



**National Council of
Women of New Zealand**

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**Submission to Justice and Electoral Select Committee
on the Care of Children Bill**

The National Council of Women of New Zealand (NCWNZ) is an umbrella organization representing 42 nationally organized societies. It has 34 branches spread throughout the country to which women of some 150 societies are affiliated. Its purpose is to work for the well-being of women, families and society through research discussion and action.

This submission follows from a lengthy submission made by the National Council of Women of New Zealand (NCWNZ) on the Discussion Document released in 2000 on the *Responsibilities for Children, Especially when Parents Part: The Laws about Guardianship, Custody and Access*. In it we shared the Government's view that current law governing guardianship, custody, access, including Family Court procedures and laws relating to the status of children, are in need of reform. In the mean time, another three years have passed, making the need for reform even more urgent.

This submission has been prepared by the members of the Family Affairs Standing Committee of NCWNZ and draws on responses from 23 branches and 5 nationally organized societies, as well as several individual members.

1 NCWNZ VIEWS ON THE MAIN CHANGES CONTAINED IN THE BILL

Members were asked to respond to a range of issues covering the main changes contained in the Bill. Their views are set out under the following headings:

1.1 Establishment of 'welfare and best interests of the child' as the paramount principle

There is unanimous support for strengthening this principle, and indeed it reflects specific NCWNZ policy. One of the national societies affiliated to NCWNZ, the Society for the Protection of the Unborn Child, raised the issue in relation to the status of children *before birth*, citing the United Nations Convention of the Rights of the Child (UNCROC) preamble which makes specific reference to the vulnerability of children who, "by reason of [their] physical and mental immaturity, need special safeguards and care, including appropriate legal protection, *before as well as after birth*" (paragraph 9 of the Preamble).

1.2 Children will be able to express a view on matters that affect them and these views will be taken into account

There is strong support for the notion that children's views must be taken into account, although most noted that the age and maturity of the child must also be given due regard. Most felt that young children especially are vulnerable to being influenced by bribes of gifts, emotional blackmail, and their inherent desire to say what they think adults want to hear.

Most agreed that children should have access to a Court appointed advocate, although some questioned whether a lawyer is necessarily the right sort of person. A distinction needs to be made between the need for legal advocacy and support, and therapeutic. Children should have the right to both services.



1.3 Custody and access orders are to be replaced by parenting orders

It was noted in our earlier submission that NCWNZ regarded the terminology used in the Act as outdated. The terms 'custody and access' imply possession and control emphasising parental rights rather than responsibilities. Most members accepted the new terminology of 'parenting orders' and contact, although some questioned whether the new terminology would actually result in a difference in legal effect.

1.4 Changes in guardianship laws such as termination, duties, powers, rights and responsibilities

Most members supported the changes proposed in regard to termination i.e. that 18 represents the age of maturity, or 16-18 for those who have entered into a de facto relationship with the parents' consent.

Some members expressed concern that children under 16 may access abortion services without their parents being informed. They considered this an infringement of their rights as parents, which inhibited their ability to carry out their responsibilities toward the care and protection of their daughters, sons, or grandchildren.

1.5 Eligibility for parenting orders to include a wider range of near relatives

NCWNZ acknowledges the diversity of family arrangements that exist for the care of children, especially across cultural divides. There was strong support for parenting orders to include a wider range of near relatives, especially grandparents, who are more commonly sharing in parenting responsibilities of their grandchildren, as their children pursue education, training, paid work, other activities which prevent their carrying out their parenting duties, or through substance abuse have become incapable of good parenting. Other near relatives may find themselves in a similar position.

The widening of the criteria to include grandparents brings into focus the need for these people (grandparents or other near relatives granted parenting orders) to be eligible for the same financial support that parents are awarded, including the child tax credits, WINZ subsidies etc. as should foster parents. We hope too, that the financial barriers facing grandparents seeking guardianship of a child will be removed, and that the best care of the child will be paramount, rather than the rights of a parent who is clearly incapable of carrying out that task.

There was some concern expressed regarding Clause 17(3) which provides that a father of a child is a guardian as long as he is living with the child's mother as a de facto partner at any time during the period beginning with the conception of the child and ending with the birth of the child. This clause is very broad and may adversely affect mothers with violent partners. Violent relationships are often unstable and making guardianship automatic even if there has only been a short time of a de facto partnership may put children and mothers at continued risk of further physical violence, continuing conflict and psychological abuse even though parents have not had a real relationship.

Similar concerns have been raised in relation to Clause 18 where guardianship is conferred if the particulars of the father are registered on the child's birth certificate. NCWNZ is aware of cases where women have been forced to agree to put their partner's name on the birth certificate because the partner wants to claim custody of the child, and receive a benefit in respect of that child. This suggests that consideration needs to be given to whether guardianship should be automatic just because a father is identified on the birth certificate.



Most members support the provisions for appointment of step-parents as guardians, but a minimum period of a relationship with the parent of the child should perhaps be required. The rationale behind this is that research has shown that second relationships are less likely to succeed. This is a situation in which the views of the child(ren) should certainly be taken into consideration. We support the other restrictions placed appointment of step-parents as guardians under Clause 22.

1.6 Restrictions on the publication of Family Court proceedings to be relaxed

Many members expressed reservations at the suggestion that restrictions on the publication of Family Court proceedings should be relaxed. Most referred to concern that the rights to privacy of the child and family may be threatened, even when names and other information leading to identification of those involved is withheld, especially in small towns and communities.

1.7 Recognition of the mother's same sex de facto partner as a legal parent or guardian

Most members were in support of extending recognition of de facto partners to include same-sex partners, although many lamented to decline of the traditional family, asserting that this provided the most stable environment in which to raise children. Several members questioned what the impact of the "new" family forms was having on children. Once again, decisions ought to be made in terms of the primary principle, what is in the best interests of the child. Some members expressed concern that the same-sex partner of the mother may be referred to as "the father of the child". We have welcomed the later announcement that this definition will not now proceed, and suggest that consideration be given to using "*parent*" or adding the words "*or same-sex partner*" as appropriate.

1.8 Provisions relating to the status of children conceived as a result of certain artificial human reproduction procedures

Most respondents asserted the child's right to know their genetic background, particularly for reasons concerning their health and welfare, but not all supported the suggestion that this necessarily involves identification of donors of gametes. Perhaps the rights of the child to information relating to their biological parents' identity must be made clear to potential donors before they consent to being donors. This would not automatically grant them guardianship or confer liability for child support.

2 GENERAL COMMENTS

2.1 Co-operative parenting

NCWNZ welcomes the encouragement of co-operative parenting contained in the Bill, emphasising the continued shared responsibility for the child, even after separation. Research into the impact on children of parental separation and of differing post-separation parenting arrangements has made it clear that continued contact and involvement between children and their non-custodial parent is very beneficial to children if the contact is of a positive nature.¹ Every effort must be made to support and encourage continued contact, including the active involvement of fathers in support and care for their children, in co-operation with the child's mother.

¹ Hall G. (1989) "The Welfare of the Child: A Literature Review", Policy and Research Division, Department of Justice.



2.2 Enforcement of parenting orders

NCWNZ welcomes the provisions contained in the Bill for enforcement of parenting orders, including monitoring of the arrangements put in place. This may reduce the need for repeated recourse to the Court to enforce orders which are being flouted. However, some concerns have been raised about how effective these provisions may be, especially in situations where a caregiver parent fears violence or abuse of themselves or their child, and so may be unfairly penalised for failure to comply with parenting orders when they were more concerned about keeping their child safe.

By the same token, NCWNZ welcomes efforts to see abandoning parents brought to account and made to face up to their responsibilities to their children.

Responsibilities for support their children financially should not be seen as contingent upon arrangements for contact. They are independent aspects of ones responsibilities toward one's children.

2.3 Supervised contact

NCWNZ welcomes the new provisions for funded supervised contact. This is important to ensure the best interests of the child are protected, and is not dependent upon parent's access to funding to provide such protection.

2.4 Delays and escalating legal costs

NCWNZ is aware of the difficulties which many parents encounter, about the procedures used to resolve custody and access disputes. Lengthy delays, very high costs, repeat vexatious applications to the court and the wide variations in practice and service delivery provided by lawyers, psychologists and specialist report writers, are of concern. We hope that the concerns raised in the Family Court Custody and Access Research (FCCAR) Report have been incorporated in the new law.

2.5 The impact of Property Relationships Act on care of children

Once again, as noted in our earlier submission, NCWNZ recommends a realistic recognition of the influence of economic factors on care of children. It is unrealistic to assume that all parents consider parenting issues without taking into account personal financial costs or losses. For example, the definition of 'join custody' in the Child Support Act means that if a father has the children for 40% of the nights this will provide a variation to the formula for assessing liability. Such a reduction in child support may impact disastrously on the ability of a low earning mother to adequately feed and house the children. Likewise, new rules which will give a compensating lump sum to a partner disadvantaged by their role in the marriage/relationship will allow the court to consider, amongst other factors, future responsibilities for the daily care of minor or dependent children. . More vigorous pursuit of custody may well be the response of a parent who stands to receive a greater or lesser share of matrimonial property. Similarly, greater use of spousal support provisions than in the past will re-focus the court's attention on the responsibilities of an applicant spouse for the future care of the children. It is inevitable that a number of parents will consider carefully their future liable parent obligations alongside the likely impact of custody decisions on property division and spousal support when deciding whether or not to contest custody. NCWNZ believes that children will be vulnerable to claims for custody or pressure for 'shared-parenting' arrangements, which may not be in their best interests. Many parents are dealing concurrently with custody and property issues through the same lawyers and Family Court processes. It will be even more important in future to consider the best way to do this so as to minimize delays, costs, and coercive practices.



3 OMISSIONS

3.1 No General Statement of Principles

Aside from the rightful primacy given to the principle of the paramountcy of the welfare and best interests of the child, this Bill makes no statement of governing principles. NCWNZ notes that an earlier draft contained nine general principles. The Ministry of Social Policy Discussion Document on the Agenda for Children sets out principles which could be repeated here; (that) they are consistent with UNCROC, child focused, family oriented, culturally affirming, preventative, well-coordinated, collaborative, community focused, and evidence based. They were endorsed by NCWNZ. Regard for the Treaty of Waitangi should also be considered as a guiding principle. NCWNZ believes that some statement of principles is useful in the implementation of the Bill.

3.2 Adoption

In its earlier submission, NCWNZ considered the Law Commission Report 65 on Adoption and its Alternatives, which also makes specific references to guardianship of children. This law is also in urgent need of reform, and, noting that this Bill is the first in a package of reforms, we look forward to the speedy introduction of amendments to the laws on adoption.

3.3 The need for more than one guardian

We note that it is possible for a child to have only one guardian, i.e. where the mother is the sole parent, and no father has been named. In 1982 NCWNZ asked the government to amend the Guardianship Act to make provision for another legal guardian for each child born to a girl under 18. At that time we considered important that such a guardian would be prepared to support and help the young mother in the rearing of the child. This is still a matter of concern, although in a number of centres schools for teen-age mothers have brought some level of assistance. However the possibility of serious accident to the sole mother, or father, of any age, resulting in either death or serious injury, can leave a child without any legal guardian, if the sole parent has not made provision for another legal guardian. We strongly recommend such a requirement be required by law.

3.4 Identification of gender issues

As noted in our earlier submission, NCWNZ recommends gender analysis of existing and proposed laws and practices so as to identify inherent gender issues. For example, the Executive Summary of the Rhoades et al Interim Research Report² refers to:

the use of the shared responsibility concept by one parent (usually the contact parent) to harass or continue abuse of the other parent (usually the resident parent).

And, an interim order refusing contact has become more difficult to obtain since the Reform Act came into operation, despite allegations of domestic violence, and that this is attributable, at least in part, to the 'right to contact' principle.

² Rhoades H, Graycar R, Harrison M (1999) The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations? Interim Report April 1999



And, an increase in applications for the return of resident parents who have relocated without the contact parent's consent, and for injunctions to restrain a resident parent from moving.

Law changes should not impact adversely on a woman's ability to re-establish herself, free from harassment, risk of violence or ongoing 'control' by an ex-partner. Relocation for job training, employment opportunities, cheaper housing or re-partnering is inevitable if some women are to re-establish independent and economically secure lives. A happy secure parent provides an environment, which fosters the well-being of the children. While this freedom of parents must not be curtailed lightly, and must be balanced with the child's rights, we recognise that the interests of parents and children are not always opposed.

3.5 Family Court Model of the FCCAR Report

In our earlier submission NCWNZ recommended serious consideration of the Family Court Model presented in Chapter seven of the FCCAR Report 8³, and proposed that a mediator-led Family Care Conference (or similar) should be offered as an additional dispute resolution option after the initial assessment. A Family Care conference model can be found in a paper presented to the 1993 Women's Law Conference by researcher Gabrielle Maxwell⁴. The presence of members of the wider family and others who are part of the child's life, as well as the children themselves if appropriate, may well assist some parents to develop future parenting arrangements which are in the best interests of the children. NCWNZ is disappointed that this suggestion does not appear to have been taken up.

CONCLUSION

While NCWNZ welcomes the changes in emphasis the Bill encapsulates we are concerned that the nine general governing principles identified in an earlier draft are not included in 3(1) The Purposes of this Act.

NCWNZ does support the changes in terminology, the priority given the best interests of the child, the inclusion of a wider range of family members able to be involved in the care of a child and an appreciation of the need for cultural and attitudinal changes in regard to the care of children.

NCWNZ would have liked to see the inclusion of the Reform of the Law Commission Report 65 on Adoption and its Alternatives; the gender analysis of existing and proposed laws and practices; a mediator-led Family Care Conference as an alternate dispute resolution option and hopes that these matters can receive some consideration.

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³ Hall G & Lee A, (1994) "Family Court Custody and Access Report 8: Discussion Paper", Department of Justice, 124

⁴ Maxwell G, (1993) Arrangements for the Children after Separation? Problems and Possibilities, Women's law Conference 1993