



# **IHC Submission to the Ministry of Justice**

Reviewing the Family Court - Public Consultation

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**Trish Grant**

**Director of Advocacy**

**IHC New Zealand Inc**

**PO Box 4155**

**Wellington**

**Tel : 04 472 2247**

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## 1.0 About IHC

### **Mission Statement**

***IHC will advocate for the rights, inclusion and welfare of all people with an intellectual disability and support them to lead satisfying lives in the community***

IHC New Zealand Incorporated (IHC) is a community-based organisation providing support and advocacy for people with an intellectual disability and their families. Through IDEA Services, IHC works with approximately 3000 families with children who have an intellectual disability, provides support and training for 4000 adults in work places and helps more than 4000 people with disabilities to live in houses and flats in the community. IHC advocates for the rights of more than 50,000 New Zealanders with an intellectual disability.

IHC is committed to non-government funded programmes of work related to individual and systemic advocacy, empowerment of individuals and families and inclusion of people with intellectual disability in society.

IHC has a long history of political and systemic advocacy. In representing and advocating for people with intellectual disabilities, IHC presents the views of its members and self-advocates.

IHC endorses the New Zealand Disability Strategy (NZDS) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) as frameworks for guiding Government policy, practices and decision-making.

IHC wishes to appear before the reviewers and we are happy to clarify or provide further information on the matters we have raised in this submission.

## **2.0 Introduction**

### **2.1 IHC's Position on the Family Court Review**

- 2.2** The purpose of the Family Court Review is to ensure the Court is sustainable, efficient, cost effective and responsive to those children and vulnerable adults who need access to its services.
- 2.3** IHC advocates for more than 50,000 New Zealanders, who, because of their intellectual disability are vulnerable. IHC Advocacy is part of IHC Programmes the non-government funded arm of IHC which supports 34 associations, more than 4500 members, families, self advocates, children and young people. IHC supports the objectives of the Family Court review.
- 2.4** IHC agrees that the Family Court can play an important role in ensuring that people who are vulnerable due to their intellectual disability have access to the necessary legal mechanisms to protect their welfare and safety.
- 2.5** IHC is concerned about the administration by the Family Court of the Protection of Personal and Property Rights Act 1988, and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 review processes, and believes that the rights of people with an intellectual disability can be disregarded by the Family Court and practices therefore are not aligned with the spirit and intent of the UNCRPD.
- 2.6** IHC is particularly concerned that Article 12 of the UNCRPD affirms the rights of persons with disabilities to recognition everywhere as persons before the law and to enjoy legal capacity on an equal basis with others, including access to the support they may require to exercise their legal capacity. IHC is concerned that people with an intellectual disability are disadvantaged in the Family Court in PPP&R and IDCC&R processes because appropriate accommodations and supports are not routinely available.
- 2.7** IHC is particularly concerned that the Family Court in its endeavours to protect the welfare and safety of vulnerable persons can fail to enhance the autonomy and independence of individuals, including the freedom to be supported to make their own choices.
- 2.8** Approximately 2500 applications are made annually to the Family Court (4% by case type) under The Protection of Personal and Property Rights Act, 1988. IHC believes there are alternative mechanisms available outside of the Family Court that, in many instances, would be more appropriate and responsive to the needs of vulnerable adults, would be more in accord with UNCRPD, and would be more cost effective.
- 2.9** IHC is concerned that children and young people with disabilities requiring care and/or protection are not afforded the same rights and legal protections as non disabled children under the CYPF Act, 1989. IHC is of the view that the Family Court should treat all children the same and thus ensure that disabled children are not denied the basic rights that should be afforded to all children, regardless of impairment.

- 2.10** IHC believes that the Family Court should require all care and protection issues to be dealt with under sections 13 – 19 of the CYPF Act as sections 141 to 146 promote discrimination against disabled children contrary to UNCRPD and the UN Convention on the Rights of the Child.

### **3.0 Specific response**

IHC has focused its responses to the specific concerns of vulnerable people and in particular to the people we advocate for, i.e. people with an intellectual disability, under the chapter headings in the review document

## **CHAPTER 2: A COURT UNDER PRESSURE**

- 3.2.1** IHC believes that issues noted as relating to children and families in this chapter are also issues that relate to vulnerable adults. We believe this is an omission that needs to be considered as part of this review. In particular there needs to be a reconsideration of the State's role around the imposition of orders under the PPP&R and IDCC&R Acts and disputes that arise around this Act.
- 3.2.2** There needs to be a focus on conciliation over litigation in disputes that may arise around the PPP&R Act. Counseling and mediation are likely to be more effective outside of the Court but will require people with the appropriate training and skills in the working with individuals with an intellectual disability. Professionals working in the Family Court with people with an intellectual disability appear to lack the necessary knowledge, skills and understandings and may not provided effective representation. IHC is aware of cases where appointed counsel does not appear to understand concepts such as supported decision making and least restrictive options.
- 3.2.3** IHC believes that unintended harm has been caused by judges, lawyers and other professionals in litigation related to the PPP&R Act who have demonstrated a lack of understanding about the capacity of disabled people and whose rights to live as other New Zealanders have been ignored. IHC submits that all professionals associated with the Family Court need to be accredited to practice in the Family Court and accreditation should require knowledge of disability issues and rights and concepts such as supported decision making and least restrictive options. IHC submits that accreditation should be time limited and require ongoing professional development with regard to people with disabilities and their rights. As a signatory to UNCROPD New Zealand has an obligation to ensure that all agents of the state recognize and respond appropriately to the rights of disabled people.
- 3.2.4** IHC asserts that the imposition of PPP&R Act orders should be only done as a last resort, all other methods available for supporting a person who has an intellectual disability should be explored before consideration is given to making orders.

## **CHAPTER 3: THE CHANGING FAMILY COURT**

- 3.3.1** People with an intellectual disability are now living much longer and the coming decades will see a growing cohort of elderly people with an intellectual disability. People with an intellectual disability are more prone to health issues such as Alzheimer's and dementia compared to the general population. This will potentially increase their vulnerability. Earlier in life they may have been able to manage their affairs with appropriate supports but this ability may decline rapidly. The Family Court may face an increased number of applications for property and welfare guardianship orders.
- 3.3.2** The court should encourage disabled people to be supported to prepare for potential diminished capacity by encouraging the appointment of an Enduring Power of Attorney.
- 3.3.3** The PPP&R and IDCC&R Acts are well intentioned legislation, but the application and implementation of these Acts can, through outdated practice, and the inability of mainstream Disability Support Service providers to respond to their needs, often infringe on people's rights. There needs to be a careful balance between protecting the rights of vulnerable people so that they are accorded appropriate privacy, and the need for the misapplication of the Acts and the poor decision making to be publicly exposed. The community of disabled people struggles to support each other due to the cloak of silence that often surrounds Family Court matters.
- 3.3.4** For example one of the key foundations for anyone subject to New Zealand's justice system is to be heard by the Court. Equally this is one of the foundations of the PPP&R Act; the subject person, wherever possible, should have the opportunity to be heard by the Court. However IHC is aware that this is not happening for people with intellectual disability. IHC is aware of a young man with an intellectual disability who has been made subject to five personal orders under PPP&R over the last two years yet has never been sighted or heard by the Court in any of the applications made against him. This is in stark contrast to procedures practiced by the Family Court for people who are subject to the Mental Health Act. Under this Act those subject to it are required to be heard by the Judge.
- 3.3.5** IHC believes that the Family Court should make provision for the appointment of Communication Assistants. This role occurs in the criminal court, and is used to assist the giving of evidence by a person with an intellectual disability. Communication Assistants, who are appointed by the judge, in other courts have been able to assist people to understand the court process and to liaise with their lawyers. We believe this is a dignified and appropriate accommodation and is akin to a sign language interpreter and should be accorded the same status and be as readily available.

## **CHAPTER 4: FOCUSING ON CHILDREN**

- 3.4.1** IHC considers there has been a significant omission in this chapter and that questions raised in this chapter should also be raised in respect of vulnerable adults, particularly around the PPP&R and IDCC&R Acts. We have answered accordingly.
- 3.4.2** IHC believes it is vital that any person who is going to be subject to an order under the PPP&R or IDCC&R Acts should be appropriately supported by a suitably trained person so they can participate fully and on an equal basis in all aspects of the court process. IHC is aware of many instances where counsel supported to represent the person with an intellectual disability has made very limited attempts to meet with the person, and with those who support them. We are aware of many instances where a difficulty with communication has been assumed to be a lack of capacity. Very often formal and informal supporters who may know and understand the person very well, are excluded from assisting the person to make their views known.
- 3.4.3** Counsel for the proposed subject person have been reported to IHC as acting for family members and /or welfare guardians and as being under their instructions and putting little effort into ascertaining the views of the person with an intellectual disability.
- 3.4.4** IHC is concerned with the provisions relating to “severely disabled children and young persons” under sections 141 to 146 of the CYPF Act sit alongside the care and protection provisions under sections 13 to 19.
- 3.4.5** We believe that there is no place for separate provisions and that all care and protection issues relating to children, regardless of disability, should be dealt with under the same part of the Act. Having separate provisions is ineffective, unwieldy, divisive and discriminatory. IHC believes that the Family Court should decline to deal with cases brought before it under sections 141 to 146 of the Act. Care and protection issues affect all children irrespective of impairment and it is the issues of care and protection of the child that should be paramount with their disability needs being able to be appropriately catered for under general care and protection provisions.
- 3.4.6** Currently sections 141 to 146 are utilized and applied whenever it is perceived the child has a disability irrespective of severity. The impact of having separate provisions is that children with disabilities are not seen as children first but as children who are different because they have impairment. Often the presence of impairment is unrelated to the issue before the court and yet a child with impairment is treated differently to their siblings and afforded fewer protections.
- 3.4.7** The separate provisions for children with a disability often results in out-of-home placement with no serious view to reunification with family. This is contrary to the intent of the Act which is based on advancing the interests of children by strengthening and sustaining relationships with families.

- 3.4.8** Section 141 allows for disabled children to have out of home placement for two years extended on an ongoing basis. It in effect sanctions indefinite out of home placements simply on the basis of the child having a disability. In practice this results in children who have a disability living a life with minimal family involvement over many years and poor monitoring of their placement when compared to the protections and care taken with the placement of non disabled children. IHC urges the court to decline referrals under sections 141 to 146 for these reasons and thereby afford disabled children the same rights as their non disabled peers in these distressing cases.
- 3.4.9** The separate provisions for children with a disability are past their use by date. They were introduced historically to ensure disabled children were afforded the protections and services that applied to all children. However the existence within the Act now means that children with a disability are treated differently simply because they have a disability and they are not being accorded the same rights as non disabled children. The provisions are contrary to the UNCRPD, the UN Convention on the Rights of the Child, and the NZ Disability Strategy all of which promote equal treatment of all people and stress the importance of providing disabled children and their families access to child youth and family focused support.
- 3.4.10** IHC will continue to campaign for the removal of sections 141 to 146. IHC urges the Family Court to signal its commitment to uphold the rights of all children irrespective of impairment by treating all applications that come before it under sections 141 to 146 with the same safeguards afforded to other children under sections 13 to 19. Clearly action by the court will in result in government and non government agencies needing to increase their capacity to enable them to support children with disabilities within the community and with families.

## **CHAPTER 5: SUPPORTING SELF-RESOLUTION**

- 3.5.1** IHC considers there has been a significant omission in this chapter and that questions raised in this chapter should also be raised in respect of vulnerable adults, particularly around the PPP&R and IDCC&R Acts. We have answered accordingly.
- 3.5.2** It is vital that vulnerable people are provided information in accessible formats. This may include utilizing the skills of support staff to ensure information is conveyed in a manner that is appropriate to the communication style of the individual concerned. For vulnerable people with particular conditions the court environment may inhibit their ability to participate. Recognition of the adaptations necessary for particular individuals should be considered.
- 3.5.3** IHC strongly believes that there needs to be a particular specialization within the Family Court relating to matters concerning persons with disabilities and in particular intellectual disability. We think it is of vital importance that in order to support the rights of persons with disabilities that lawyers receive appropriate mandatory training in the UNCRPD, and in particular that they develop competence and understanding of supported decision making and least restrictive option practices as they relate to persons with an intellectual disability.

- 3.5.4** It is the view of IHC that there are very few individuals with an intellectual disability who wholly lack capacity. Most individuals are able to be supported to manage their own affairs without the necessity for court orders. In our experience counsel for the disabled individual are frequently persuaded by family members and/or welfare guardians who are often not educated around, or presented with, less restrictive options as a means for supporting an individual with intellectual disability.
- 3.5.5** IHC is most concerned that once orders are imposed under the PPP&R Act there are no easy mechanisms for ensuring that welfare guardians and property managers are acting in accordance with the intent of the Act. IHC believes that ongoing training of people who are appointed to these roles is essential and should be mandatory. Once a person is subject to the Act they can become trapped by it, unable to change counsel and unable to challenge, because they have been deemed to be wholly incompetent. They essentially receive a lifelong sentence of control by others and struggle to be free from the court sanctioned control by their welfare guardians over whom there is no monitoring.

## **CHAPTER 6: FOCUSING ON ALTERNATIVE DISPUTE RESOLUTION (ADR) SERVICES**

- 3.6.1** IHC suggests that Alternative Dispute Resolution Services are a most appropriate way for working with people with an intellectual disability. IHC suggests that the courts should become a place of last resort when all alternative dispute resolution services have been exhausted. It is imperative that the ADR services utilized have the skills, expertise and knowledge to work with persons with an intellectual disability.
- 3.6.2** IHC supports making ADR services mandatory around issues relating to welfare guardianship and property management. It has been our experience that once orders are in place then the subject person can effectively lose their voice particularly when their appointed counsel takes instructions from the guardian and not the subject person. The subject person almost becomes a “non person” and they lose all rights to engage counsel of their choice and so on.

## **CHAPTER 7: ENTERING THE COURT**

- 3.7.1** IHC agrees that applications to the Family Court should be screened and whenever possible referral to ADR services should be required. In matters relating to persons with an intellectual disability the person responsible for screening should be well trained in the rights of persons with a disability.
- 3.7.2** IHC supports a standard form of affidavit in plain English and other accessible formats.

## **CHAPTER 8: PATHWAYS AND PROCESSES IN THE COURT**

- 3.8.1** IHC has not got a fixed view on this but would presume that if cases were appropriately screened and referred to ADR then all counseling and mediation pathways would be exhausted prior to a case coming before the court.
- 3.8.2** IHC considers the mediation and counseling skills required in cases involving persons with an intellectual disability are more important than whether the counselor or mediator has a law degree. In our view lawyers should only be used for mediation in cases involving a person with an intellectual disability if they have the requisite skills, knowledge and understanding of intellectual disability and disability rights.
- 3.8.3** In cases involving people with an intellectual disability who have complex social needs IHC considers that it would be appropriate to involve social agencies who have the skill and expertise to address the needs of the disabled person.
- 3.8.4** IHC thinks it is vital that reports written by court appointed psychologists with regard to persons with an intellectual disability should be able to be critiqued and that, in addition, the report writer should be able to be cross examined. IHC is aware of psychologists reports that have been written that have contained errors of fact and interpretation but cross examination has not been permitted. IHC is aware of instances where persons subject to the PPP&R Act have had reports written about them which they have disagreed with but because they were subject persons they were unable to challenge.

Trish Grant  
**Director of Advocacy**