

ACCESS TO JUSTICE FOR CHILDREN: NEW ZEALAND

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

In New Zealand,¹ when treaties creating obligations on the State are ratified, the obligations are not automatically implemented into national law. Implementation of international treaty obligations only occurs if national legislation provides for such implementation.²

New Zealand ratified the CRC on 6 April 1993.³ Post-ratification, relevant legislative reform is scrutinised to ensure conformity to CRC obligations (e.g., the Immigration Act 1987 and the Children, Young Persons and Their Families Act 1989 (CYPFA 1989)⁴ were under such scrutiny to ensure the CRC obligations were implemented).⁵ However, there is no formal mechanism to ensure this happens consistently.⁶

New Zealand has also signed and ratified the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OPAC)⁷ and the Optional Protocol to the

¹ Comments on this report were provided by Peter Shuttleworth, August 2015; Holly Walker, Principal Adviser (Advocacy), Office of the Children's Commissioner, August 2015; and John Hancock, Senior Legal Adviser, Human Rights Commission, October 2015.

² New Zealand Law Commission, 'Report 34, Part-I (International Law and the law of New Zealand)', paras 28-29, 43-46, available at: <http://www.nzlii.org/nz/other/nzlc/report/R34/R34-Part.html#Heading125>.

³ Prior to ratification, New Zealand had undertaken a compliance assessment process to gauge whether its national legislation would be consistent with its proposed obligations under the CRC. The Ministry of Youth Development advised the Government on the implications of New Zealand's commitment to the CRC. It is now the role of the Ministry of Social Development to administer the CRC and provide ongoing advice and information on its application in New Zealand.

⁴ Available at: http://www.nzlii.org/nz/legis/hist_act/cypatfa19891989n24426/.

⁵ See *Third and fourth periodic reports of New Zealand to the UN Committee on the Rights of the Child*, CRC/C/NZL/3-4, 14 June 2010, p.14. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fNZL%2f3-4&Lang=en; See also, Office of the Children's Commissioner, 'Annual Report for the year ended 30 June 2012', available at: <http://www.occ.org.nz/assets/Uploads/Journals/corporate-documents/Annual-Report-2012.pdf>.

⁶ The Office of the Children's Commissioner, New Zealand has observed that consideration of the child rights implications of planned legislative reform is more likely to happen when the legislation is about or for children or when the agencies working on the reforms work directly with children and understand children's rights. It is less likely to occur for legislative reform that is not *prima facie* about children, or which might have unintended consequences for children. The Office of the Children's Commissioner will often submit on legislation from a child rights perspective at the select committee stage. However, it is not sufficiently resourced to do this for all relevant legislation, and there is no guarantee that a select committee will take its comments on board.

⁷ Ratified on 12 November 2001.

CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC)⁸ but with a territorial reservation for Tokelau.

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law. While New Zealand acknowledges its obligations under the CRC, it reserves the right to interpret the CRC obligations in consonance with its national laws and policies.

C. Has the CRC been incorporated into national law?

There is no specific legislation giving effect to the CRC. New Zealand's domestic laws have, however, been significantly inspired and influenced by the CRC. For instance, the Care of Children Act 2004 (CCA 2004) was enacted with the intent to give effect to the principles and the spirit of the CRC.⁹ One of the express purposes of the CCA 2004 is to "recognise certain rights of children" and the Act uses the terminology of the CRC. For example, section 5(f) of the CCA 2004 states that the "child's identity (including, without limitation, his or her culture, language and religious denomination and practice) should be preserved and strengthened", which is articulated in terms similar to Article 8 of the CRC.¹⁰ Moreover, it has been well established by the New Zealand courts that domestic legislation, and in particular the CCA 2004, must be interpreted in conformity with the CRC (see discussion at part I.D below). The Children's Commissioner Act 2003 provides the Children's Commissioner with purposes and functions concerning the monitoring and advancement of the CRC in New Zealand.¹¹ Also, the text of the CRC is included in Schedule 2 to the Children's Commissioner Act, although this does not constitute incorporation into statute law.

There are certain areas of the CRC that have not been incorporated into New Zealand law. For example:

- there is no minimum age or agreed conditions of employing children. The Committee on the Rights of the Child has recommended that New Zealand ratify the ILO Convention No. 138 concerning Minimum Age for Admission to Employment; and
- contrary to the CRC, children in custody can be held with adult prisoners in some circumstances.

D. Can the CRC be directly enforced by New Zealand courts?

⁸ Ratified on 20 September 2011. See the status of the treaties available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict) and http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography).

⁹ B D Inglis, *New Zealand Family Law in the 21st Century* (Thomson Brookers, Wellington, 2007) at 14.1.

¹⁰ See s. 4 CCA 2004.

¹¹ Children's Commissioner Act 2003, ss. 3(c) and 12(f).

While the CRC is not enforced directly, the New Zealand Family Court gives due consideration to the principles and policies embodied in the CRC while deciding cases concerning children's rights.¹²

The New Zealand courts have taken the approach that in interpreting domestic legislation, an interpretation consistent with New Zealand's obligations under the CRC should be preferred. This judicial sentiment was stated by Cooke P in *Tavita v. Minister of Immigration*.¹³ Similarly, the High Court in *LP v. Chief Executive, Department of Child, Youth and Family Services*¹⁴ considered that although the CRC has not been implemented as part of New Zealand law, it is still a relevant and important consideration in judicial decision making and it has a "moral force which requires domestic legislation to be read and interpreted, to the extent it permits, in a manner consistent with New Zealand's international obligations..." This reflects a principled approach to international obligations confirmed in other contexts by the Court of Appeal¹⁵ and the Supreme Court.¹⁶

In short, in the context of proceedings involving children, the courts do not ignore New Zealand's obligations under the CRC. The CRC will colour the interpretation of domestic legislation, and provide a set of principles which decision makers must consider.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Yes, aside from the decisions in *Tavita* and *LP* above, there are many other instances of domestic courts using, applying or referring to the CRC.

For example, in *C v. S*, a case involving custody of a child, Randerson J in the Court of Appeal used the CRC explicitly as an interpretive guide to determine domestic legislative provisions of the CCA 2004.¹⁷ Randerson J specifically reviewed the CRC's principles with regard to the child's right to express his or her view and have that view taken into consideration.¹⁸ He opined that sections 6 and 7 of the CCA 2004 (regarding the right of the child to express views) give effect to the equivalent articles in the CRC.

Similarly in *Ye v. Minister of Immigration*¹⁹ the Supreme Court discussed the CRC when determining whether a removal order was appropriate where the adults subject to the removal order had children who were citizens of New Zealand. Tipping J, delivering the majority judgment, found that it was appropriate to interpret provisions of the Immigration Act 2009 in light of New Zealand's obligations under the CRC. Tipping J firmly emphasised, however, that under the CRC, the best interests of the child were

¹² 'Public Health Conference, Achieving Equity: Our Children's Right to Opportunity', available at: <http://www.justice.govt.nz/courts/familycourt/documents/publications/speeches/Speech%20for%20Public%20Health%20Conference%20-%20Wednesday%205%20September%20-%20FINAL.pdf>.

¹³ *Tavita v. Minister of Immigration* [1994] 2 NZLR 257.

¹⁴ *LP v. Chief Executive, Department of Child, Youth and Family Services HC Auckland* [2001] NZHC 601; 2001 NZFLR 721.

¹⁵ See *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) and *Birkenfeld v. Yachting New Zealand Inc* [2007] 1 NZLR 596.

¹⁶ See *Attorney General v. Chapman* [2012] 1 NZLR 462 and *Mist v. R* [2006] 3 NZLR 145.

¹⁷ *C v. S* [2006] 3 NZLR 420 at [26].

¹⁸ *Ibid.*, at [27].

¹⁹ *Ye v. Ministry of Immigration* [2010] 1 NZLR 104.

only a primary consideration. In contrast section 4 of the CCA 2004 provides that the best interests of the child are *the* paramount consideration. Thus, it is noteworthy that the Government in enacting domestic legislation like the CCA 2004 has elevated the importance of the best interests of the child beyond its obligations under the CRC.²⁰

It is not only the appellate courts that have considered the role of international law in determining domestic proceedings involving the rights of the child. The Family Court has on numerous occasions affirmed the relevance of the CRC in cases involving custody disputes and adoption.²¹

Further examples include:

- The Youth Court referring to Article 4 of the CRC (implementation) in the case of *Police v. JLBHM*;²²
- The Court of Appeal referring to Articles 3, 8, 16, 19, 32 and 36 of the CRC in *Hosking & Hosking v. Runting and Pacific Magazines Ltd*²³ in relation to clarifying a child's right to privacy in New Zealand; and
- The Supreme Court applying the Convention on the Civil Aspects of International Child Abduction in *Secretary for Justice v. H J*.²⁴

II. What is the legal status of the child?²⁵

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Yes. The courts will hear proceedings involving violations of children's rights. Family Court proceedings may be brought concerning issues such as parenting, guardianship or child protection, whereas public law proceedings, such as High Court judicial review or declaratory judgment proceedings, may be brought to challenge administrative decisions or policies (see part III.A below).

The CCA 2004 and the CYPFA 1989 are the primary pieces of legislation which have been enacted for the purpose of upholding the rights of the child and provide the process for proceedings to be brought to court to ensure the rights of the child are maintained. The CCA 2004 provides for private proceedings to be brought as between, for example, family members, guardians or other associates of the child. The purpose of the CYPFA 1989 on the other hand is to provide for State or community intervention where the safety or welfare of the child is threatened.

There are numerous other pieces of legislation such as the Immigration Act 2009 and the Adoption Act 1955 which have specific provisions to ensure the rights and welfare

²⁰ The CYPFA 1989 is another example, which stipulates that the best interests of the child are to be the first and paramount consideration in the exercise of all powers under the Act.

²¹ See: *CG v. SC* (2005) 24 FRNZ 502 (FAMC); *Mirko v. Harvey* [1999] NZFLR 439 (FAMC) and *Re T* (1999) 19 FRNZ 11 (FAMC).

²² [2012] NZYC 5 (26 June 2012).

²³ (2005) INZLR 1; (2004) 7 HRNZ 301.

²⁴ [2006] NZSC 97.

²⁵ It is worth noting that the legal definition of "child" varies depending upon the legal context in which the child is being viewed (e.g., Children, Young Persons and Their Families Act 1989 – "child" means under 14 years, and "young person" means of or over 14 but under 17 years; Care of Children Act 2004 – age 18 and under; Domestic Violence Act 1995 – under 17, but not including a person who is or has been married or in a civil union or a de facto relationship).

of the child are considered; as stated above, these acts must be interpreted with regard to New Zealand's obligations under the CRC.

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

A minor (under 18 years of age in New Zealand)²⁶ can bring, continue or defend any court proceedings.²⁷ Generally, they require a "litigation guardian" to instigate proceedings.²⁸

Rule 90(2) of the Family Court Rules requires that a minor aged under 18 must be represented by a litigation guardian or next friend in Family Court proceedings, but for exceptions listed in Rules 90(2) and 90A. In particular, Rule 90A provides that the court or Registrar may, on an application from a minor, make an order allowing the minor to take part in proceedings without a next friend or litigation guardian if it is satisfied that the minor is capable of making the decisions required or likely to be required in the proceedings, and no reason exists that would make it in the interests of the minor to be represented by a next friend or litigation guardian.

If a child wishes to appeal a decision of the Family Court, a litigation guardian must be appointed by the High Court unless the High Court orders otherwise.²⁹ The exception to this rule is if an enactment explicitly requires, permits or authorises a child to bring a proceeding themselves without the assistance of a litigation guardian.³⁰

Cases seeking a review of a guardian's decision or refusal to give consent can be brought by a child if the child is over 16 years of age.³¹

C. In the case of infants and young children, how would cases typically be brought?

See part II.B above.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

If a lawyer is appointed for the child, it is solely at the discretion of the court to decide whether or not the court fees will be paid by the applicant.³² In circumstances where a lawyer is appointed by a court under section 7 of the CCA 2004, the fees of that lawyer

²⁶ See definition of "minor" at r 1.3 of the High Court Rules. This is different to cases involving sexual contact with a minor. In those cases, a child is deemed to be a minor if they are younger than 16 years of age.

²⁷ S. 158 Family Proceedings Act, 1980, available at: http://www.nzlii.org/nz/legis/hist_act/fpa19801980n94212/.

²⁸ See r. 4.35 High Court Rules.

²⁹ R. 4.31 High Court Rules; s. 27 CCA 2004.

³⁰ R. 4.31(2) High Court Rules.

³¹ See s. 46 CCA 2004, available at: http://www.nzlii.org/nz/legis/hist_act/coca20042004n90155/.

³² S. 6 High Court Fees Regulations, 2001, available at: http://www.nzlii.org/nz/legis/consol_reg/hcfr2001261/; s. 186(2) Family Proceedings Act, 1980, available at: http://www.nzlii.org/nz/legis/hist_act/fpa19801980n94212/.

are usually paid for by the State, unless the judge orders one of the parties (usually the parents) to contribute to the lawyers' fees.³³

The court appoints lawyers to represent children as a matter of course in Care and Protection and Youth Justice proceedings under Part 2 and Part 4 of the CYPFA 1989 respectively.³⁴ The costs of these lawyers are met by the court and there are no repayment requirements.

Alternatively, representatives may receive financial assistance if they are eligible for legal aid, or if someone is prepared to fund their work on a pro bono basis. An application for legal aid in respect of a civil matter for a person who is aged under 16 must be made by someone of full age,³⁵ and someone who is either the person's parent,³⁶ guardian or has the role of providing the day-to-day care for, or custody of, the person.³⁶ The application must be accompanied by an undertaking by the applicant that he or she will pay any repayment required under the grant. Where proceedings are brought or defended by a litigation guardian,³⁷ any application for legal aid must be brought by the litigation guardian.

A minor aged 16 or over may apply for legal aid in his or her own right, and will be personally liable for any repayment required and for any costs ordered by the court.³⁸ There are, however, grounds under the Legal Services Act where repayment may be waived, for example, due to serious hardship or where it would be just and equitable.³⁹ There are also certain specified proceedings where conditions concerning repayment requirements do not apply.⁴⁰

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g. would a child's parents or guardian have to agree to a case being brought)?

Yes, there are certain orders under both the CCA 2004 and the CYPFA 1989 that a child cannot apply for, even with the assistance of a litigation guardian. Whether a child is or is not able to bring proceedings seeking a particular order will depend on the enactment under which the order is sought and the type of order.

III. How can children's rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

The type of legal challenge will depend on the type of violation and the person or body which caused the violation.

³³ S. 131 CCA 2004.

³⁴ See ss. 159 and 323 of the CYPFA 1989.

³⁵ S. 15(2) Legal Services Act 2011.

³⁶ Regulation 16 Legal Services Regulations 2011.

³⁷ S. 15(3) Legal Services Act 2011.

³⁸ Ibid., s. 15(1).

³⁹ Ibid., s. 42.

⁴⁰ Ibid., s. 18(7).

Any decision of a public nature which allegedly violates the rights of a child may be scrutinised by the courts by way of judicial review. Where judicial review of a decision is successful, the usual remedy is that the decision is quashed or amended and the decision maker will have to reformulate the decision to ensure no further violations occur.⁴¹

Where there has been a breach of a right guaranteed in the New Zealand Bill of Rights Act 1990 (NZBORA 1990), a claimant, including a child claimant, can bring a claim for compensation as a public law remedy for unjustified breach of any of the rights in the NZBORA 1990.⁴² Proceedings involving remedies for a breach of the NZBORA 1990 will be brought in the High Court, so a child complainant must be represented by a litigation guardian unless the Court orders otherwise.⁴³

Complaints about violations of children's rights can also be made to the Human Rights Commission or the Office of the Children's Commissioner, which both have investigative and monitoring roles.⁴⁴ The Office of the Children's Commissioner receives complaints about child, youth and family through its Child Rights Line.⁴⁵ The Child Rights Line provides advice and support for making formal complaints and referrals to other agencies. The Human Rights Commission can receive and consider complaints about discrimination and broader human rights issues, and facilitate mediation to resolve the issue.⁴⁶

Where the matter cannot be resolved through mediation, a complainant can seek a binding decision from and enforced by the Human Rights Review Tribunal, which has been established to hear proceedings involving breaches of the Human Rights Act 1993 (HRA 1993).⁴⁷ If a party is dissatisfied with the decision of the Tribunal, an appeal may be made to the High Court.⁴⁸

Complaints about breaches of the NZBORA 1990 and HRA 1993 may be made against any person, the Government and any public authority.

A child, a representative of the child or an officer of a Government department may apply to the Family Court under either the CCA 2004 or the CYPFA 1989, depending on the circumstances and the parties involved, to protect the rights, welfare and best interests of a child. Such cases must concern the Family Court's guardianship and child protection jurisdiction.

⁴¹ See for example *Horlor v. District Court at Christchurch* Christchurch CIV-2009-409-2499, 12 March 2010.

⁴² See *Simpson v. Attorney General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

⁴³ R. 4.31 High Court Rules.

⁴⁴ The functions and responsibilities of both entities are set out in their respective legislation (for the Human Rights Commission; the Human Rights Act 1993, and for the Office of the Children's Commissioner, the Children's Commissioner Act 2003). See *Third and fourth periodic reports of New Zealand to the UN Committee on the Rights of the Child*, paras 62-68.

⁴⁵ Office of the Children's Commissioner, 'Annual report 2013', available at: <http://www.occ.org.nz/assets/Uploads/Corporate-docs/FINAL-web-ANNUAL-REPORT.pdf>

⁴⁶ Human Rights Commission, 'What can I complain about?', available at: <http://www.hrc.co.nz/enquiries-and-complaints-guide/what-can-i-complain-about/>.

⁴⁷ S. 93 HRA 1993.

⁴⁸ *Ibid.*, s. 123.

Where a person believes that a child is being or is likely to be harmed, he or she can go to either the police or a social worker,⁴⁹ or make a report directly to Child Youth and Family, the government agency responsible for protecting children from abuse and neglect.⁵⁰ Following investigation the Care and Protection Coordinator or Youth Justice Coordinator⁵¹ at Child Youth and Family may then convene a family group conference to discuss the matter.⁵² If the situation presents a risk of serious harm, abuse or neglect, a safety warrant may be granted to uplift the child.⁵³ Where the situation is critical a search and uplift may occur without a warrant;⁵⁴ in such cases, the Family Court can issue a care and protection declaration without a family group conference having occurred.⁵⁵

B. What powers would Courts have to review these violations, and what remedies could they offer?

The higher courts of New Zealand, i.e., the High Court, the Court of Appeal and the Supreme Court, have wide powers of review. The High Court has the power to grant any relief it deems appropriate, including, but not limited to, writs and/or setting aside the impugned decision.⁵⁶

With respect to the NZBORA 1990, “effective and appropriate remedies” are available for breaches of the Act. The range of remedies that the courts have awarded or considered include:

- excluding 'tainted' evidence from a proceeding;
- issuing a stay of proceedings;
- awarding monetary compensation;
- remitting a decision to the original decision-maker for reconsideration;
- reducing the sentence of an offender;
- issuing an injunction requiring positive action, or an order for return of property;
- declaring that an action of a public body is inconsistent with the NZBORA 1990; and
- making a formal declaration of inconsistency between the NZBORA 1990 and a particular statute. However, the courts are not empowered to override legislation that is inconsistent with the NZBORA.⁵⁷

The Human Rights Review Tribunal can issue a number of remedies to complainants for breaches of the HRA 1993, including:

⁴⁹ See s. 15 of CYPFA 1989.

⁵⁰ See <http://www.cyf.govt.nz/>.

⁵¹ S. 18 CYPFA 1989.

⁵² Ibid., ss. 18-20.

⁵³ Ibid., s. 39.

⁵⁴ Ibid., s. 42.

⁵⁵ Ibid., s. 70(2).

⁵⁶ For more information, see Courts of New Zealand, ‘How cases come to the High Court’, available at: <http://www.courtsofnz.govt.nz/about/high/cases-to-court>; Courts of New Zealand, ‘The structure of the court system’, available at: <http://www.courtsofnz.govt.nz/about/system/structure/overview>; s. 4 Judicature Amendment Act, 1972, available at: http://www.nzlii.org/nz/legis/consol_act/jaa1972203/; and s. 16 Judicature Act, 1908, available at: http://www.nzlii.org/nz/legis/consol_act/ja1908123/.

⁵⁷ Ministry of Justice, ‘Part IV Remedies under the Bill of Rights Act’, available at: <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/part-iv-remedies-under-the-bill-of-rights-act>.

- a declaration that a breach of the HRA 1993 has occurred;
- an order requiring the defendant to act or cease to act in a certain way;
- damages; and
- a declaration that a piece of legislation is inconsistent with the NZBORA 1990 (and, therefore, a breach of Part 1A of the HRA 1993). Where a declaration of inconsistency is made, the Government is required to prepare a report to Parliament setting out what it intends to do in response to the declaration.⁵⁸

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Ordinarily, children need to be identified to bring an action. However, it is possible for one or more people or an organisation to sue on behalf of a group or class of people (see parts III.D and E below). In such cases, at least one victim or the organisation will be named in the proceeding as the party; there is no requirement that all persons who may receive the benefit of the court order be named as parties in the proceeding.

Minors who bring proceedings by way of a litigation guardian generally have their name prevented from publication. In addition, all Family Court and Youth Court proceedings are closed and names of children prevented from publication.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

In New Zealand it is possible for one or more people or an organisation to sue on behalf of a group of people with the same interest in the subject matter of a proceeding provided that the person with the same interest has given consent and an application has been made to the court by the intending party to the proceeding.⁵⁹

Under the HRA 1993 there are powers for the Director of Human Rights Proceedings to represent a class of people before the Human Rights Tribunal who have been similarly aggrieved.⁶⁰

A recent decision of the High Court also confirms that NGOs or public interest groups may have standing to bring human rights proceedings on behalf of a class of people (see part III.E below).

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

It is possible that an NGO may have standing to bring a claim involving a violation of children's rights, including a class action claim. For example, in the case of *CPAG v. Attorney General*,⁶¹ although the case was ultimately unsuccessful, the High Court affirmed the right of Child Poverty Action Group (CPAG), a non-profit group, to bring proceedings in its own name in the interests of 250,000 children whose parents were excluded from the In Work Tax Credit. This allowed the case to be heard and determined without an individual beneficiary having to come forward and prove they

⁵⁸ S. 92I HRA 1993; see also *Ibid*.

⁵⁹ R. 4.24 High Court Rules.

⁶⁰ Ss. 90 and 92B HRA 1993.

⁶¹ [2013] NZCA 402, available at: <http://www.nzlii.org/nz/cases/NZCA/2013/402.html>.

were the subject of discrimination. According to CPAG, this decision “has been of critical importance to the future ability of public interest groups to challenge a government policy, omission or law under Part 1A of the Human Rights Act which discriminates against vulnerable groups of persons, on their behalf”.⁶²

Under the CYPFA 1989 any Iwi Social Service, Cultural Social Service, or Child and Family Support Service (all of which may also be non-governmental organisations (NGOs)) may apply for a variation to or discharge of an order for the care and protection of a child. To qualify as one of these services the organisation must be an incorporated body and apply to the chief executive of the Ministry of Social Development approval.⁶³

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Most civil and criminal actions commence in the District Court. District Courts have the power to hear civil claims involving amounts up to \$200,000.⁶⁴ Civil cases involving amounts greater than \$200,000 must be heard in the High Court.⁶⁵ To initiate a civil proceeding in the District Court, the applicant will have to complete, file and serve on the other parties a Notice of Claim.

District Courts generally hear minor criminal offences, but can also hear criminal trials for some serious offences, such as rape.⁶⁶ Criminal proceedings in the District Court may be commenced in a number of ways under the Criminal Disclosure Act 2008 by the police or Crown Prosecutor.⁶⁷

The Youth Court, a division of the District Court, deals with criminal offending by children aged 14, 15 and 16 years. In cases of very serious offending, the Youth Court also has certain powers to deal with young people aged 10 to 13.⁶⁸ Recent amendments to the CYPFA 1989 mean that unless a young person elects trial by jury, all criminal cases – but for murder/manslaughter and some specified infringement offences – are proceeded with and determined in the Youth Court. If a Youth Court finds the charge proven (either by plea or by way of trial) they may enter a conviction and transfer the young person for sentencing in the District Court.⁶⁹

⁶² See Child Poverty Action Group, ‘CPAG vs Attorney General: what did we gain?’, available at:

<http://www.cpag.org.nz/resources-publications/cpag-in-the-court-of-appeal-3/>.

⁶³ S. 396 CYPFA 1989.

⁶⁴ Community Law, ‘Structure of the court system’, available at:

<http://www.communitylaw.org.nz/community-law-manual/chapter-1-new-zealand-legal-system-new/structure-of-the-court-system/>.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ S. 9 Criminal Disclosure Act 2008.

⁶⁸ The Youth Court can deal with 12 and 13 year olds who have been charged with a very serious crime; 10 and 11 year olds may only be criminally charged with murder or manslaughter. These cases are heard in the High Court, although pre-trial stages occur in the Youth Court.

⁶⁹ S. 283(o) CYPFA 1989. These transfers only occur in very serious cases and have been falling in frequency in recent years.

Family Courts, which are a division of the District Court, have jurisdiction over a wide range of family law matters, including:

- care of children, custody and guardianship orders, and restraining orders;⁷⁰
- adoption;
- domestic violence;
- abuse or neglect of children;
- disputes about wills and estates;
- applications for the compulsory assessment and treatment of people with mental illness; and
- the personal care or affairs of people who have become mentally incapacitated by age or illness.⁷¹

The Family Court has joint jurisdiction with the High Court over certain proceedings including applications for guardianship of the Court,⁷² and with the District Court for applications for warrants to enforce court orders,⁷³ and for applications made under the Hague Convention.⁷⁴ A District Court may, however, preside over proceedings where the matter is urgent and it is impracticable for it to be determined as a matter of urgency in a Family Court.⁷⁵ The Family Court does not have jurisdiction over criminal proceedings.⁷⁶ To initiate a proceeding in the Family Court an application must be filed with the Court together with any supporting documents (such as an information sheet or affidavit). If the application is on notice and involves other parties these documents must be served on those other parties.⁷⁷

It is also possible to transfer Family Court proceedings to the High Court if the Family Court is satisfied that because of the complexity of the proceedings or of any question in the proceedings the matter would be better dealt with by the High Court. The High Court will then have the same power to adjudicate on the proceedings as the Family Court had.⁷⁸ Any question of law that has arisen in the Family Court proceedings may also be put to the High Court for opinion, without having to transfer the whole of the proceedings.⁷⁹

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood

⁷⁰ S. 150 CYPFA 1989.

⁷¹ Generally, the Family Court has jurisdiction over proceedings arising under or by virtue of any of the provisions of the: Marriage Act 1955, Adoption Act 1955, CCA 2004, Domestic Actions Act 1975, Property (Relationships) Act 1976, Family Proceedings Act 1980, Child Support Act 1991, CYPFA 1989, Law Reform (Testamentary Promises) Act 1949, Family Protection Act 1955, Civil Union Act 2004 and Wills Act 2007: S. 11 Family Courts Act 1980. See also Community Law.

⁷² S. 30 CCA 2004.

⁷³ Ibid., ss. 72, 73 and 125.

⁷⁴ Ibid., s. 101.

⁷⁵ S. 151 CYPFA 1989.

⁷⁶ S. 125 (1)(a) CCA 2004. It does have jurisdiction to deal with criminal offending by children aged 10 to 13, other than murder and manslaughter – these proceedings are child protection proceedings under Part 2 of CYPFA (see ss. 14(1)(e) and 83-85).

⁷⁷ Part 2 Family Courts Rules 2002.

⁷⁸ S. 14 Family Courts Act 1980.

⁷⁹ Ibid., s. 13.

of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

It is possible to receive legal aid in family proceedings.⁸⁰ The legal aid may be free or subject to repayments depending on the applicant's circumstances.

The decision whether to grant legal aid rests with the Legal Services Commissioner at the Ministry of Justice using criteria established under the Legal Services Act 2011. The primary consideration for a grant of legal aid is the level of income and disposable capital of the applicant.⁸¹ The merits of the case will also be considered and aid will be refused where the applicant cannot show reasonable grounds for taking or defending the proceedings, the applicant has little prospect of success, or if the cost of the legal proceedings would exceed the potential award to the applicant. Legal aid may also be refused on broad grounds if it is unreasonable or undesirable in the particular circumstances of the case.⁸²

Specifically, with regard to family proceedings, including those relating to proceedings under the CCA 2004 and CYPFA 1989,⁸³ the Legal Services Act 2011 states that in respect of any original proceeding the Commissioner may refuse legal aid if it is not justified. To assess whether legal aid is "justified", the Commissioner must have regard to:⁸⁴

- (a) any previous proceedings to which the application relates;
- (b) any orders or issues relating to personal protection;
- (c) the interests and welfare of any other person who may be affected by the outcome of the proceedings;
- (d) whether there are any complex factual, legal or evidential matters that require the determination of the Court; and
- (e) whether it is in the public interest that legal aid be granted.

The Legal Services Act also makes special provisions for minors. A minor aged 16 or over may apply for legal aid in respect of a civil matter in his or her own right but will be personally liable for any repayment required. However, an application for legal aid by a person under 16 years old must be made by a person of full capacity (e.g. a parent or guardian)⁸⁵ or by the litigation guardian.

Legal aid is usually granted on the condition that the applicant repays some of the grant according to repayment schedules contained in the regulations prescribed under the Act.⁸⁶

Legal aid is a current area of reform. The Ministry of Justice of New Zealand has stated that "the government is proposing law changes which would restrict eligibility for

⁸⁰ S. 7(1)(a) Legal Services Act 2011.

⁸¹ *Ibid.*, s. 10(2).

⁸² *Ibid.*, s. 10; ss. 5 and 6 Legal Services Regulations 2011.

⁸³ Sch 2 Legal Services Act 2011.

⁸⁴ *Ibid.*, s. 10.

⁸⁵ *Ibid.*, s. 15.

⁸⁶ See s. 10 Legal Services Regulations 2011; rr. 11 and 12 Legal Services Regulations 2011.

family legal aid in some circumstances. It is also proposing to introduce a user charge for some family legal aid cases”.⁸⁷

With respect to court fees, it is solely at the discretion of the Registrar of the concerned court to decide whether or not the court fees will be paid by the applicant. Applicants can seek a waiver if they receive government benefits or would face financial hardship.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

It is possible. However, it is at the sole discretion of any law firm as to whether they will accept work on a pro bono basis.⁸⁸ In New Zealand lawyers are able to accept instructions on the basis that some or all of the lawyer's fees and expenses for legal services rendered are payable only if the outcome of the matter is successful.⁸⁹

Free legal advice can also be sought from community law centres and organisations like the Citizens Advice Bureau. Links to these services and some information on private firm pro bono work are available at:

- <http://www.communitylaw.org.nz/>; and
- <http://www.cab.org.nz/Pages/home.aspx>.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The Limitation Act 2010 applies limitation periods to civil claims only. For example, a child bringing a claim against a trustee of an estate that the child has a beneficial interest in would need to bring the claim within a certain period from the date of the alleged infraction. If the alleged infraction occurred while the child was younger than 18 years of age, the limitation period would not start until that child is 18 years old.⁹⁰

Civil pecuniary penalties may be sought:

- (a) within six years of the act or omission (the primary period); or
- (b) within three years of the date on which the claimant knew, or ought to have known of, the act/omission, but no later than 15 years after the date of the act or omission (a longstop period). The longstop period does not apply if the claimant can show lack of knowledge by reason of the defendant's fraud.

⁸⁷ Legal Aid for people involved in family disputes, Ministry of Justice, New Zealand, available at: <http://www.justice.govt.nz/services/legal-help/legal-aid/family/legal-aid-for-people-involved-in-family-disputes>.

⁸⁸ There is a developing culture of pro bono in New Zealand with major firms such as Chapman Tripp, Simpson Grierson and DLA Piper making a significant contribution. See further at: <http://www.lawforchange.co.nz/wp-content/uploads/2013/07/Pro-Bono-Law-Talk-1.pdf> However, we have been informed by Chapman Tripp that in their experience there is not a strong culture of family law practitioners providing assistance on a pro bono basis.

⁸⁹ Ss. 333-335 Lawyers and Conveyancers Act 2006.

⁹⁰ S. 44 Limitation Act 2010.

In relation to criminal charges, previously the position was that charges had to be laid within a 10 year limitation period from the date of the alleged offence. However, as of 1 July 2013 the limitation period has been revoked and there is now no general limitation period under the Crimes Act 1961.

Section 25 of the Criminal Procedure Act 2011 sets out specific limitation periods for different categories of offences, tiered based on the severity of the offence (determined by sentence term of the relevant charge). On the face of it, children do not have any preferential rights to extend time limits in those limitation periods under the Criminal Procedure Act. The specific offences and categories are outlined in the Criminal Procedures Act, which provides that a charging document must be filed:⁹¹

- (a) at any time in respect of a category 4 offence (e.g., murder)⁹² or a category 3 offence where the term of imprisonment exceeds three years;
- (b) within 5 years after the date on which the offence was committed if the penalty for the offence includes a term of imprisonment not exceeding three years; or
- (c) within 6 months after the date the offence was committed if the offence is category 1 (i.e., an offence not punishable by a term of imprisonment) or category 2 (i.e., where the offence is punishable by a term of imprisonment less than 2 years, or the offence can be served by a community based sentence).⁹³

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Where a child is a complainant in a criminal proceeding, the prosecution must apply to the court for direction with respect to the manner in which the complainant is to give evidence and be cross-examined. The judge must pay regard to the need to: (i) ensure the fairness of the proceeding, (ii) minimise stress to the child, and (iii) promote the recovery of the complainant from the alleged offence.⁹⁴ By way of example, the court may order that cross-examination of the child occurs outside of the courtroom and be provided as evidence by way of video record.⁹⁵

The Court of Appeal has stated that, with a child complainant, evidence will normally be given by way of video record unless exceptional circumstances apply.⁹⁶ While this approach used to be limited to sexual offence cases, this now applies to all cases involving a child complainant. The High Court has determined that “unless there are exceptional circumstances the normal situation will be that the evidence in chief will be given by playing the video interview where one exists”. With regard to cross-examination of the child complainant, the High Court has stated that “in most cases the fact that initial evidence has been by way of video record will mean that cross-examination should also take place with the witness outside the Courtroom”.⁹⁷

⁹¹ S. 25 Criminal Procedure Act 2011.

⁹² See *Ibid.*, Sched 1.

⁹³ For further information on Offence Categories and types of trial, see:

<http://www.justice.govt.nz/services/information-for-legal-professionals/criminal-court-processes/offence-categories-and-types-of-trial>

⁹⁴ S. 107 Evidence Act 2006.

⁹⁵ See *Ibid.*, ss. 103 and 105(1)(a).

⁹⁶ *R v. M (CA590/09)* [2009] NZCA 455.

⁹⁷ *R v. Faatafa* HC Auckland CRI-2009-004-8563, 7 May 2010 at [17]-[18].

With respect to very young children, the Evidence Regulations 2007 provide guidelines for warning or informing juries about very young children's evidence. The judge may direct the jury on how to assess evidence of children under the age of 6 years.⁹⁸

A critical feature of Family Court proceedings is that a child must be given a reasonable opportunity to express views on matters affecting them and these views must be taken into account.⁹⁹ These provisions reflect Article 12 of the CRC. In order to fulfil this obligation, a Family Court judge can appoint a lawyer for a child if he/she has concerns for the safety or wellbeing of a child involved in a care of children dispute. The Court *must* appoint a lawyer for the child in care and protection cases involving Child, Youth and Family Services under the CYPFA 1989.¹⁰⁰ The appointed lawyer has a duty to explain the court process to the child in a way they can understand; represent the child in the court process, and in any negotiations between the parents or other parties, if there is a dispute about care arrangements for the child; make sure the child's views and all issues relevant to the child's welfare and best interests are explained to the court; and explain the judge's decision to the child and discuss with them how it will affect them.¹⁰¹

The Evidence Amendment Bill 2015 introduces a statutory presumption that a child witness will give evidence in alternative ways. It broadens the means through which child witnesses can give evidence, provides for a support person, and restricts cross-examination of child witnesses in criminal and civil proceedings involving domestic violence or harassment.¹⁰²

Privacy

Special provisions exist to protect the privacy of children involved in court proceedings. Hearings in the Youth Court are not open to the public. Identifying details, such as the name of the child and their parents, cannot be reported in the media. Reporters can be present but are not allowed to publish a report of the case except with the Youth Court's permission.¹⁰³ The publication of Family Court proceedings are restricted where the publication contains identifying information relating to a person under 18 involved in the proceedings.¹⁰⁴ In cases where the child is not the applicant but the child is still involved in the proceeding in some way, the child's identifying information, including name, will be restricted from publication. The same principle applies to identifying information of other involved parties, such as a parent, guardian or relative, if that information is likely to lead to the identification of the child.¹⁰⁵

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

⁹⁸ R. 49 Evidence Regulations.

⁹⁹ S. 6 CCA 2004.

¹⁰⁰ Ministry of Justice, 'Lawyer for the child', 2014, available at:

<http://www.justice.govt.nz/family-justice/about-us/documents/publications/brochure-and-pamphlets/pdf/moj0601-lawyer-for-the-child.pdf>.

¹⁰¹ Ibid.

¹⁰² See

<http://www.parliament.nz/en-nz/pb/legislation/bills/digests/51PLLaw22181/evidence-amendment-bill-2015-bills-digest-no-2218>.

¹⁰³ S. 438 CYPFA 1989; see also Community Law.

¹⁰⁴ S. 11B Family Courts Act 1980.

¹⁰⁵ Ibid., s. 11C.

This is entirely dependent on the circumstances of each case and on what is sought by an applicant. There is scope for particular pressing or urgent matters to be given priority, though the thresholds are understandably higher. The length of any proceeding will also be affected by the complexity of legal issues, if any, and whether the facts are in dispute.

In June 2013 a new web based initiative called ‘eDuty’ was launched across the country which allowed urgent applications to be filed on a secure website which Family Court judges can access and decide on. Guidelines indicate that decisions filed on eDuty should be made within an hour of the application being filed.¹⁰⁶

G. Appeal. What are the possibilities for appealing a decision to a higher court?

Decisions of the District Court in civil and criminal cases can be appealed to the High Court, then the Court of Appeal, then the Supreme Court. The Supreme Court is New Zealand’s final court of appeal. Appeals to the Supreme Court can be heard only with the leave of the Supreme Court. To give leave to appeal, the Court must be satisfied that it is necessary in the interests of justice for the Court to hear and decide the appeal.¹⁰⁷

If a party is dissatisfied with a Family Court decision then it may seek to alter it by: (i) an appeal by way of rehearing to the High Court; or (ii) an application for rehearing by the Family Court. A “rehearing” in the High Court is not a retrial; rather the Court will review the process and evidence that was before the Family Court in the first instance and determine whether the judgment of the Court was correct. A decision of the High Court may then be appealed to the Court of Appeal if leave is given by the Court of Appeal.¹⁰⁸ Finally, a decision of the Court of Appeal may be appealed to the Supreme Court with leave from the Supreme Court. A “rehearing” in the Family Court is effectively a new trial but a rehearing will only be granted if there is found to have been a miscarriage of justice in the original proceeding.¹⁰⁹

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

A court will usually be mindful of concerns of precedent or policy implications of its decisions. Where decisions are made and those considerations are particularly topical or contentious, leave to appeal may be more likely to be granted so that a higher court may make a more determinative ruling on those points.

The long-term impacts of a negative decision will depend on the circumstances of the proceedings and the degree to which the decision is of public interest and importance. Public interest and importance will also drive whether there is any political backlash regarding the decision.

We are not aware of any instance where Parliament has moved to pass laws as a result of a positive decision involving the rights of a child. However, the New Zealand

¹⁰⁶ For further information on eDuty, see: <http://www.nzfvc.org.nz/?q=node/1339>.

¹⁰⁷ See Community Law.

¹⁰⁸ S. 174(5) Family Proceedings Act 1980.

¹⁰⁹ S. 109 Family Court Rules.

Parliament has in the past legislated on issues of public importance contrary to the decision of a Court.¹¹⁰

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

New Zealand judgments are generally well enforced through an efficient and operative domestic court system.

V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

The following national laws may be relevant:

- Adoption Act 1955;
- Adoption (Intercountry) Act 1997;
- Adult Adoption Information Act 1985;
- Births Deaths and Marriages Registration Act 1966;
- Care of Children Act 2004;
- Children's Commissioner Act 2003;
- Children, Young Persons and Their Families Act 1989;
- Child Support Act 1991;
- Criminal Procedure Act 2011;
- Domestic Violence Act;
- Education Act 1989;
- Evidence Act 2006;
- Family Proceedings Act 1980;
- Family Courts Act 1989;
- Family Court Rules 2002;
- Human Rights Act 1993;
- Legal Services Regulations 2011;
- New Zealand Bill of Rights Act 1990;
- Status of Children Act 1969; and
- Vulnerable Children Act 2014.

Currently children and their families do not have access to an external review of decisions made by the schools they attend. If a child or family disagrees with the decision of a school Board of Trustees that cannot be resolved voluntarily between the parties, they need to challenge the decision through the High Court or complain to the Ombudsman. The Office of the Children's Commissioner believes that this is a gap, and

¹¹⁰ Cf New Zealand Public Health and Disability Amendment Bill (No 2) 2013 which mandates that the family members of disabled people will not be paid for the care they provide to those people. The drafting of this Bill followed the decision in *Ministry of Health v. Atkinson* [2012] 3 NZLR 456 (CA) which dismissed the Ministry of Health's appeal of a proceeding initiated in Human Rights Review Tribunal where family members of disabled people had successfully argued that the Ministry's policy of not paying family member for providing disability support services was discriminatory and not a justified limit in relation to s. 19 NZBORA 1990.

New Zealand needs an independent, local disputes resolution process for school complaints to ensure children's access to education.¹¹¹

This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹¹¹ For more information on the school Boards of Trustees system, see Cathy Wylie, 'School governance in New Zealand – how is it working?', 2007, available at: <http://www.nzcer.org.nz/system/files/15252.pdf>.