.
3. We set out below our reasons for opposing lowering the age of criminal responsibility.
4. Lowering the age of criminal prosecution would be in breach of our international juvenile justice obligations per Article 40 of the UN Convention on the Rights of the Child (UNCROC). In its 2003 report on New Zealand, the UN Committee on the Rights of the Child recommended that the Government "*raise the age of criminal responsibility to an "internationally acceptable age and ensure that it applies to all criminal offences"*"⁸ [emphasis added]. Lowering the age of criminal prosecution to 12, even in limited circumstances, is therefore clearly at complete odds with our UNCROC obligations and would not reflect well on New Zealand's international human rights reputation.
5. We are not aware of any compelling evidence that supports lowering the age of criminal prosecution in New Zealand. Apprehension rates for child offenders have been described by the Principal Youth Court Judge as "relatively static".⁹ Only

⁸ CRC/C/15/Add.216 para 21(a).

⁹ Principal Youth Court Judge Becroft, *Youth Offending: Putting the Headlines into Context*, December 2004

- about 5% (barely over 50) of all applications for declarations for care and protection filed in the Family Court are in respect of child offending under section 14(1)(e) of the CYPF Act¹⁰.
6. Lowering the age of criminal prosecution to 12 would be inconsistent with the *doli incapax* principle of diminished responsibility currently enshrined in section 22(1) of the Crimes Act 1961. The current Youth Court jurisdictional threshold is consistent with the Crimes Act which provides that diminished responsibility for criminal offending ceases at age 14.
 7. It is difficult to conceive of any tangible benefit that lowering the age of criminal prosecution would provide the youth justice system. To the contrary, it would most likely place more pressure on current youth justice custodial facilities and lead to more of the older youth residents being placed in youth offenders units in adult prisons, where they are mixed with adult prisoners aged between 18 and 20. It may also exacerbate the perpetual problem of children and young people being detained in police cells as a result of a lack of beds in CYFS residences.
 8. The orders available to the Family Court can be more effective than the Youth Court in responding to serious offending, as the Family Court can issue support¹¹, services¹² and custody orders¹³; all options that the Youth Court does not have. For example, a child who has been proven to have committed a sexual offence may be ordered by the Family Court to attend a residential SAFE programme. This option would not appear to be available to the Youth Court under its current jurisdiction under section 283. There may be some merit in examining whether the Youth Court should be provided with a broader set of options. However, in doing so there could be potential for cross-pollination of the youth justice system with the care and protection system which would be contrary to s208(b).
 9. We would support legislative amendments that would simplify the process for dealing with child offenders. To this end, we consider that there would be merit in separating child offender provisions under the Act from the other care and protection grounds, and drawing them together into one part of the Act.
 10. We consider that the current child offenders system is subject to undue delay in practice. Our experience is that the police do not tend to prioritise the follow up of s14(1)(e) matters following an FGC. This can lead to delays which render the viability of s14(1)(e) proceedings nugatory and in many cases the police decide not to proceed. The small number of s14(1)(e) care and protection applications filed in the Family Court perhaps reflects this.

¹⁰ Ministry of Justice, 2004 Family Court Statistics

¹¹ s91 CYPF Act

¹² S86 CYPF Act

¹³ S101 CYPF Act

11. We consider that the system would benefit from having much clearer and tighter timeframes within which things need to be done. The Act already provides that its procedures should be administered in a timeframe appropriate to the child's sense of time.¹⁴ This means delays should be avoided. The responsibilities and obligations of the police and CYFS social workers and FGC Co-ordinator should be clearly delineated. If, at the outcome of a section 14(1)(e) FGC, it is recommended that a declaration for care and protection be filed in the Family Court, it should be filed without delay. A social worker should be appointed at the same time as the police file is referred to the FGC Co-ordinator, if one has not been appointed by that stage.

Youth Justice Family Group Conferences

12. We strongly support the continuing use of FGC's as a primary forum for resolving youth offending matters. In our experience, an effective FGC can produce a meaningful and proportionate outcome that can really help a young person get themselves back on track.

Community Representatives

13. The Discussion Document raises the question of whether or not it would be useful to include community representatives as "entitled" representatives at a youth justice FGC. We do not support this proposal, as we consider that such persons are not relevant parties to the matter of the offending itself and have no professional role in respect of the young person. We accordingly believe that the attendance of such a person should be by consent or invitation of the young person and their family only. We consider that the current framework of "entitled" persons under section 251 of the Act to be sufficiently broad.

Role of Youth Advocates

14. We support Youth Advocates being appointed prior to any pre-charge FGC in order to represent the young person at the conference and provide them with legal advice beforehand. Pre-charge FGCs invariably involve the young person admitting or denying an alleged offence and police summary of facts. The young person should be entitled to the benefit of legal advice prior to making a decision of this nature and gravity. We note that adult defendants can access free legal advice and representation with respect to their plea through the duty solicitor scheme at the District Court.
15. We have represented many young people at pre-charge FGCs and our experience indicates that it is important for a young person to have an advocate present in order to protect the young person's interests. Without representation, a young person is vulnerable to pressure to agree or admit to allegations or measures that they may dispute or be unsure about.

¹⁴ s5(f) of the Act

16. We do not agree with the view that attendance of a Youth Advocate somehow derogates the “family focus” and victim’s participation at a pre-charge FGC. It should be remembered that a pre-charge FGC is still a formal part of the criminal process for young people. As the accused, a young person is in the most vulnerable position at a pre-charge FGC and in that respect should be able to access legal advice and advocacy. We would therefore support s323 of the Act to be amended to allow a Youth Advocate to be appointed once the police have consulted with an FGC co-ordinator under s245(1)(b)(ii).

Access to legal advice during police questioning

17. Another issue of note is the ability of young people to access a Youth Advocate whilst being questioned by police. We understand that there is currently a lack of Youth Advocates on the Police Detention Legal Assistance scheme (PDLA).

18. Under the current system, the police must advise a young person of their right to consult with a lawyer or independent nominated person (INP) prior to questioning and to have a lawyer or INP present during questioning under s215(1)(f). Our anecdotal experience suggests that in the large majority of cases, young people do not access legal advice or assistance prior to or during police questioning, instead preferring an INP known to them, usually a parent. This is perfectly understandable, as a parent or supportive adult known to the young person can provide the young person with greater emotional support, during such a stressful situation, than a lawyer can. However, particularly in circumstances where the allegations and potential consequences are very serious, we consider that it is important for the young person to have professional legal advice prior to making a decision about whether to agree to police questioning. We consider that in such circumstances every effort should be made by the police to ensure the young person and their INP can access legal advice, and are aware they can access legal advice. Accordingly we would support s222 being amended in order to place an obligation on the police to inform a young person’s INP of the right of the young person to consult a lawyer prior to and during police questioning.

Youth Court Orders

19. We note that the orders of the Youth Court under s283 of the Act have been the subject of a Ministry of Justice consultation paper in April 2006, which posed, among other issues, the idea of introducing an extended supervision with residence order with a residence order of up to six months.

20. We consider that any consideration of lengthening the custodial aspect of a current supervision with residence orders under s283(n) must correspond with a re-evaluation of s283(o) which allows the Youth Court to transfer a 15 or 16 year old, convicted of a purely indictable offence, to the District Court for sentencing.

21. Section 283(o) still holds the most potentially punitive custodial outcome for a young person under the youth justice system. It is a statutory gateway to the adult criminal justice system which leads to young people being imprisoned in the youth offenders units of adult prisons with young adult criminal offenders, an outcome which is in breach of international youth justice obligations, specifically Article 37(c) of the United Nations Convention on the Rights of the Child and Rules 13.4 and 26.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules').
22. Following on from this point, it is our view that the youth justice system should be consistent in adhering to its foundation principles, including international minimum standards, and be clearly differentiated from the adult criminal justice system.
23. In addition, we consider that extending residential orders to six months would inevitably require more beds in youth justice residences, which in turn would necessitate significant costs to the sector, which would in our view be better invested in developing much-needed support services and programmes.
24. Electronic monitoring could be effective in ensuring that a young person adheres to the terms of a supervision order and would certainly be preferable than custody. However, we consider that electronic monitoring should be approached with caution and should be only applicable to those young offenders subject to supervision orders where there is a clear and identifiable likelihood of abscondment or recidivism whilst under supervision. We would strongly oppose any move towards widespread implementation of electronic monitoring of young people in the youth justice system.
25. We would support provision for the duration of supervision with activity orders to be extended in order to accommodate programmes which are currently unable to be covered by the order.

Youth Court Ordered Bail

26. We made submissions on the CYPF Act Amendment Bill (No 4). We had significant concerns that the Bill suggested a number of proposals that were both contrary to the youth justice principles currently expressed in s208 of the Act and UNCROC.
27. In our submissions, we firmly opposed the breach of bail provisions in the Bill regarding warrantless arrest and noted that the police have existing powers under sections 214(1)(a)(ii) and (b) to arrest a child or young person without warrant to prevent further offending or where issuing a summons, in respect of a summonsable matter, would not achieve its purpose.

Victim Provisions

28. We are of the view that the CYPF Act already makes adequate provision for victims of child and youth offending. The Act currently provides victims with more capacity for participation and recognition than they are accorded in the adult criminal justice system. Section 208(g) provides that the youth justice process shall have due regard for any victims of child and youth offending and a victim, or a victim's representative, is entitled to attend a youth justice FGC per section 251(f). Victims therefore can have a reasonably central role in determining the outcome of a youth justice matter, should they choose to participate in the FGC process. However, a means of further underlining the rights of victims during the youth justice system could be to amend s208(g) to specifically confirm the application of the Victims Rights Act 2002 to the youth justice system.
29. Our experience suggests that Youth Justice Co-ordinator go to reasonable effort to incorporate the participation of victims in FGCs. Whilst the Act confers a number of duties upon Youth Justice Co-ordinators to inform and facilitate the participation of FGC attendees, specific provision could possibly be made to ensure that victims are kept informed and provided with a say over the scheduling of an FGC. However, this would need to be balanced against the need to have youth justice matters dealt with without unnecessary delay.

Thank you for your consideration of the issues we have raised above.

YouthLaw / ACYA

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