

Children, Young Persons, and their Families (Advocacy, Workforce, and Age settings) Amendment Bill 2016

Submission from the Office of the Children's Commissioner
28 July 2016

"When I walk down the street I see families walking along laughing happy and it is hard, knowing that I don't have a family like that."

– Child in non-kin foster care, 2015

INTRODUCTION

The Office of the Children's Commissioner (OCC) supports the direction of the final report from the Expert Advisory Panel (EAP) and the Government's objective of reforming the care and protection and youth justice systems to ensure they are child-centred. This bill is the first in a series of legislative changes to give effect to these reforms.

This bill is a positive development, but we are concerned that it does not go far enough to ensure the new operating model is child-centred.

This submission must start by grounding the bill and discussion in the relevant rights under the UN Convention on the Rights of the Child. Too often, this is overlooked in New Zealand's policy decisions affecting children.

Rights of children in the care and protection and youth justice systems under the UN Convention

Children and young people in the care and protection and youth justice systems are among the most vulnerable in New Zealand. Their rights have often been diminished before they came into contact with the system, and many have experienced significant trauma.

It is vital that their rights are upheld and progressed by the new operating model. A key criterion for success of this legislation and the new operating model should be the extent to which children's rights are given practical effect, leading to improved outcomes.

New Zealand ratified the UN Convention on the Rights of the Child in 1993 and has committed to progressively implement it. The Convention has four general principles which are its cornerstones.

All four are critical for children in the care and protection and youth justice systems. These are:

- The right to protection from discrimination (article 2);
- That the best interests of the child should always be a primary consideration in any decisions affecting them (article 3);
- The right to life, survival and development (article 6); and
- The right to have an opinion and for that opinion to be heard in all matters affecting the child (article 12).

In addition, the Convention guarantees rights of specific importance to children in the care and protection system, for example that children should not be separated from their parents unless it is in their best interests (article 9), the right to be protected from harm or maltreatment (article 19), the right to special protection and support when they cannot live with their parents (article 20), the right to have their treatment reviewed regularly if they are placed away from home (article 25), and the right to help and support if they have been abused or maltreated (article 39).

Likewise, article 40 sets out the rights of children and young people alleged, or found to have committed an offence. Children in the youth justice system have the right to be treated with dignity and respect, and have their age taken into account, with the objective of promoting their reintegration in society.

The OCC represents **1.1 million people** in Aotearoa New Zealand under the age of 18, who make up 24 percent of the total population.

We advocate for their interests, ensure their rights are upheld, and help them have a say on issues that affect them.

For more information, please contact:

Holly Walker
Principal Advisor
(Strategy, Rights and Advice)

h.walker@occ.org.nz

04 470 8716

Our submission now considers each of the bill's four major objectives:

1. Raising the age of state care and protection;
2. Embedding the views of children and young people in the new system;
3. Supporting the creation of a new youth advocacy service; and
4. Extending powers under the CYP&F Act to a broader range of professionals.

1. RAISING THE AGE OF STATE CARE AND PROTECTION

(Refer to clause 4 of the bill, which amends section 2 of the CYP&F Act)

We strongly support provisions to raise the age of state care and protection to 18 years.

When we engage with children and young people in the care system, they tell us that they

are not ready to leave care at age 17, and uncertainty about what will happen after their 17th birthday is a source of considerable stress.

While accurate aggregated data about what happens to young people after they leave care is hard to obtain, we know from our engagement with key stakeholders and young people themselves that it is common for young people leaving care to swiftly find themselves homeless, jobless, and

without a caring and supportive adult in their life. Many become parents very young, while others progress from the youth justice to adult criminal justice systems quickly.

Additional support and advice for care leavers after they turn 17 (as has been required since 1 July 2016) is one way to address this, but raising the age to leave care to 18 – in line with the age at which young people attain full adult status – is critical.

That the CYP&F Act currently sets the upper age limit for the care and protection and youth justice systems at 17 is a significant and enduring area of non-compliance with the UN Convention, which defines a child as anyone under the age of 18. This has been noted with deep concern by the UN Committee on the Rights of the Child at successive examinations of the New Zealand Government. It is pleasing to see the Government finally taking active steps to remedy this breach.

We also strongly support the EAP's recommendation that raising the age is accompanied with an opt-in right for a young person to stay in or return to care up to the age of 21, and to access extra support up to the age of 25. This mirrors the experience of the majority of young people who are able to stay at home, or return home for periods of time, and access support from their parents long after they turn 18. We look forward to seeing this as part of the next tranche of legislation giving effect to the EAP's recommendations.

The youth justice age must also be raised to 18

The arguments for raising the age of care and protection are well understood and uncontroversial. The same cannot be said for raising the maximum age for inclusion in the youth justice system, which we are very concerned is not in this bill.

We cannot stress enough how important it is to raise the age for youth justice alongside the age for care and protection.

It is both illogical and impractical to function with two different ages under the CYP&F Act. After the passage of this bill, young people who are in the care and protection and youth justice systems at the same time, of whom there are more than 300 at any given time, will be placed in the untenable position of having to effectively cut themselves in half to receive services they are entitled to under the CYP&F Act. This, in our view, is counterproductive and contrary to the objective of a child-centred system.

It will also place considerable administrative burden on both systems. For example, when 17-year-olds who are the subject of a custody order under section 101 of the CYP&F Act appear in the adult District Court, a Child, Youth and Family (CYF) social worker will need to be available to assist them – not something that currently happens in the District Court.

The same issues of non-compliance with the UN Convention apply to the maximum age of youth justice, which also needs to be raised to 18 to ensure our compliance with our international obligations.

Furthermore, raising the youth justice age is the most effective way to reduce reoffending and achieve the objective of article 40 of the UN Convention – to promote reintegration of young people into constructive roles in society. The youth system has proved to be more effective at

"When you get to that crucial point when you're 17 everything hits you at once. You may not be prepared for it and when it does hit you, it's a bit scary if you don't have any support in place."

- Care-experienced young person, 2014

reducing reoffending than the adult system. Young people get an evidence-based response which addresses the causes of their offending and helps them to change their behaviour.

Parts of the brain that control logic and judgement are still developing at 17, meaning at this age, young people's ability to control impulses and rationally assess consequences of their actions is poor. On the flipside, because the adolescent brain is still developing, young people at this age respond well to interventions and learn to make responsible choices.

We strongly recommend that the very welcome move to raise the age of state care and protection is accompanied by the equivalent change in the youth justice system

2. EMBEDDING THE VIEWS OF CHILDREN AND YOUNG PEOPLE

We absolutely support provisions in this legislation to embed the voices of children and young people in the new operating model. Children's voices need to be heard at both the individual and systemic level. However at both levels, greater specificity is required about how children's views will be taken into account and acted upon.

(A) Voices of individual children in decisions that affect them (refer to clauses 8 of the bill, which amends sections 11 of the CYP&F Act)

There are some provisions in the CYP&F Act currently that encourage children's participation. Section 5(d) establishes the principle that consideration should be given to the wishes of the child or young person, and section 5(e) states that endeavours should be made to obtain the support of the child or young person in the exercise of any power under the Act. Section 11 places a duty on legal professionals to assist children to participate in Family and Youth Court proceedings that affect them.

Despite the existence of these provisions, we have regularly noted in our monitoring of CYF that not enough is done to meaningfully involve children and young people in decisions that affect them. Children and young people report times when they were not consulted, engaged or even told about decisions that were being made about their care, for example feeling like they had not been given a say in their own Family Group Conference, not being told about a change in care placement, or not having input into their individual care plan.

A greater degree of specificity in legislation will help to ensure that children's right to have a say in decisions that affect them is more consistently upheld. For this reason we support the provisions in clause 8 to replace section 11 of the CYP&F Act with a more far-reaching obligation to involve children and young people in decisions that affect them, but we think a greater level of detail than proposed is required.

We particularly support new section 11(2)(c) requiring suitable supports to be provided for children who may have difficulties expressing their views or being heard. This will be very important for children with impairments or disabilities. Careful consideration (and resourcing) will need to be devoted to the implementation of this provision to ensure it is achieved in practice for all children.

We also support the requirement (in new section 11(2)(d)) that any views children and young people express in relation to certain proceedings that affect them **must** be taken into account. However, the level of detail in the bill is insufficient to ensure this happens in practice. The bill is silent on these matters:

- How will these views be taken into account?
- Do they take precedence over other considerations or are they to be considered with equal weight alongside other factors?
- How will stakeholders, including the public and children and young people themselves know how these views were taken into account?
- When children's wishes cannot be accommodated, how will this be communicated to them?

There is a common misconception that child-centred practice involves *only* listening to and acting on the views of the child. This is not the case. In our recent *State of Care* report, we provided the following guidance:

"Determining what is in a child's best interests involves talking and listening to them and their families and whānau, and it also requires that social workers and others use their professional judgement, expertise in child development and attachment, cultural competence, and knowledge of the individual child and their circumstances to

"No one ever talked to me about a plan."

- Child in non-kin foster care, 2015

*make informed decisions that meet that child's needs.*¹

In our view, professionals to whom new section 11 will apply should take children's views as their starting point, and consider other factors such as those listed above in light of what the child has expressed. If, after taking into account the full range of considerations, it is clear that enacting the child's wishes is not in their best interests, the reasons for this should be clearly and honestly communicated to the child. This would reflect section 5(e) of the CYP&F Act which states that effort should be made to obtain children's support for decisions that affect them.

To ensure this happens in practice, we recommend:

- Expanding new section 11(2)(d) to stipulate how children's views must be taken into account;
- Adding a new section 11(2)(e) to oblige the decision-maker to demonstrate in the decision how a child's voice has been taken into account; and
- Adding a new section 11(2)(f) stipulating that the outcome of the decision must be communicated to the child as soon as possible in language that they can understand, including an explanation of how their views were accommodated, or of why their views could not be accommodated.

It is also concerning that the bill offers an effective "get-out" clause in new section 11(2)(a), whereby an adult (described in subsection 3) can deem participation by the child is not appropriate. Again, the bill is silent on how such a decision is to be made. It is possible to envisage some situations in which children's participation may be inappropriate (such as when it would endanger the child or another person). However, as drafted, it reads rather too much like "adults know best." The bill should clearly define the circumstances in which it would be appropriate for a child or young person's voice to be excluded.

(B) Voices of children at the system level (refer to clause 6(3) of the bill, which amends section 7(2)(c)(ii) of the CYP&F Act)

The bill also provides for children's voices to be embedded in the new operating model by requiring, wherever possible, that policies and services have regard to the views of children and young people. We support this provision.

There are numerous methods by which children and young people's views can be gathered to inform policy and service decisions, ranging from individual interviews with care-experienced children and young people, to the establishment of youth advisory boards, to surveys and regular informal feedback mechanisms, including empowering young people themselves to gather feedback from their peers.

We recommend that the bill specifies that the full range of methods for gathering children and young people's views are actively investigated and used as appropriate, both in the development and implementation phase, and in the "business as usual" of the new operating model.

Once the new model is operational, the ways that children and young people's views have been used to improve policies and services should be a matter of public record.

We recommend a new section 7(2)(c)(ii)(ia), to include a requirement for the Chief Executive to publish annually how the views of children and young people have been given regard to, and what changes have been made as a result.

This would help to ensure the intention of requiring the Chief Executive to have regard to children's views is given effect in practice, and would help embed a more child-centred way of working across the whole organisation. Anything less than this will mean that the new obligation to have regard for the views of children and young people will not have sufficient public accountability.

Given all these changes strengthening the extent to which children and young people's views are taken into account, we also recommend amending the existing section 5(d) of the CYP&F Act, which sets out the principle that children and young people's views should be given "consideration." This section should reflect the new expectation that these views will now be "taken into account" in the ways we have outlined above.

"The children of the State have a voice and know the system better than anybody. Please ask us."

- Participants in a youth voices workshop, 2014

¹ Office of the Children's Commissioner, *State of Care 2016*: <http://www.occ.org.nz/assets/Uploads/OCC-State-of-Care-2016FINAL.pdf>

While these changes should strengthen the extent to which children can participate in decisions that affect them, legislation alone does not guarantee that meaningful participation will occur. For children's views to be successfully and meaningfully embedded in the new operating model, at both the individual and system levels, a considerable culture change will be required within the current workforce. This will require a clear child-centred vision, strong leadership, training and support, supervision, and a commitment to continuous improvement, including addressing underlying values and attitudes. In our view, without the additional elements we have suggested, the bill will not drive the cultural change required.

3. A NEW YOUTH ADVOCACY SERVICE

(Refer to clause 6(2) of the bill, which amends section 7(2)(b) of the CYP&F Act)

The bill would require the Chief Executive to ensure that advocacy services are available to children and young people that:

- Support them to express their views on matters that are important to them; and
- Listen to their views on the operation and effectiveness of services provided under the Act, with a view to improving them.

We strongly support the creation of the youth advocacy service. In addition to these two important functions, we think a number of additional elements are critical to the success of such a service. These are based on a review of what works well in other jurisdictions and our observation of what is required in New Zealand, and were included in our inaugural *State of Care* report in 2015.² We think an independent advocacy service needs to:

- Connect children in care together, reducing the isolation that can be experienced in care, and helping them to establish a positive identity as part of a wider family of children and young people in care;
- Advocate for individual children in care, helping to make their care experience more positive and reducing negative outcomes they can experience; and
- Empower children in care, supporting them to speak up about what they need and

investing in training and development to grow youth leadership from within the system.

Missing from the current system, and the bill as currently drafted, are provisions to enable a child-friendly complaints mechanism through which children and young people can raise concerns about their treatment and experience. The inaccessibility of the current complaints system to children is evidenced by the fact that in the 2015-16 financial year (up until March 2016), CYF received only two complaints from children and young people.

"Young people's questions get shut down a little bit. We don't have a forum for raising genuine issues."

- Care-experienced young person, 2014

We recommend adding to new section 7(2)(bb) a third area that the advocacy services should support children and young people to raise their views on, namely any concerns about their experience in the care and protection and youth justice systems, including maltreatment, abuse, neglect or miscarriage of justice.

In addition, we think the second tranche of legislation giving effect to the EAP's recommendations should include the establishment of a fully child-centred complaints mechanism, separate from, but connected to, the new advocacy service. Without such a mechanism, our experience suggests children will continue to lack confidence in the system and choose not to raise complaints.

4. EXTENDING POWERS UNDER THE ACT TO A BROADER RANGE OF PROFESSIONALS

(Refer to clause 7 of the bill, which amends section 7 of the CYP&F Act)

Finally, the bill gives effect to Cabinet's stated intention to enable more professionals to perform a broader set of functions in the new operating model, while making clear that the Chief Executive of the new children's entity is the single point of accountability for vulnerable children and young people.

While we cautiously support this objective, we have some concerns about these provisions, which arise largely because the legislation is being amended before detailed policy decisions have been made.

The bill vests in the Chief Executive statutory functions currently residing with social workers to

² Office of the Children's Commissioner, *State of Care 2015*: <http://www.occ.org.nz/assets/Publications/OCC-State-of-Care-2016.pdf>

assess, make decisions, and act on behalf of children and young people. To ensure social workers can continue to exercise these functions, and recognising their position as key professionals in the care and protection and youth justice systems, the Chief Executive will be deemed to have delegated all relevant functions to social workers, but will have the flexibility to delegate these functions to a range of other professionals as well.

This Committee is currently conducting an inquiry into the operation of the *Social Workers Registration Act 2003*. In our submission on that inquiry we suggested that social workers exercising statutory powers under the CYP&F Act should be registered and also be required to demonstrate a competence to work with children and young people. If these statutory powers are to be extended to other professionals, careful thought needs to be given to how their competence to do so will be assessed.

The bill states at new section 7C(2)(a) that before making a delegation to a person who is not a social worker, the Chief Executive must be satisfied that the person is appropriately qualified, taking into account their training, expertise and interpersonal skills. However, the bill is silent on how this will be assessed. It will not be practical for the Chief Executive to individually assess the training and interpersonal skills of every individual from the wide range of professionals that the bill anticipates could have functions extended to them. Yet the Chief Executive will be the single point of accountability and will need to be satisfied to a high degree of certainty that the professionals to whom s/he is delegating powers is competent to exercise them. We recommend a publicly transparent mechanism for determining how this is developed and implemented.

If there is a need for a child-centred competency in the social work profession, it is even more important that some mechanism is developed to ensure that other professionals exercising powers under the CYP&F Act in future can also demonstrate the skills, knowledge and expertise required to work effectively with children and appropriately exercise statutory powers. We strongly suggest that the Committee considers this bill alongside its inquiry into the operation of the *Social Workers Registration Act 2003* to ensure that changes to both pieces of legislation are compatible.

For the new operating model to be truly child-centred, it will be vital that children and young people have one point of contact, even if multiple agencies and professionals are involved in their care. Children tell us that they need to be able to engage with someone familiar and trusted, who can broker and coordinate other services on their behalf. This role has traditionally been carried out by social workers. While we are open to the idea of other professionals exercising this function, care needs to be given to ensure children and young people have access to one person with the skills and expertise to work with them and exercise statutory functions responsibly.

CONCLUSION

This bill is a promising development, but it does not go far enough. The maximum age for inclusion in the youth justice system needs to be raised to 18 alongside the age for care and protection. To ensure the new operating model is child-centred, the bill needs more detail about how children's voices will be acted upon. This greater level of detail will help to ensure that the necessary culture change towards more child-centred ways of working occurs, by setting clear expectations and accountabilities in legislation. The move to a child-centred system will also require a clear vision and appropriate leadership, training and support. A child-friendly complaints system is needed alongside the new advocacy service. Careful thought needs to be given to how the Chief Executive will ensure that professionals with delegated powers under the *Children, Young Persons and Their Families Act, 1989* (CYP&F Act) have the skills and knowledge to work effectively with children and young people.

SUMMARY OF RECOMMENDATIONS AND AMENDMENTS

High-level recommendations:

1. The extent to which children's rights are given practical effect is established as a key criterion for success of the new operating model.
2. The EAP's recommendation of an opt-in right for a young person to stay in or return to care up to the age of 21 and to access extra support up to the age of 25 is expedited in the second tranche of legislation later this year.
3. The upper age for inclusion in the youth justice system is raised to 18 years as soon as possible.
4. Careful consideration (and resourcing) is devoted to the implementation of new section 11(2)(c) requiring suitable supports to be provided for children who may have difficulties expressing their views or being heard.
5. The bill specifies that a full range of methods for gathering children and young people's views is investigated and used as appropriate, both in the development and implementation phase, and in the "business as usual" of the new operating model.
6. A clear child-centred vision is developed for the new operating model, and accompanied by strong leadership, training and support, supervision, and a commitment to continuous improvement, including to address underlying culture, values and attitudes.
7. The new youth advocacy service includes the functions of connecting children in care together, advocating for individual children, and empowering children in care.
8. The second tranche of legislation includes the establishment of a fully child-centred complaints mechanism, separate from, but connected to, the new advocacy service.
9. A publicly transparent mechanism is developed to clarify how a professional's competence to exercise delegated statutory powers will be assessed under new section 7C(2)(a).
10. The Committee considers this bill alongside its inquiry into the operation of the Social Workers Registration Act 2003 to ensure that changes to both pieces of legislation are compatible.
11. Care is given to how the new operating model will ensure children and young people have access to one person with the skills and expertise to work with them and exercise statutory functions responsibly.

Specific amendments:

1. Amend new section 11(2)(a) to set out the circumstances in which it would be appropriate for a child or young person's voice to be excluded.
2. Expand new section 11(2)(d) to stipulate how children's views must be taken into account.
3. Adding new section 11(2)(e) to oblige the decision-maker to demonstrate in the decision how a child's voice has been taken into account.
4. Adding new section 11(2)(f) stipulating that the outcome of the decision must be communicated to the child as soon as possible in language that they can understand, including an explanation of how their views were accommodated, or of why their views could not be accommodated.
5. Amend new section 7(2)(c)(ii)(ia) to include a requirement for the Chief Executive to publish annually how the views of children and young people have been given regard to, and what changes have been made as a result.
6. Amend section 5(d), to reflect the new expectation that children and young people's views will be "taken into account."
7. Amend new section 7(2)(bb) to provide children with an opportunity to express concerns about their experience in the care and protection and youth justice systems, including maltreatment, abuse, neglect or miscarriage of justice.