

17 April 2009

The Chair
Social Services Committee
Parliament Buildings
WELLINGTON

CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES (YOUTH COURTS JURISDICTION AND ORDERS) AMENDMENT BILL

Introduction

- 1 This submission on the Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Bill (the Bill) is made by the Legislation Advisory Committee (LAC).
- 2 The LAC was established to provide advice to Government on good legislative practice, legislative proposals, and public law issues. The LAC produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.
- 3 The LAC does not wish to be heard on this submission.

Military-style activity camp programmes

- 4 The Regulatory Impact Statement in the Explanatory note states that the bill is intended to “enable the introduction of military-style activity camp programmes that will provide the most serious and recidivist young offenders with clear boundaries, and reinforcement of self-discipline, personal responsibility and community values. They will include mentoring and measures to address the underlying causes of offending, for example to address alcohol or drug issues, and improve literacy and numeracy skills.”
- 5 The bill does not provide any detail about what these activity camp programmes will involve, nor even how young offenders will be sentenced to attend them. Presumably the sentence of supervision with residence will be used. This sentence involves an order placing the child or young person in the custody, and under the supervision, of the Chief Executive of the Ministry of Social Development (the Chief Executive). The child or young person lives in a residence specified in a plan that is approved by the Court. The bill amends the

existing sentence by expanding the possible period of a custody order from 3 to 6 months, by enabling the court to make it a condition that the child or young person undertake specified programmes or activities and empowers the Court to place the child or young person under the supervision of the Chief Executive for between 6 and 12 months after the expiry of the custody order, during which time the child or young person may be required to undertake specified programmes or activities.

- 6 The LAC is concerned that the bill makes no attempt to spell out what the proposed military-style activity programmes will involve. It seems likely that they will be significantly more coercive than the existing sentencing options. Without further detail on the proposed programmes, it is not possible to assess whether the existing safeguards in the legislation are adequate. But the nature of the programme suggests it is of a different type than previous activities authorised by these provisions. Clarity about what is intended, and full consideration of the adequacy of the available safeguards, assumes particular importance in the context of a coercive sentencing option that potentially affects children as young as ten years old.
- 7 The LAC submits that having regard to the different, and more punitive, nature of military style programmes, they should be established as a separate stand alone sentencing option with additional safeguards. These could include legislative provisions that specify minimum standards for this type of programme and/or specific statutory approval processes for the programme specifications. It would also be desirable to spell out more clearly the circumstances in which the sentence is appropriate. The explanatory note suggests that it will be used for serious recidivist offenders but there is nothing in the bill that restricts the sentence to this category of offender. It seems desirable that consideration also be given to the possibility of age restrictions. For example, should coercive programmes of this kind be imposed upon children under 14 years old?
- 8 The lack of clarity about the programmes also creates legal risk. For example, it may be arguable that a military-style activity camp is not a “residence.” “Residence” is defined in the Act as “any residential centre, family home, group home, foster home, family resource centre, or other premises, approved or recognised for the time being by the chief executive as a place of care or treatment.” It is not clear that a camp would be classed as a “place of care or treatment.” It might instead be seen as a place of punishment. A decision by the Chief Executive to recognise such a place as a residence could therefore be subject to challenge. Depending on the design of the programme, there is also potential for allegations of breaches of Section 9 of the New Zealand Bill of Rights Act 1990 (the right not to be subjected to torture or cruel treatment).

Consent to treatment

- 9 Clause 297B of the bill provides that no young person may receive or undergo any medical, psychiatric or psychological examination or treatment that forms part of a programme that the young person is required to attend by an alcohol or drug rehabilitation order unless consent has been given by or on behalf of the young person. If the young person is under the age of 16 years, consent must be given by a parent or guardian.

- 10 The LAC is concerned that this is inconsistent with the general law on consent. The general law is that a child or young person under the age of 16 may consent if they are competent in terms of the test set out in the UK House of Lords case *Gillick v Wisbech Area Health Authority* [1986] 1 AC 112, known as the Gillick competency test. The test is whether the child or young person has the capacity to make an informed decision, taking into account factors such as the child's age, their level of understanding and maturity and the gravity of the relevant medical procedure. The effect of the bill is that a child or young person under the age of 16 who is competent to consent may have that consent overridden.

Thank you for your consideration of this submission.

A handwritten signature in black ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath it.

Sir Geoffrey Palmer
Chair, Legislation Advisory Committee