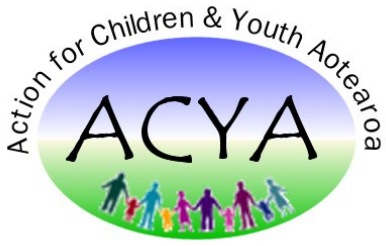
Family Court Proceedings Reform Bill

Submission to the Justice and Electoral Committee

13 February 2013



Action for Children and Youth Aotearoa (ACYA) is a coalition of non-governmental organisations, families and individuals promoting the rights and wellbeing of our children and youth through education and advocacy based on evidence and New Zealand's human rights commitments.

Underpinned by the values encapsulated in the UN Convention on the Rights of the Child (UNCRC), Te Tiriti O Waitangi and the wider human rights framework, ACYA promotes:

- accountability by providing reports from NGOs in Aotearoa New Zealand on Aotearoa's compliance with UNCRC to the UN Committee on the Rights of the Child (UNCRC Committee)
- understanding and implementation of UNCR
- action on the recommendations of UNCRC Committee to Aotearoa New Zealand;
- opportunities for the participation of children and youth and for their voices to be heard

ACYA's principal work is the production and publication of Aotearoa New Zealand's Alternative NGO (non-governmental organization) Reports to the UNCRC Committee on Aotearoa's implementation of the UNCRC. Aotearoa ratified UNCRC 6 April 1993. Thealternative reports are submitted as part of the formal periodic reporting process under Article 44 of UNCRC.

ACYA most recently produced and published *Children and Youth Aotearoa 2010*, the NGO sector's third and fourth periodic report on Aotearoa New Zealand's implementation of UNCRC. The report and its working papers were presented to the Committee in Geneva, 7 October 2010.

ACYA produced and published *Children and Youth in Aotearoa 2003*, the second periodic NGO report on Aotearoa New Zealand's implementation of UNCRC. ACYA supported children to develop a video called *Whakarongo Mai / Listen Up* which collated and presented the views of children and young people. Both the report and video were presented to the Committee in Geneva in June 2003.

ACYA has made numerous reports on New Zealand's compliance with other human rights treaties and on proposed legislation and policy that impact upon children. Between 2004 and 2009 ACYA was represented on the UNCROC Advisory Group to the Ministry of Social Development and most recently sits on the UNCROC Monitoring Group co-ordinated by the Office of the Children's Commissioner. All the work of ACYA is done by volunteers. ACYA receives no government funding.

General Comments on the purpose of the Bill

1. Family Court Review public consultation document, paragraph 89, acknowledged that children and young people had a right to be heard in family law proceedings and that delivering that right was beneficial for all those involved. The consultation document stated that children and young people need to "understand what is happening" and they should have "an opportunity to make their views known." The explanatory note to the Bill refers to the purposes of the Bill as to ensure a family justice system that is responsive to children.

2. Under the UN Convention on the Rights of the Child (UNCRC) Article 12.1 children capable of forming views have the right to express those views freely in all matters affecting them. The views are to be given due weight in accordance with age and maturity of the child. Article 12.2 requires that children be given the opportunity to be heard in all judicial and administrative proceedings affecting them, either directly or through a representative. In respect of family law proceedings, whether those proceedings relate to day-to-day care, contact arrangements, child protection or relocation, children's voices must be heard, for Aotearoa New Zealand to comply with its international law obligations.

3. Article 4 of UNCRC *requires* New Zealand to "undertake all appropriate legislative, administrative, and other measures" for the implementation of the rights in UNCRC "to the maximum extent of…available resources". The Bill proposes to amend section 7 of the Care of Children Act (COCA), to limit severely the circumstances in which a lawyer for child may be appointed. This would leave most children and young people affected by family law disputes with no effective mechanism for expressing their views. That would be a headline breach of Aotearoa New Zealand's international obligations under UNCRC.

4. The explanatory note states that one of the Bill's aims is to encourage less adversarial resolutions of disputes through requiring parties to participate in an out-of-court dispute resolution process. The Bill places no requirement on dispute resolution providers to ensure that children and young people's views and experiences are part of the process. This will lock young people out of participation in crucial decision making about their lives and would again be a breach of UNCRC obligations. Research (discussed below in section on family dispute resolution) has demonstrated the benefits to children and young people of involving them when their parents and carers are separating or divorcing.

5. It is claimed that the Bill refocuses the Family Court by clarifying the principles relevant to the child's welfare and best interests, including the child's safety. The Bill proposes to replace sections 58 to 62 of COCA. The effect of the proposed changes would be to remove the existing presumption against contact for children and young people with carers who have been violent. That is a breach of Aotearoa New Zealand's obligations under Article 19.1 of UNCRC to take all appropriate legislative steps to protect children from all forms of physical or mental violence, injury and abuse.

6. ACYA opposes the Family Law Proceedings Reform Bill. The rights, interests and welfare of children and young people in Aotearoa New Zealand should not be compromised in the name of efficiency and cost-effectiveness.

7. ACYA wishes to exercise its right to an audience with the select committee and to address the committee directly on the issues arising from its submission.

Lawyer for Child

8. Research indicates several important benefits of listening to children's voices in parental separation and divorce. Maes, De Mol and Buysse[1] note that children regarded the decision to divorce as fundamentally unfair, since they were never consulted. This made them feel as though they did not matter. Children's psychological wellbeing requires that they know they matter to their parents[2] and the children indicated that they wanted to be taken into account in living arrangements. Neale's research showed[3] that older children attached much importance to autonomy in making decisions about their personal lives.

9. Research with children and young people now indicates that they want to be heard in decisions about what will happen to them in the future. Cashmore and Parkinson[4] found that children involved in contested cases were much more likely than other children to say that they should choose what should happen in day-to-day care and contact arrangements. This was particularly so for children whose cases involved violence, abuse or high levels of parental conflict. Graham and Fitzgerald's research in Australia[5] found that children wanted to be listened to by adults making decisions and were angry and resentful when that did not happen. Several other studies have presented similar results[6] and the message is clear: children and young people want their voices heard in family law disputes.

10. Clause 5 of the Bill proposes new sections 7 and 7A to replace the exising section 7 of the Care of Children Act 2004 (COCA). Under the existing s7, in all cases relating to day-to-day care of a child, or dealing with contact between a child and others, the court must appoint a lawyer for the child. This system acknowledges the place of the child in the process and the importance of the child's views to the eventual decisions made. The new sections would restrict the circumstances in which a lawyer for child could be appointed. The proposed provision states that a court may appoint a lawyer to represent a child who is the subject of, or who is a party to, proceedings if the court (a) has concerns for the safety or well-being of the child and (b) considers an appointment necessary."

11. Section 6 of the Care of Children Act recognises Aotearoa New Zealand's obligations under the UNCRC Article 12. It provides that in guardianship, day-to-day care and contact cases, a child must be given reasonable opportunities to express views on matters affecting him or her and that any views expressed either directly or through a representative must be take into account. The effect of clause 5 of the Bill will be that the court's duties under section 6 of COCA will not be fulfilled in many family law cases. Where the child or young person is denied access to a lawyer for child, his or her options are to become involved in and express views in out-of-court family dispute resolution processes, or to speak directly to the judge, where the matter is decided in court.

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[1] Sofie Maes, Jan De Mol and Ann Buysse "Children's Experiences and Meaning Construction on parental divorce" a focus group study: 2011 *Childhood* 19(2) 266

[2] S Marshall "Do I Matter? Construct validation of adolescents' perceived mattering to parents and friends" 2001 *Journal of Adolescence* 24(4) 473

[3] B Neale "Dialogues with children: Children, Divorce and citizenship" 2002 *Childhood* 9(4) 455

[4] J Cashmore and P Parkinson "Children's and parent's perceptions on children's participation in decision making after parental separation and divorce" 2008 *Family Court Review* 46(1) 91

[5] A Graham and R Fitzgerald (2010) 'Exploring the promises and possibilities for children's participation in Family Relationship Centres', *Australian Institute of Family Matters* 84, 53–60.

[6] A O'Quigley (2000) *Listening to Children's Views: The Findings and Recommendations of Recent Research*, York: Joseph Rowntree Foundation and J McIntosh (2009) 'Four young people speak about children's involvement in family court matters', *Journal of Family Studies* **15**(1), 98–103.

12. Judicial interviews with children and young people have increased during the operation of the Care of Children Act.[7] The previous Principal Family Court Judge Boshier indicated that to comply with s6 of COCA, "the child's wishes should be introduced 'primarily' through either counsel for child or through an interview with the judge."[8] Research evidence suggests that judges' attitudes vary and they sometimes regard the purpose of meeting the child or young person as an opportunity to get to know the child and to better understand the case context, rather than to ascertain and give weight to views.

13. It is not an adequate discharge of the UNCRC obligations to provide lawyer for child only in limited circumstances. The requirement to give children and young people opportunities to express views does not apply only to cases where there may be safety concerns. Indeed, these are the cases where it may be most difficult for the child to express views, for fear of reprisals. Clause 5 would leave a broad discretion to appoint a lawyer for child with the court. Even in a case involving safety issues, the court could still decide that the appointment was not "necessary". The existing section 7 provision, which requires the court to be satisfied that an appointment is not necessary, is much more appropriate, in terms of UNCRC and also the requirement of justice under s27 of the NZ Bill of Rights Act, which applies to children and young people in Aotearoa New Zealand.

14. ACYA opposes the proposed new sections 7 and 7A of COCA, contained in clause 5 of the Bill.

Family Dispute Resolution

15. One of the Bill's primary aims is to simplify family justice processes and to make them less adversarial. There is no doubt that protracted and bitter disputes between those caring for them are damaging to children and young people's emotional well-being. ACYA is supportive in principle of the move towards more routinely available out-of-court family dispute resolution (FDR) mechanisms. However, the current proposed fee for the FDR of $897, where adult parties are to be mandated to take part in the process, is highly problematic. Children and young people's welfare is not served by placing their carers under increased financial strains.

16. ACYA's principle concern regarding the proposed FDR processes is that there is no provision that providers of the services must ensure that there are adequate opportunities for children and young people to express views and to have these views taken into account. In ACYA's experience, many existing family mediation providers do not involve children and young people in the process, or even make provision for the process and its purpose to be explained to those who are most closely affected by the outcomes.

17. ACYA recommends that section 6 of COCA be amended to state that FDR processes are relevant proceedings for the purposes of that section. ACYA further recommends that the new Part I provisions to be inserted into the newly named Family Disputes (Resolution Methods) Act 1980 (previously Family Courts Act 1980) state that all FDR processes must give children and young people an opportunity to epxress views and have those views taken into account, if they wish to do so.

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[7] Judge Ian Mill "Conversations with Children: a Judge's Perspective on Meeting the Patient Before Operating on the Family" (2008) 6 NZFLJ 72

[8] Principal Family Court Judge Peter Boshier "Listening to Children's Views in Disputed Custody and Access Cases" 2008 29 May, Association of Family and Conciliation Courts Annual Conference, Vancouver, BC, Canada, at p6 available at <http://www.justice. govt.nz/courts/family-court/publications/ speeches-and-papers/association-of-family-and-conciliation-courts-annual-conference

The Right to Safe Day-to-Day Care and Contact

18. Aotearoa New Zealand was admired internationally when it enacted a statutory presumption against a child's living with or having contact with a violent party. At present, s60(3) of COCA states that the court must not make an order giving a violent party the role of day-to-day care of the child or allowing the violent party contact (other than supervised) with the child. The court can make such orders only where the court is satisfied that the child will be safe with the violent party. The present law recognises our international obligations under UNCRC Article 19 to take all appropriate legislative measures to protect children from all forms of physical or mental violence, injury or abuse.

19. Clause 14 of the Bill proposes to replace sections 58 to 62 of COCA with new provisions. In relation to violent parties, the proposed new sections would remove the presumption against contact with a violent party. When considering the making of a contact order, the court may make an order for supervised contact "if not satisfied that the child will be safe". The onus will be on anyone with concerns to convince the court not to make an order, or to make a supervised order. The law will no longer require a violent party to satisfiy it that the child will be safe with him or her.

20. ACYA opposes the proposed new sections 58 to 62 of COCA contained in clause 14 of the Bill.

On behalf of the ACYA Committee
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