

Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill

Submission to the Justice Committee

20 October 2023

Mihi

*Tuia te rangi e tū iho nei
Tuia te papa e takoto ake nei
Tuia ngā kōrero
Tuia ngā wānanga
Kia mau, kia ita, kia kuru pounamu te rongo
mō te oranga o ngā mokopuna
Haumi e, hui e! Tāiki e!*

*E ngā mana, e ngā reo, e ngā iwi o ngā hau e
whā. E rau rangatira mā, e ngā mokopuna o
te motu whānui, tēnā koutou katoa.*

*Nei rā te mihi maioha ki a koutou ngā
mokopuna e pou kaha ana ki te whakaputa
ngā whakaaro kia hāpai ai i ēnei mahi o
Mana Mokopuna, kia mōhio, kia mārāma ai
tātou katoa kia kuru pounamu te rongo. Tēnā
koutou.*

*He taonga te mokopuna, kia tipu, kia rea. Nō
reira manaakitia ā tātou mokopuna.*

Nāku iti nei,



Kaikōmihana Matua mō ngā tamariki
Mana Mokopuna
Kaiwhakawā Frances Eivers
Ngati Maniapoto, Waikato

Acknowledgments

*Weave together the sky
Weave together the earth
Weave together the thoughts
Weave together the knowledge
Hold firm, be committed and steadfast so that
all children can live their best lives
Be united, draw together! Affirm!*

To all the peoples, speakers, and tribes across the four winds. To all the chiefly people, and to the mokopuna of Aotearoa, greetings to you all.

I acknowledge the children and young people who have shared their voice, thoughts, and knowledge to help support the Commission's work, to learn and understand so children and young people can live their best lives.

A child is a treasure, to be nurtured, to grow, to flourish. Therefore, take care of our mokopuna.

Yours humbly,



Chief Children's Commissioner
Children and Young People's Commission
Judge Frances Eivers

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Mana Mokopuna - Children and Young People's Commission

Mana Mokopuna - Children and Young People's Commission (Mana Mokopuna) is an Independent Crown Entity, led by the Chief Children's Commissioner. We advocate for the rights, interests, participation, and well-being of all children and young people (mokopuna) under 18 years of age in Aotearoa New Zealand, and young people aged 18-25 years if they are, or have been, in care or custody. We view mokopuna within the context of their families, whānau, hapū, iwi and communities.

We are committed to:

- giving effect to our obligations under Te Tiriti o Waitangi (Te Tiriti) and the Treaty of Waitangi (Treaty), recognising and respecting Māori participation, leadership and te ao Māori approaches in the performance of our functions
- advancing and monitoring the application of the United Nations Convention on the Rights of the Child (the Children's Convention), especially by Government.

The work of Mana Mokopuna is underpinned by:

- the Children's Convention:
- the child or young person within (without limitation) the context of their family, whānau, hapū, iwi, and communities:
- the diversity of children and young people in all its forms:
- the need for high aspirations for the well-being of all children and young people, including responsive systems and structures that support them:
- the need to give priority to the children and young people who are disadvantaged, and the issues affecting them:
- the need to hear from, and be informed by, children and young people:
- other international instruments relevant to, and that affect, children and young people.

Note the use of the word 'mokopuna'

Drawing from the wisdom of te ao Māori, Mana Mokopuna have adopted the term 'mokopuna' to describe all children and young people we advocate for, aged under 18 years of age in Aotearoa New Zealand. This acknowledges the special status held by mokopuna in their families, whānau, hapū and iwi and reflects that in all we do. Referring to the people we advocate for as mokopuna draws them closer to us and reminds us that who they are, and where they come from matters for their identity, belonging and wellbeing, at every stage of their lives.

Executive Summary

“Pleeeeee, to the people in power and the government – don’t tuck us away as a statistic... It’s really happening, who do we call for help???”
(Female mokopuna, Te Puru)¹

1. Mana Mokopuna - Children and Young People’s Commission welcomes the opportunity to provide this submission on the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill (the Bill).
2. Mana Mokopuna is an independent advocate for all 1.2 million mokopuna aged under 18 in Aotearoa and care-experienced mokopuna aged up to 25. Led by the Chief Children’s Commissioner, we advocate to promote the rights, interests and wellbeing of children and young people, as set out in the Children and Young People’s Commission Act.
3. We support the intention of this Bill to strengthen legal protections for victim-survivors of sexual violence and reduce the risk of mokopuna being questioned about consent to sexual activity in court through amending the Crimes Act 1961. Strengthening legal protections relating to mokopuna further aligns with Aotearoa New Zealand’s obligations under the Children’s Convention.
4. This submission raises the following key points:
 - The proposed Bill fails to strengthen protections for mokopuna victim-survivors aged 12-16 years;
 - Amendments within this Bill comprise only part of the reforms necessary in Aotearoa New Zealand on the kaupapa of consent. This includes challenging the concept of ‘reasonable belief in consent’ on the basis that it enables prejudicial, stereotyped, or false beliefs that downplay, deny, or justify rape to be aired in court, and places mokopuna survivors at further risk of re-traumatisation during proceedings. The petition of Layba Zubair outlines this issue (among others) and we urge the Committee to consider the issues raised by this petitioner;² and
 - In order for regulatory change to be effective, Mana Mokopuna proposes that amendments within the Crimes Act 1961 resulting from this Bill be incorporated into training and education for the legal sector and judiciary, to ensure they apply the legislation as intended, and in a way that contributes to a fair and robust justice system.
5. Please note, we wish to appear before Select Committee for this Bill.

Recommendations and endorsements

6. **We endorse** the amendments to the Crimes Act 1961 to reduce the risk of child victims of sexual violence aged under 12 being questioned about consent to sexual activity in court;
7. **We recommend** further consideration is given to also amending s134 of the Crimes Act 1961 to reduce the risk of child victims aged under 16 years being questioned about consent to sexual activity in court and to align s134 with the proposed changes to s132;

¹ PhotoVoice-Artwork.pdf (manamokopuna.org.nz)

² Report of the Justice Committee (2023). Petition of Layba Zubair: Consent law reform. Downloaded 13/10/2023 from [Petition of Layba Zubair: Consent law reform \(petitions.parliament.nz\)](https://petitions.parliament.nz/Petition-of-Layba-Zubair-Consent-law-reform).

8. **We recommend** that the Committee ground this amendment within wider consent reforms that are supported by regulatory and non-regulatory changes. This includes exploring what a positive definition of consent is, providing consent education for all mokopuna and clarifying reasonable grounds in law;
9. **We endorse** the petition by Layba Zubair, and urge Committee to consider the issues raised by this petitioner;
10. **We recommend** that guidance, education and training for the legal sector and judiciary is developed and implemented alongside the amendments in this Bill;
11. **We recommend** the Committee updates their use of language to describe those who have experienced sexual violence, adopting the term 'victim-survivor' rather than solely using the term 'victim'. Our proposed terminology is in line with current rights-based understanding of how people describe their experiences of sexual violence, and validates the complexity of people's experience and the broad-ranging impacts of sexual violence; and
12. **We recommend** a children's rights approach, based on the Children's Convention, Te Tiriti and the Treaty, is applied to this Bill.

Introduction

14. Mana Mokopuna is an Independent Crown Entity established under the Children and Young People's Act 2022, led by the Chief Children's Commissioner. We are the independent advocate for all 1.2 million mokopuna aged under 18 in Aotearoa and care-experienced mokopuna aged up to 25. Our purpose is to promote the rights, interests and well-being of children (under the age of 18) and custody- and care-experienced young people (aged 18-25). We advocate for their interests, ensure their rights are upheld, and help them have a say on issues that affect them.

Mana Mokopuna support strengthening protections for victim-survivors of childhood sexual violence

15. This Bill seeks to strengthen the legislative safeguards and to enhance protection for survivors of sexual violence aged under 12 during court processes.
16. The proposed amendments to the Crimes Act 1961 intend to reduce the risk of child victim-survivors of sexual violence being questioned about consent to sexual activity in court through:
- increasing the maximum penalty for the offence of sexual connection with a child to 20 years' imprisonment from 14 years' currently (s132(1)); and
 - adding an amendment to the offence of sexual violation (s128B) to specify that it does not apply to alleged victims under 12 years old.
17. Currently, most charges related to sexual violence against a child victim-survivor under the age of 12 have been brought under s128 of the Crimes Act 1961, regardless of the age of complainant. This means children under 12 are exposed to lines of questioning around sexual consent despite there being an age-specific category that specifies that consent is not a defence for this age group.
18. Data from the Ministry of Justice shows that between 2021 and 2022, there were 673 charges of s128B sexual violation against a child under 12 years. In the same period, there were 14 charges made under s132(1), 'sexual connection' with a child under 12 years (which specifies that consent is not a defence and is therefore irrelevant in court).³
19. This practice of bringing charges under s128B is inconsistent with current legislation and contradicts s132(1), which sets out an age-specific offence category for victim-survivors aged under 12 years, and in doing so, places mokopuna participating within the justice system at increased risk of further victimisation and traumatisation.
20. It also highlights the absence of a child-rights and active protection lens in the justice system, and the need for further training of the legal sector and judiciary who continue to charge and consider incidents of age-specific sexual violence under s128.
21. Mana Mokopuna supports the proposed amendments that will strengthen legal protections for children navigating the justice system. However, we have also outlined in the remainder of this submission some further considerations and recommendations aimed at improving the child protection landscape in the criminal and wider justice system for children and young people.

³ *Regulatory Impact Statement: Strengthening legal protections for victims of sexual violence - 24 March 2023 - Regulatory Impact Statement - Ministry of Justice (treasury.govt.nz)

22. **We endorse** the proposed amendments to the Crimes Act 1961 to reduce the risk of child victim-survivors of sexual violence being questioned about consent to sexual activity in court.

This amendment may result in further inconsistencies in how age-related sexual offences are treated

23. It is important to note that an additional provision, s134(1) Crimes Act 1961, contains the offence of sexual connection with a young person under 16 years. This provision is not subject to any amendments under this Bill.⁴
24. In effect, when considered alongside s128B and s132(1), s134(1) applies to offending against victim-survivors who are aged between 12 and 16 years. The maximum penalty available under s134(1) is 10 years imprisonment.
25. This Bill gives rise to two key consistency concerns.
- Firstly, the lower maximum penalty of 10 years for sexual connection under s134(1), in comparison to the maximum penalty of 20 years for sexual connection under s132(1) and sexual violation under s128B.
 - Secondly, the continued risk of re-traumatising mokopuna aged between 12 and 16 years through lines of questioning relating to whether or not they gave consent, effectively exempting this population of mokopuna from the protections this Bill is proposing for mokopuna under 12 years of age.

Inconsistency across maximum penalties

26. The policy rationale behind the current Bill outlines the trend that has emerged whereby prosecutors have utilised s128 instead of the age-specific provisions (s132 and s134), regardless of the age of the victim-survivor, in order to achieve the higher penalty of 20 years.⁵ The amendments proposed within this Bill do not include an increase of the maximum penalty for sexual connection with a young person under 16 years of age (i.e. 12 – 16 years).
27. The maximum penalty of offences reflects the culpability of offenders; prosecutors utilise s128 because the higher maximum penalty available under this provision reflects a higher level of culpability than those available under the age-specific provisions.⁶
28. All rights guaranteed by the Children’s Convention are guided by the general principle of non-discrimination.⁷ The distinction between mokopuna aged under 12 years, and those aged between 12 and 16 years, and the protections each group are afforded (or not) under this Bill is inconsistent with the Children’s Convention general principle of non-discrimination (that is, discrimination of all forms is prohibited).
- 29. Mana Mokopuna submits** that this Bill should contain an amendment to s134 to increase the maximum penalty from 10 years to 20 years in alignment with the amendment to s132 under this Bill, and s128.

⁴ Crimes Act 1961, s 134(1): “Every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.” Note s 134(6): “In this section young person means a person under the age of 16”.

⁵ [*Regulatory Impact Statement: Strengthening legal protections for victims of sexual violence - 24 March 2023 - Regulatory Impact Statement - Ministry of Justice \(treasury.govt.nz\)](#)

⁶ [*Regulatory Impact Statement: Strengthening legal protections for victims of sexual violence - 24 March 2023 - Regulatory Impact Statement - Ministry of Justice \(treasury.govt.nz\)](#)

⁷ [Convention on the Rights of the Child | OHCHR](#)

Consent-oriented questioning of mokopuna aged 12 – 16 years

30. We note that if the maximum penalty under s134(1) is not increased, the trend in practice of utilising s128B for sexual violence offending against mokopuna aged 12-16 years is likely to continue. However, regardless of whether s134(1) or s128B is used to prosecute offending against mokopuna aged 12-16 years, the defendant has a 'reasonable belief in consent' defence available to them. Given this, Mana Mokopuna is concerned about the harms this cohort of mokopuna experience in court proceedings when their consent is brought into question.⁸ This is discussed further below at [52].
31. While acknowledging this issue is complex,⁹ it is important to consider how to minimise the harms experienced by this cohort of mokopuna through sexual violence court proceedings. Such an approach is consistent with Article 3 of the Children's Convention, which requires the best interests of the child to be a primary consideration in all actions concerning them, including actions undertaken by courts of law.
32. In accordance with Article 12 of the Children's Convention, mokopuna have the right to have their views heard, considered and taken seriously in decision making that affects them. Any consideration of how to minimise the harms experienced by this cohort of mokopuna should take their views into account.
33. **Mana Mokopuna recommends** further consideration is given to aligning the amendments in s132 for mokopuna under 12 years of age with s134 for mokopuna under 16 years, and that consultation with mokopuna should be considered an integral part of this work.

We encourage considering these amendments in the wider context of consent reform

“ Better sex education including consent, all the types of contraception, and different sexualities.”

(Mokopuna, Education matters to me: If I were the boss)¹⁰

34. Mana Mokopuna encourages the Select Committee (Committee) to view the proposed amendments to strengthen legal protections as part of a part of wider consent law reform in Aotearoa New Zealand. Three key areas for reform relevant to victim-survivors and community organisations include:
 - a. Amending the definition of consent; and
 - b. Providing consent education for children and young people, as well as those working to support mokopuna in various systems; and
 - c. Clarification on what 'reasonable grounds' entail.
35. These suggested areas of consent reform build on the petition by Layba Zubair. Mana Mokopuna endorses this petition and urges the Justice Committee and the government to consider the issues raised in this petition.

⁸ [Chief-Victims-Advisor-report-Thats-a-lie-PDF.pdf \(justice.govt.nz\)](#)

⁹ [*Regulatory Impact Statement: Strengthening legal protections for victims of sexual violence - 24 March 2023 - Regulatory Impact Statement - Ministry of Justice \(treasury.govt.nz\)](#)

¹⁰ [Education matters to me: If I were the boss | Mana Mokopuna](#)

Amending the definition of consent

36. Unlike other international jurisdictions, Aotearoa New Zealand law does not define what consent *is*. Rather, s128A of the Crimes Act 1961 provides a non-exhaustive list of what consent *is not*, i.e., identifying what does not count as consent, and when it cannot be given. As Zubair states in her petition, the current negative model of consent allows the defence to argue that consent can be presumed until it is explicitly withdrawn or an individual is “clearly not in a state” to consent.¹¹ The current status quo is also clearly out of step with consent as taught through our education system – reflecting consent as an ‘enthusiastic yes’ and an ongoing process.
37. This interpretation of consent perpetuates harm during court proceedings, requiring complainants – including mokopuna – to prove an absence of consent to justify their allegation of sexual violence.
38. The current definition, or lack of, fails to consider the rights and needs of mokopuna, who are, in this context, vulnerable due to their age and stage of life, as well as the particular rights and needs of disabled mokopuna, complainants in relationships where sexual violence is a recurrence as well as ‘relationships’ in which a person has been groomed.
39. Case law, such as *Christian v R*,¹² highlights how the current legal definition of consent creates ambiguity and subjectiveness that negatively influences sexual assault cases. In *Christian v R*, the Supreme Court determined that even in the absence of a positive expression of consent (meaning affirmative answer), conduct or circumstances of the activity might infer a basis of consent. In defining what ‘circumstances’ qualify, the Supreme Court stated that ‘relationship expectations’ is an example of the circumstances in which a complainant’s silence may infer consent.¹³
40. This decision in *Christian v R* reinforces the need for the Aotearoa New Zealand justice system to align itself with international good practice¹⁴, common law, public understanding of consent, and as it is taught in the Aotearoa New Zealand education system (i.e. the notion of consent as an “enthusiastic yes”)¹⁵ to clearly define what consent is, rather than what it is not.
41. It is clear the definition of consent set out in our law does not reflect a rights-based understanding of consent. The absence of a positive definition of consent contributes to negative experiences for mokopuna navigating the justice system, barriers to understandings of healthy relationships and what safe and consensual sex and relationships look like, and ambiguity surrounding what sexual violence is.
42. The harmful impacts of utilising negative definitions of consent in the court system (i.e. what consent is not), will be amplified for 12 – 16 year old mokopuna following the proposed amendments. These mokopuna will now be the sole remaining cohort who may find themselves vulnerable to the use of a consent defence under s128B for prosecutors to access higher maximum penalty charge. (As highlighted above, using s128B removes

¹¹ Report of the Justice Committee (2023). Petition of Layba Zubair: Consent law reform. Downloaded 13/10/2023 from [Petition of Layba Zubair: Consent law reform \(petitions.parliament.nz\)](#).

¹² *Cyrus Christian (AKA William John Tassell) v R* [2017] NZSC 145 — Courts of New Zealand ([courtsfnz.govt.nz](#)).

¹³ [Consent and the law in Aotearoa — Dear Em](#)

¹⁴ International examples of positive definitions of consent are listed in Report of the Justice Committee (2023). Petition of Layba Zubair: Consent law reform. Downloaded 13/10/2023 from [Petition of Layba Zubair: Consent law reform \(petitions.parliament.nz\)](#), pp 4-5.

¹⁵ Report of the Justice Committee (2023). Petition of Layba Zubair: Consent law reform. Downloaded 13/10/2023 from [Petition of Layba Zubair: Consent law reform \(petitions.parliament.nz\)](#).

existing protections around consent defence in legislation specifically set out in their age-specific category). Our strong view is that this should be avoided.

43. We urge the Committee to look to international jurisdictions, and follow suit with adopting a positive definition of consent. Currently the likes of Canada, United Kingdom, and Victoria and New South Wales in Australia have not only adopted positive definitions of content, but several jurisdictions have changed their mens rea formulation as it relates to reasonable belief.¹⁶
44. In the context of sexual offences and sexual violence, consent forms a key basis in defence in both legislation and practice in the criminal and justice system. Without a clear understanding of what consent is, the legislation and justice system in Aotearoa continue to harm those most vulnerable, and in doing so, sits as an outlier internationally in its approach to consent reform.
45. Mana Mokopuna endorses the 12,178-strong petition led by Layba Zubair. We share the concern highlighted by Zubair and community that the absence of a clear definition for consent continues to perpetuate a lack of understanding and inequitable and harmful practices in the justice system, and a positive definition of consent is essential to empowering victim-survivors, strengthening positive social norms around safe and healthy relationships, and enabling an equitable and robust justice system. These issues have a direct and important impact on mokopuna and their rights and wellbeing in Aotearoa New Zealand, and we must do all we can to strengthen and uphold their rights and wellbeing in this context.

Consent education and training

46. Aotearoa New Zealand currently relies on individual schools in consultation with its community to decide if they want to teach consent education, including how and what this looks like. The only official guidance for schools is from the Ministry of Education, which updated its guidelines on the importance of age-appropriate consent education in 2020, even so, these guidelines are not compulsory.¹⁷
47. The absence of a clear mandate for consent education, means there is a risk of discrepancy and bias in what mokopuna are taught in schools, if at all.

“ Often people don’t know how to react or don’t realise that its happened to them or the significance of it.”

(Rosie, year 13 ākonga)¹⁸

48. Children and young people who experience sexual violence are often not even be able to identify or label it as such. This can contribute towards the low rate of reporting of sexual violence experienced by mokopuna and can make mokopuna even more vulnerable to grooming and further abuse.

¹⁶ Mens rea: "(the mental element) is an ingredient of the offence and the prosecution is required to prove it (along with the physical element, the actus reus, of the offence). It requires the prosecution to prove that not only did a defendant engage in a prohibited act, but that defendant did so with the specified intent: the defendant's state of mind is important in assessing culpability". See the Legislation Design and Advisory Committee: Chapter 24 Creating criminal offences.

¹⁷ [Relationships and sexuality education – Parents.education.govt.nz – Practical information about education for parents and carers](https://www.education.govt.nz/parents/relationships-and-sexuality-education/)

¹⁸ [Calls for sexual consent education to be compulsory in NZ schools \(1news.co.nz\)](https://www.1news.co.nz/news/calls-for-sexual-consent-education-to-be-compulsory-in-nz-schools/)

49. Mokopuna have told us that they want sex and consent education in schools and their communities and have observed that this education may help mokopuna address problems with physical and virtual bullying and other forms of unhealthy relationships they are experiencing at school, at home and in their communities.¹⁹
50. In February 2022, Australia mandated consent education in every Australian school from 2023²⁰. This means all Australian schools are now required to teach age-appropriate consent education, which includes education around coercion, gendered stereotypes, and power imbalances. We strongly suggest that Aotearoa New Zealand has the opportunity to make similar traction in this space and learn from Australia's experience.

Clarifying 'reasonable grounds' in law

51. To be found guilty under s128B and s134(1) (age-specific section for mokopuna under 16), requires a jury or court to be convinced beyond reasonable doubt that the defendant had no 'reasonable grounds' to believe that the complainant consented to sexual violation under s128B or sexual connection under s134(1).
52. This means a defendant is not required to have proof of consent during a trial, but rather they can simply argue they believed the complainant consented at that time. For example, it may be argued that the complainant initiated sexual contact and/or they were very enthusiastic. It is then up to the complainant to prove they in fact did not consent.
53. As set out in the petition by Layba Zubair,²¹ the current interpretation of 'reasonable grounds' incentivises rape myths that are prejudicial, stereotyped, or false beliefs that serve to downplay, deny, or justify rape to be aired in the court room. This can minimise and further disenfranchises mokopuna victim-survivors as they engage in court proceedings.
54. Currently mokopuna between the age of 12 and 16 years, as set out in s134, are exposed to these lines of questioning in court proceedings around both their consent and their age.
55. Mana Mokopuna strongly urges the Committee to review the use of 'reasonable belief' in legislation and the application during court proceedings for all victim-survivors of sexual violence.

Sustained consent reform requires regulatory and non-regulatory change

56. In order to truly strengthen legal protections and support victim-survivors in the justice system, the proposed Bill must be considered in the context of wider consent reform. We encourage the Committee to consider any regulatory amendments are supported with non-regulatory changes to ensure practice reflects legislation.
57. **We recommend** that the Committee ground these amendments within wider consent reforms that are supported by regulatory and non-regulatory changes. This includes exploring what a definition of consent is, rather than the absence of one, and providing consent education for children and young people, including those working in systems that support mokopuna; and
58. **We endorse** the petition by Layba Zubair and urge Committee to consider the issues raised by this petitioner.

¹⁹ [What Makes a Good Life? | Mana Mokopuna](#)

²⁰ [Mandatory consent education is a huge win for Australia – but consent is just one small part of navigating relationships \(theconversation.com\)](#)

²¹ [Final report \(Petition of Layba Zubair\).pdf](#)

Regulatory amendments need to sit alongside further training and education

59. **Mana Mokopuna submits** that guidance and education for the legal sector and judiciary is necessary alongside the amendments in this Bill.
60. An option was presented in the Regulatory Impact Statement which focused on improving the guidance and education provided to prosecutors, defence lawyers and the judiciary to encourage the use of age-appropriate provisions and to reduce the likelihood of harmful lines of questioning.²²
61. Evidence shows that cross-examination questioning employed against young victim-survivors of sexual violence is characterised by the use of sexual violence misconceptions and myths; questioning the character of the complainant and/or their family; accusations of lying; and leading styles of questioning.²³ These forms of questioning do not speak directly to the question of consent but rather seek to undermine the credibility of a victim-survivor and bring into question the credibility of their evidence.²⁴ Young complainants report cross-examination to be highly distressing due to these methods of questioning.²⁵
62. This issue is not directly addressed by the Bill. Rather, by removing a consent-based defence in order to protect mokopuna under 12 years from this type of cross-examination these lines of questioning, Parliament acknowledges through this Bill the harm these lines of questioning cause.
63. **Mana Mokopuna recommends** increased education for lawyers including mokopuna-centric guidelines with a rights-based, active protection lens for the questioning of mokopuna in sexual violence proceedings, and judicial oversight and enforcement of these guidelines in court proceedings, as being necessary to reduce the harms experienced by mokopuna in the court system.²⁶

Strengthening legal protections aligns with a children's-rights approach

64. The New Zealand Government ratified the Children's Convention in 1993 and, in doing so, agreed to bring Aotearoa New Zealand's laws and policies in line with its provisions and principles. The Children's Convention therefore provides a framework upon which policy and legislation that affects children and young people (aged 0-17 years inclusive) ought to be built.
65. Children's rights are universal, indivisible, and interdependent. This means that the right of all mokopuna to be safe from violence needs to be considered in conjunction with, for example, their rights: to be to be safe and protected from violence (article 19); afford the highest possible standard of health (article 24);²⁷ to be protected from sexual exploitation

²² *Regulatory Impact Statement: Strengthening legal protections for victims of sexual violence - 24 March 2023 - Regulatory Impact Statement - Ministry of Justice (treasury.govt.nz)

²³ [Chief-Victims-Advisor-report-Thats-a-lie-PDF.pdf \(justice.govt.nz\)](#)

²⁴ [Chief-Victims-Advisor-report-Thats-a-lie-PDF.pdf \(justice.govt.nz\)](#)

²⁵ [Chief-Victims-Advisor-report-Thats-a-lie-PDF.pdf \(justice.govt.nz\)](#)

²⁶ [Chief-Victims-Advisor-report-Thats-a-lie-PDF.pdf \(justice.govt.nz\)](#)

²⁷ [Maori Health Model: Te Whare Tapa Wha, developed by Mason Durie. \(image... | Download Scientific Diagram \(researchgate.net\)\)](#)

(article 34); bringing the child justice system in line with the Children’s Convention (article 34); and to be supported to heal from violence (article 39)

66. Four principles guide the application of the Children’s Convention:
- a. Non-discrimination – all rights apply to every child, without discrimination; every mokopuna has the right to be safe from violence, without discrimination (Article 2)
 - b. Best interests – the best interests of the child should be the primary consideration in all actions concerning them, including prevention of, responses to, and healing from violence (Article 3)
 - c. The right to life and maximum possible survival and development (Article 6)
 - d. Participation – the right of mokopuna to have a say, be listened to and be respected as an active participant in their own lives and the things that are important to them. (Article 12)
67. In its sixth periodic report on the children’s rights situation in Aotearoa New Zealand (2023), the United Nations Committee on the Rights of the Child made the following observations relevant to the changes proposed by the Bill and related consent reform:²⁸
- The Committee remains seriously concerned about the persistent rates of abuse, neglect and violence against children, particularly domestic violence, noting the higher risk faced by Māori, Pasifika, LGBTI children, and children with disabilities.*
- The Committee is also concerned about the limited access to child-friendly reporting channels, physical and psychological rehabilitation and health services, including mental health services, available to children who have suffered violence, trauma or abuse.*
68. The UN Committee made recommendations relating to violence against children and identified them as requiring urgent action. These included the following recommendations relevant to the changes proposed by the Bill and further consent reform:
- a. Facilitate access to child friendly, multidisciplinary and multisectoral assistance and protection services for children who are victims of violence, including psychological support, to ensure their recovery and reintegration, and means to seek remedies for the violation of their rights; and
 - b. Invest in culturally-specific, community-based initiatives to equip families and communities to prevent and respond to cases of child abuse, neglect and violence, in coordination with civil society organizations.

We encourage the adoption of more rights-based language in the justice system

69. Mana Mokopuna encourages the Justice Committee to consider what rights-based language in the justice system may look like.
70. There is an argument that using either victim or survivor by itself invalidates a person’s complexity of experience; the term survivor can be seen as both empowering, but also implies an onus on victims to overcome what has been ‘done’ to them. Similarly, the term ‘victim’ can validate a person’s experience of harm done to them, yet the term may also invalidate a person’s sense of resilience or strength as they heal from violence. Additionally, we understand that ‘victim’ has specific legal implications and is a necessary term within the justice system.

²⁸ UN committee publishes concluding observations on rights of the child | New Zealand Family Violence Clearinghouse (nzfvc.org.nz)

71. Current good practice advises that when referring to people who have experienced harm, it is best to ask for their preference, acknowledge that how a person feels about their experience and the impact of violence is not static, and recognise that people may identify as both victim and/or survivor at any given time. To reflect this understanding, Mana Mokopuna joins others in broadly using the term 'victim-survivor', and supporting individuals impacted by harm to define themselves.²⁹
72. **We recommend** the Justice Committee updates its use of language to describe those who have experienced sexual violence, adopting the term 'victim-survivor' rather than solely using the term 'victim'. Our proposed terminology is in line with current rights-based understanding of how people describe their experiences of sexual violence and validates the complexity of people's experience and the broad-ranging impacts of sexual violence.

A Te Tiriti-centric approach is crucial for enhancing the rights, interests, and wellbeing of mokopuna

73. Te Tiriti o Waitangi and the Treaty of Waitangi provide the historical and constitutional context through which all government legislation and policy should be viewed. Prioritising a Te Tiriti-centric approach is crucial for enhancing the rights, interests, and well-being of mokopuna Māori, within their whānau, hapū, iwi, and communities. This aligns with the spirit and intent of Te Tiriti and the Treaty.
74. The provision of kāwanatanga under article 1 of Te Tiriti translates to a Crown's obligation to uphold good governance, including in the sphere of legislative drafting and policy making. This governance obligation must be considered alongside the guarantee of tino rangatiratanga to Māori under article 2 of Te Tiriti. Consistency in legislation is one means of ensuring good governance, which in itself then dictates what governance in action looks like, such as in court proceedings.
75. The provision of tino rangatiratanga under article 2 of Te Tiriti affirms and guarantees Māori self-determination and agency over their taonga (material and non-material). Article 2 of the Treaty establishes the provision of Crown protection of Māori self-determination and agency over taonga, such as mokopuna.
76. Mokopuna Māori are often disproportionately represented in sexual assault figures (25% in 2020). Therefore, an example of the Crown upholding the provision of protection (and good governance) includes ensuring legislative safeguards exist for vulnerable mokopuna that appear as complainants in court proceedings to mitigate further harm being. Further, the Crown must fulfil their obligations alongside the right of Māori to tino rangatiratanga which requires Māori participation, involvement and leadership in matters affecting them, which means legislative processes should be informed by the needs of mokopuna, whānau, hapū and iwi.
77. The provision of ngā tikanga katoa rite tahi under article 3 of Te Tiriti affirms the equal enjoyment of all rights and privileges for all peoples. This provision is often heightened in circumstances where governance and legislation do not safeguard those most

²⁹ Ministry of Justice (2023), Progression and attrition of reported sexual violence victimisations in the criminal justice system Victimisations reported April 2017– March 2023. Accessed 13 October 2023 from <https://www.justice.govt.nz/assets/Documents/Publications/Progression-and-attrition-of-sexual-violence-victimisations-through-the-criminal-justice-system-2017-to-2023.pdf>; SAKI – Sexual Assault Kit Initiative (2021), Victim or Survivor: Terminology from Investigation Through Prosecution. Accessed 13 October 2023 from <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf>; Ministry of Social Development (2020), Literature review on international best court support models for victim-survivors of sexual violence, Accessed 13/10/2023 from <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/literature-reviews/literature-review-on-international-best-court-support-models-for-victim-survivors-of-sexual-violence.pdf>

vulnerable, such as mokopuna Māori. For example, sexual violence is the primary reason for a mokopuna participating in a trial as a complainant. The absence of an active protection lens to legislation means child sexual abuse survivors under the age of 12 are currently exposed to lines of questioning concerning their consent to the abuse, further victimising these mokopuna.

78. The provision of te ritenga Māori under article 4 of Te Tiriti affirms and upholds the right of all individuals to practice Māori spiritual customs and religious beliefs without hindrance. It is essential that Crown systems acknowledge and respect this freedom of spiritual expression, including within the criminal justice system, ensuring that Māori spiritual customs and beliefs are valued, respected and protected for all to enjoy.
79. **We recommend** a children's rights approach, based on the Children's Convention and Te Tiriti, is applied within the criminal justice system to prevent inconsistencies between various pieces of legislation and their application in the operations of the system.

Conclusion

80. Mana Mokopuna supports the intention of this Bill to strengthen protections for mokopuna victim-survivors of sexual violence. We urge the Committee to consider our comments and reflect our recommendations, which seek to enhance the Bill through the application of a mokopuna rights-based and Te Tiriti approach.