UNDTP webinar presentation 23 September 2021

Judge A J FitzGerald

Mihi - pepeha

Tēnā koe Faith

Tēnā koutou katoa

Ka tīmata ki Ōtepoti

Ki Kāpukataumahaka maunga

Ki Whakaherekau moana

Ki tāku kāinga ō mua

Ka whakawhiti ki Tāmaki Makaurau, Ki Kohīmaramara

Ki tāku kāinga ō nāianei

Kō Tony FitzGerald tāku ingoa

Kō au tētahi kaiwhakawā ō te Kōti a Rohe, ō te Kōti a Whānau,

me te Kōti Taiohi

ō Tāmaki Makaurau anō hoki

Ngā mihi mahana ki a koutou

SLIDE 1

I have just explained that I am originally from Dunedin near the bottom of the South Island that you can see there but I now live in Auckland towards the top of the North Island where I am a Judge of the District Court, Family Court and Youth Court.

And I send warm greetings to you all, those who are joining here in Aotearoa New Zealand on the North and South Islands and to all of you there on the West Island – our good Australian friends - and to hear that there are others from even further afield joining us is awesome – kia ora koutou.

And I join Faith in acknowledging tangata whenua – the people of the land, the traditional owners of our countries - ngā mihi nui ki a koutou. Tēnā tātou katoa. Greetings to all of us.

Introduction

I've been invited to speak about use of the Children's Rights Convention ("the CRC") and the Convention on the Rights of persons with disabilities ("the CRPD") in decision making but I must begin by owning up to being a novice in terms of my understanding of these and the related UN instruments.

But I have a duty to respect and uphold the rights under those Conventions of every single child and young person I meet in the Youth Court, and in the Family Court in relation to their care and protection, and so I have realised the need to greatly increase my understanding and my use of these tools and in that respect, I'm on a journey.

What I'm about to say begins with why I set off on the journey, followed by how it's going and then some "what" things I will explain later.

So, there are 3 parts to this; the why, the how and the what.

Just a few things first:

When I talk about children from now on, I am including young people under NZ law.

Although there are some differences between our countries, I think we are much more alike than we are different and so I hope my comments will be helpful to everyone whichever island you are on. And if any of this is helpful further afield well, then that is wonderful.

By way of brief background, NZ ratified the CRC in 1993 and the CRPD in 2008.

I believe Australia did so in 1990 and 2007 respectively.

In NZ, over the years, our higher courts have said numerous times that the Conventions to which we are a party and other instruments are useful aids and provide helpful guidance to the interpretation of our domestic law but that has really been the extent of it.

As a result, in practice these instruments have tended to be of limited use and usually only as an add on to the domestic law – an occasional supplement in submissions or decisions.

Looking back now I realise that I didn't really understand their significance, nor their potential despite having used them occasionally both as a lawyer and as a Judge.

That changed for me in 2019 and there are 2 main reasons why.

WHY – there are 2 parts to this

The first is that on the 1st of July 2019 the law here concerning children in need of care and protection and those in the youth justice system was amended in various important ways. The 2019 changes to the Oranga Tamariki Act included significantly enhanced obligations imposed on everyone exercising powers under it.

One of those is the requirement to respect and uphold the rights of children under the CRC and the CRPD. So that must now be done. In every case. As I see it, we were being told by Parliament to start making more use of these tools – the conventions - that had been sitting in the toolbox a long time but largely unused.

There is a 3rd powerful tool we've been given as well, which is the practical commitment that must be demonstrated to the principles of our nation's founding document, the Treaty of Waitangi, in the way described in the Act, but that is outside the scope of this talk.

Except to emphasise that the combined effect of using these 3 tools (The Act, the conventions and the Treat) in all cases concerning tamariki Maori children will enable truly transformative change – so the importance of doing so, cannot be overstated.

The 2nd part of WHY is that in August 2019 I attended a symposium organised by Dr Nessa Lynch at Victoria University in Wellington to mark the 30th anniversary of the CRC. Nessa brought together an impressive line-up of people from within New Zealand and overseas.

Listening to the discussions and talking to people there opened my mind to the significance and potential of the Conventions; I had not previously heard them spoken about and explained the way they were there.

Now, I can't explain things as eloquently or authoritatively as the people there did, but I can explain how their words spoke to me, and how that resonated in my mind with my own work experiences. There are three things in particular I took away:

1. The first is that ratifying the CRC amounted to a guarantee, a promise, that every single child in the country was entitled to every single right and protection in all of the 54 articles every day with qualification or compromise. And the same goes for the CRPD. These are no simple add-ons or optional extras; I had seriously underestimated the scale and the scope of these tools.

2. Secondly, in relation to children's rights, all too often in practice we settle for near enough being good enough and as a result we are selling short the very people who most need to have these rights respected and upheld – that is, those for whom that is not currently happening. I see this in 2 ways;

    a. First, on the broad scale, there is the fact that in NZ, about 90% of children have those rights and protections respected and upheld – most of them completely and others at least adequately. I suspect it's similar in Australia. So, I think there is an attitude that actually we're doing pretty well. I mean 90% is pretty good isn't it? And for some things absolutely yes; I mean if I stick to my New Year's resolution to just have 2 cups of coffee a day, 90% of the time, that's pretty impressive isn't it? Just quietly.

    But there are some things where we would never accept that 90% is good enough – take air traffic control for example. If those responsible for doing that job got it wrong 1 time out of every 10 there would be a huge uproar and urgent action would be taken so that bad practice would change.

    And, of course, we should never ever accept that anything less than 100 % is good enough in relation to the well-being of our children; not ever. Now, in NZ 10% of the children is more than 100,000. That is a lot of children who don't get the rights or protections that were guaranteed to them. They are the ones I see at work every day. But has there been any change in practice for these most vulnerable of our citizens? No. From where I sit, not at all. Deeply imbedded bad practice just carries on regardless of the 2019 law changes and that needs to be called out.

    b. And then in practice there are the proxies that Professor Laura Lundy talked about; those things that in practice we so readily settle for as being adequate in terms of respecting and upholding children's rights. For example the phase we went through when pity and protection were emphasised; then the time

when listening to their voices was prioritised; then well-being became the focus and of course all of those things have their place but what was guaranteed to every one of our children was so much more than that. So much more.

3. Which brings me to the 3rd thing. And I have to admit that for the first day of the Symposium as I listened to the talk about rights in such complete and idealised terms, I was thinking, Yeah, but that never happens or, yeah well that's fine in theory but that doesn't happen out there in the real world.

   But then the penny dropped; kua taka te kapa. And I realised that we must view the rights that way; because if we lose sight of the ideal, of exactly what has been guaranteed, we are not respecting and upholding those rights. We are settling for less than that; for a compromise. As soon as we drop our sights from the ideal towards which we must always aim, we compromise the rights of the child for whom we do that.

So, with these thoughts buzzing around in my head in August 2019, including the teachings of Ursula Kilkelly and armed with the large poster of the CRC that I was given by Bruce Adamson which now fills a wall in my room here, and this [Red book], I went back to work.

And then on the 18th of September 2019 the UN issued its latest General Comment on child justice. Perfect timing. And I acknowledge here Justice Clarence Nelson who was at the Symposium and I believe one of the authors of the General comment and especially Dr Faith Gordon who sent it to me hot off the press. Which brings me to the how.

How

Since September 2019 I have been making decisions every day where that document and other convention related material has been a significant factor in deciding what to do.

The first transcribed decision I can find was on 16 October 2019 and I will return to that in a moment. What I need to do first is this:

SLIDE 2

I need to start with the vibe. I think those of us here in the antipodes all know what the vibe is, and so I apologise to anyone in the international audience who has not seen this movie, The Castle. If you haven't, you must. I highly recommend it.

Every one of us will know the feeling of trying to explain or justify some point we want to make and struggling sometimes to make the reasons sound convincing. The bane of a judge's life. But in our own way we all face that from time to time in our respective roles. And you know that you're getting really desperate if the best you can think of to support your position is the vibe.

This, for me, is where the Conventions and associated instruments come into their own. They enable decisions to be made, on a transparent and principled basis, that go beyond what was possible previously. There is such deep, rich, evidence-based material there that goes beyond what we have available in our domestic law.

The first example of what I am talking about is that case in October 2019 called Police v HX [2019] NZYC 548 which was to do with diversion away from formal sentencing for serious offending by a 14- year-old boy. Use of such diversion can be a difficult and controversial decision to make especially for serious offending and quite hard to articulate reasons simply by reference to the Act. In fact, I doubt that you will find a reasoned written decision on it. And yet that latest General comment has numerous good reasons why we should be scaling up diversion at all stages of the court process and even for serious offending in appropriate cases. And like so many issues, it not only supports it from a child rights perspective, but also explains why there is a public interest in doing so because of what we now know will reduce the risk of reoffending.

Another example has to do with a child's right to legal representation at the very first point of contact with police for suspected offending. This was one of many issues in a case called Police v [FG] [2020] NZYC 328. One of the Youth Justice principles of the Act is that children are entitled to special protections during the investigation stage of alleged offending because of their vulnerability. But under our domestic law and based on the leading decisions of our Court of Appeal, the protections in reality are not special at all; most children are no better off than adults for reasons I explain in the decision. So, I looked at what a rights-based approach would mean on this issue including how countries that are familiar with respecting

and upholding children's rights deal with this issue. As it happens, the Grand chamber of the ECHR decided the exact issue in November 2008 and explained in completely unanswerable terms why a child must have legal representation from that first point of contact. I know that's not binding on Courts here but if the law here is to evolve and if we are to respect and uphold convention rights, I believe these things should be pointed out. If someone is unhappy enough with the result, the appeal Court will tell us the answer and set the new standard. That's how our system works and how law evolves. And I would love to have seen how the Court of Appeal dealt with the views of the Grand Chamber of the European Court of Human Rights.

Police v [AN] [2020] NZYC 609, concerns a young woman facing a very serious charge where the argument was whether she should go to the adult system to be sent to prison or stay in the Youth Court. Amongst other things, this required looking at the disadvantaged situation of all young women in the Youth Justice system, which is an issue everywhere, I think. The decision-making exercise by reference to the Act was finely balanced. The right result became crystal clear by reference to the Convention and other rights materials.

Another case called Police v [JV] [2021] NZYC 248 addresses issues to do with the age of criminal responsibility and again the convention materials were hugely influential in not just making the right decision but explaining it by reference to the up to date guidance in the General Comment.

There are cases drawing attention to the ongoing criminalisation of care and protection such as Police/Oranga Tamariki v [LV] [2020] NZYC 117 and more recently Police/Oranga Tamariki v [SD] [2021] NZYC 360 which speak for themselves, I think. But that is the area that troubles me the most because practice in this area is just not changing. And we need to bring in everything available to change that.

Recently, Police v HN [2021] NZYC 364 is a first attempt to understand and include the CRPD in decision making. The unavoidable conclusion is that we are not capable of respecting and upholding the rights of most children under that convention on almost every level the way the system is set up. From diagnosis to disposition and most things in between, to the provision of supports and services based on need, we do not have a system that comes close to respecting and upholding the CRPD rights adequately. There are some things being done

well, most notably the vital role communication assistants from Talking Trouble are playing now to enable the meaningful participation of children in justice processes but that shines out as one of few bright lights in an otherwise dark landscape inhabited by those many children with disabilities.

Which brings me the last part, which is what has been happening, what I have learnt so far and what I want to encourage you to think about and do.

What

What has surprised me most is the reaction to drawing attention to issues and concerns by reference to the Rights framework and where it is relevant, the Treaty as well. Calling issues out has been taken as a call to action and instead of appeals there a several things now happening to address the concerns raised in some of the decisions.

What we all want is justice and better outcomes for all of our children and to get there we need to call to our aid everything available to achieve that. In New Zealand we have been given a mandate to use the conventions, but all countries who have ratified them have given the guarantee I spoke of before. The Conventions are not only available – they are our countries guarantee of better outcomes for our most vulnerable children.

We all work in a system that only evolves by the pushing of boundaries. That is how the law develops and improves over time. In this area there are boundaries that must be pushed. What I hope you will see from the examples I have given is the potential of these conventions to enable that to happen on a principled basis.

Whatever your role, whether it is policy, advocacy, research, a social worker preparing a report, a lawyer preparing submissions a judge making decisions, we should be using these tools, because that is what they are there for. That can be scary, I know, because it's not easy to stick your neck out and try something new that others might criticise, and we all have audiences whose opinions we cannot ignore.

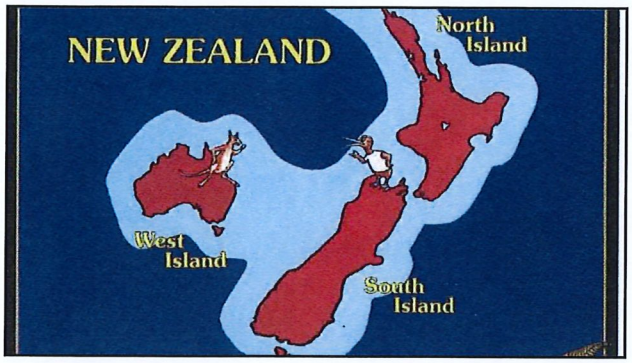
What I want to encourage you to do when those thoughts enter your mind is remind yourself about who you are doing it for – and if you don't do it, who will?

Slide 3

Lastly, what was the outcome in the Castle? Think about it. Go out there armed with more than the vibe. Think about what happened when the right tools were called upon and presented the right way, and start using these conventions to further support the advice, the submissions, the recommendations or the decisions you are giving or making and be bold and brave in that. Remember why and for whom you need to be.

Kia kaha, kia maia, kia manawanui (Be strong, be brave, be steadfast).

Kia ora tatou.


NEW ZEALAND
North Island
West Island
South Island

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It's the vibe and, uh...no that's it. It's the vibe.

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