Towards a child-centred care and protection and youth justice system

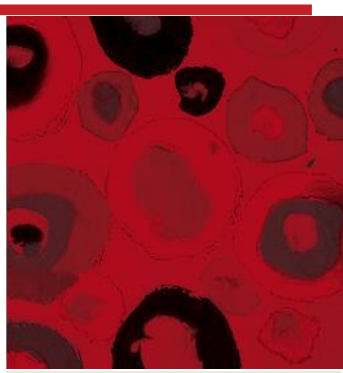
SUBMISSION FROM THE OFFICE OF THE CHILDREN'S COMMISSIONER ON THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES (ORANGA TAMARIKI) LEGISLATION BILL

3 MARCH 2017

MANAAKITIA A TĀTOU TAMARIKI
Children's Commissioner

Contents

Introductory comments from the Children's Commissioner



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

The Commissioner has the statutory role to advocate for their interests, ensure their rights are upheld, and help them have a say on issues that affect them.

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1 The *Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill* (the Bill) is one of the most significant pieces of legislation for children since the introduction of the original *Children, Young Persons, and Their Families Act* in 1989 (the Act).

2 Since starting my term on 1 July 2016, one of my top priorities has been providing constructive input into the re-design of the care and protection and youth justice systems to improve the experiences of the more than 60,000 children and young people who come into contact with those systems each year. My staff and I will continue to have input into the service design of the new system during and following the passage of this legislation. However, in many ways this Bill represents the culmination of that work – it lays the ground for the new agency, Oranga Tamariki, and its operating model.

3 Our Office has had the opportunity to comment on and make recommendations to improve many of the proposals in this Bill at earlier stages of their development. Some of our feedback has been taken on board and is reflected in the draft legislation. In other areas, we think more needs to be done to achieve the transformational, child-centred vision outlined by the Expert Advisory Panel (EAP) in its 2016 report.

4 I support the EAP's vision and the Government's objective of reforming the care and protection and youth justice systems. Our own monitoring of Child, Youth and Family (CYF) confirms what the EAP found: the current system is fragmented, lacks accountability, and is not well-established around a common purpose. The result is a system that does not serve children and young people well: not only do they experience high rates of re-abuse and re-victimisation, they have poor long-term health, education and employment outcomes.[1] The care and protection and youth justice systems exist to protect children and young people and help them to heal and recover so they can lead full and thriving lives. We should accept nothing less, but the sad reality is that we have collectively been putting up with less for many years. It is clear that change is needed.

5 There are a number of genuinely transformational changes to celebrate in this Bill. These include:

- The inclusion of a new principle supporting children and young people's right to participate in decisions that affect them;
- The ability for young people to remain in care until they turn 21, and to continue to receive advice and support until they turn 25 (to mirror the on-going support other young people receive from their parents at similar ages); and
- The decision to finally include most 17-year-olds in the youth justice system, bringing New Zealand back in line with our international obligations under the United Nations (UN) Convention on the Rights of the Child.

6 The Bill places a strong emphasis on the importance of a stable and loving home for all children and young people at the earliest opportunity; recognition of the importance of retaining links with family, siblings, culture and community; an understanding of the importance of culture and identity to children and young people's wellbeing; and, a strong

[1] Expert Advisory Panel Final Report, page 7: https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/investing-in-children/investing-in-children-report.pdf

focus on prevention and early, intensive intervention to ensure families where children are at risk are supported to retain care and custody of their own children whenever possible. All of these are positive developments worth supporting.

7 While I endorse the overall direction of this legislation and many of its individual provisions, it would be remiss of me not to sound three significant notes of caution.

1. THE IMPORTANCE OF ACCOMPANYING LEGISLATIVE CHANGE WITH SIGNIFICANT CULTURE CHANGE ACROSS THE ENTIRE SYSTEM

8 When it was introduced in 1989, the *Children, Young Persons and their Families Act* was considered transformational – even revolutionary. This was particularly because of the strong emphasis it placed on seeing the child and young person in the context of their family and community, and the extensive involvement it anticipated for family, whānau, hapū and iwi in decision-making. In practice, the promise of the Act has never been realised, in large part because practice has not reflected the Act.

9 A key finding of our 2016 *State of Care* report was that organisational culture was the main barrier preventing CYF from achieving its stated vision of "putting children at the centre of everything we do."[2] While there are elements of the legislation that need to be updated, the main barrier to date has not been inadequate legislation but a lack of alignment around a child-centred vision at all levels of CYF. In 2016 we observed barriers to child-centred practice in CYF in staff attitudes, values and beliefs; in the skills and knowledge that are valued in the workforce; and in the extent to which children's rights and needs were prioritised in decisions about their case management. Without a strong parallel process to embed child-centred practice across Oranga Tamariki, and the organisations and individuals it will partner with to deliver services, legislative change will do little to improve the daily experience of children and young people.

10 We cannot rely on regulation, practice guidelines or response to 'signals' in the legislation to bring about the changes we need. This has proved ineffective in the past. Rather, we need the legislation to be clear and directive and accompanied by a strategy for organisational change. Well-crafted legislation can lay the basis for transformational change. This submission contains 24 recommendations that, in my view, will help to achieve this.

2. THE VISION FOR TAMARIKI AND RANGATAHI MĀORI

11 The EAP and Investing in Children (IIC) teams have rightly identified that the new system needs to work better for Māori. It is my strong view that to achieve this will require recognition of the need to consider the needs of tamariki and rangatahi Māori through a Māori lens. This would be a considerable paradigm shift for the care and protection and youth justice systems. Making this shift would be consistent with the obligations imposed on the Crown in the Treaty of Waitangi.

12 The Bill contains some very positive additions in terms of recognising and upholding the rights and improving the outcomes of tamariki and rangatahi Māori – including the introduction of the concepts of mana tamaiti/tamariki, whakapapa and whanaungatanga. We commend these additions. However, two issues are not satisfactorily addressed.

Care placements with a member of the child's hapū or iwi.

13 This Bill has generated strong public concern about the exclusion of the existing principle in section 13(g)(i) that care placements should give priority to placing a child or young person with a caregiver who is a member of the child's hapū or iwi.

[2] CYF's child-centred vision as stated in *Ma Matou Ma Tatou,* CYF's Strategic Plan 2012-2015, available at: http://www.cyf.govt.nz/documents/about-us/publications/reports/our-strategy-final.pdf. Findings of our *State of Care* report are available at http://www.occ.org.nz/assets/Uploads/OCC-State-of-Care-2016FINAL.pdf (see page 8).

14 There are many positive additions in the Bill that affirm the role of whānau, hapū, and iwi. For example, the new section 5(d) makes it clear that decisions about tamariki and rangatahi Māori must recognise the whakapapa and whanaungatanga responsibilities of their whānau, hapū and iwi, and ensure that wherever possible whānau, hapū and iwi can participate in those decisions. These new elements, while referenced at the start of section 13, do not clearly and adequately offset the removal of the priority for kinship care placements as described in the Act at current section 13(g)(i). In my view, the Bill as currently drafted could lead to whānau, hapū, and iwi being excluded from decisions about where to place a child who has been removed from their usual caregivers.

15 Removing this provision will understandably be seen as potentially disconnecting tamariki and rangatahi Māori from their whānau, hapū, iwi, culture and identity. In my view, the removal of section 13(g)(i) is likely to result in decisions that do not maximise the best interests, uphold the rights, or meet the cultural needs of Māori children and young people.

16 There are many other enhancements to the system that need to be considered. The development of National Care Standards that will apply to all types of care arrangements is an important addition, and a means of providing assurance of the safety, stability and best fit of a care placement for each child and young person.

17 In Section 4 of this submission, I propose a way forward that will affirm the important role of whānau, hapū, iwi, in decision-making as well as their on-going care responsibility when children are removed from their usual caregiver. My recommendation involves re-drafting and re-ordering section 13 (see pages 23 and 24 of this submission).

Start from a Māori world view

18 Māori children make up only 15 percent of the wider population,[3] yet are 61 percent of children in care, and 71 percent of admissions to youth justice residences.[4] It is clear the system needs to change in fundamental ways to better serve their needs. We can see little evidence that the new system has been designed with the needs of the majority of the children and young people it serves at the centre – that is, starting from a Māori world view. Rather, the Māori concepts introduced in the Bill give the impression of being secondary considerations for Māori children in addition to the purposes and principles that apply to all children who come into contact with the care and protection and youth justice systems. The additional concepts are often only to be considered "where practicable". This is the wrong way around.

19 Our care and protection and youth justice systems should set high aspirations for the future lives and outcomes of Māori children and young people, and these should be the same aspirations for all children who come into contact with the system:

- Every child will benefit from knowing who they are, who their relatives and ancestors are, and where they come from;
- Every child will benefit from having meaningful, ongoing connection with their culture;
- Every child will benefit if their immediate and extended family are supported to provide them with a safe, stable and loving home;
- Every child needs and deserves love, connection, and aroha through secure attachments with loving caregivers;
- Every child is precious and should be protected from harm while having their rights and agency as individual citizens upheld.

[3] See http://www.stats.govt.nz/browse_for_stats/people_and_communities/Māori/Māori-population-article-2015.aspx?gclid=CLXL2qaNkdICFVFxvAodipwCvA

[4] See *State of Care 2016*, page 53: http://www.occ.org.nz/assets/Uploads/OCC-State-of-Care-2016FINAL.pdf

20 In this submission I propose enhancing the purposes and principles for decision-making about tamariki and rangatahi Māori and making these integral to the system as a whole. This simple change will shift the approach in the Bill from one where Māori considerations are secondary, to one where the system is transformational.

3. A LACK OF TRANSFORMATIONAL THINKING

21 The Bill as currently drafted falls short of the transformational vision for change outlined by the EAP. As the legislation has developed, operational considerations have constrained the scope and vision of the proposals so that in many cases they are unlikely to achieve the significant change mandated by Cabinet in its support of the final EAP report.

22 An example close to my heart as the former Principal Youth Court Judge is the failure to remove the use of Police cells as a custodial remand option for young people following an appearance in the Youth Court. Police cells are not an appropriate environment for young people. In such an environment, young people often experience inadequate food, round-the-clock lighting, and little access to appropriate support. They are often required to mix with adult prisoners during movement from cell to showering and washing facilities, and when being transported to and from court. The continued use of Police cells to detain young people is an ongoing breach of their rights under Article 37 of the UN Convention to be held in an appropriate custodial environment. This issue has been regularly raised by the UN Committee on the Rights of the Child. That the opportunity to correct this breach by repealing section 238(1)(e) has not been taken in this Bill is hugely disappointing. It is an example of the transformational vision of the EAP being watered down by current practice or operational resource concerns. A child-centred approach to this question would undoubtedly result in the removal of this provision, providing a real incentive to the development of new options for custodial remand.

23 Likewise there is evidence of this less-than-transformational approach in other parts of the Bill: the frequent weakening of important principles of participation and cultural consideration with qualifiers such as "where practicable", for example. If these reforms are to achieve their purpose of radically reforming the care and protection and youth justice systems from the ground up, and transforming the experiences of children and young people in these systems, this legislation needs to be more ambitious.

SUMMARY OF OUR RECOMMENDATIONS

Purposes of a child-centred system

Rec 1: Consider simplifying and restating the purposes and principles more clearly to better reflect their intent.

Rec 2: Reframe principles of mana tamaiti/tamariki, whakapapa, and whanaungatanga and place them at the heart of the Act for all children (i.e. ensure the system is designed from a Māori world view).

Rec 3: Include a definition of child-centred in the legislation, for example: "decisions and actions that affect children and young people are grounded in their best interests, enhance their mana, uphold their rights, include their voices, and meet their needs".

Rec 4: Update Section 2(1) in the Act so that the definition of child reads "a person under the age of 14 years" and the definition of young person reads "a person over the age of 14 years but under 18 years."

Rec 5: Replace all references to "him/her" and "his/her" throughout the *Children, Young Persons and their Families Act 1989* with the gender neutral pronouns "them/their."

Rec 6: Remove the phrase "so far is practicable" from the new Principles of Participation at proposed subsection 5A(1)(a) and 5A(1)(c).

Rec 7: Include in new section 5A reference to the collective right of children and young people to participate in policy and service decisions that affect them as a group, as well as in decisions that affect them as individuals.

Rec 8: Remove the exemption for decision makers under section 11 to comply with new subsection 5A(1) and instead amend section 11 to clarify that encouraging and assisting children and young people to participate in proceedings of the Family Court and Youth Court requires compliance with subsection 5(A)(1).

Rec 9: Include reference to the UN Declaration on the Rights of Indigenous Peoples at proposed section 5(a)(i).

Improving outcomes for Māori

Rec 10: Remove the qualifying language "wherever possible" from new section 5(d)(ii) and replace with "unless demonstrably impracticable".

Rec 11: Replace "have regard to" with "uphold and protect" at new section 7A(2)(b) so that it reads: "the policies, practices, and services of the department must uphold and protect the mana and whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi."

Care

Rec 12: Redraft section 13 as outlined in Section 4 of this submission to a) differentiate decision-making before and after a child is removed from their usual caregivers, b) apply the principles of mana tamaiti/tamariki, whakapapa and whanaungatanga to all children, and c) affirm the role of the child's family, whānau, hapū, iwi, and family group in decision-making both prior to and following a decision to remove a child from their usual caregivers.

Transition

Rec 13: Consider including timeframes for response in section 386A(3) and (4), and section 386B(2)(a) and (b).

Rec 14: Consider adding specialist therapy (or other relevant term) to the list of options listed at section 386B(4)(d) in recognition of the high likelihood that young people using this transition service will require ongoing therapeutic support.

Including 17-year-olds in the youth justice system

Rec 15: Remove the caveats for some offences and bring all 17-year-old offenders into the jurisdiction of the Youth Court.

Rec 16: If Recommendation 15 is not accepted, allow for young people who have serious charges reduced to be moved back form the adult justice system to the Youth Court, either by requiring that amended charges are automatically transferred to the Youth Court, or by requiring the amended charge to be withdrawn and a fresh charge laid in the Youth Court.

Rec 17: Consider flexibility to allow some 18 and 19-year-olds to come into the jurisdiction of the Youth Court under certain circumstances.

Rec 18: Raise the lower age of criminal responsibility from 10 to 12.

Youth justice

Rec 19: Conduct a full review of section 238(1)(c) with a view to ensuring an option for remand into the custody of family/support people that is workable in practice.

Rec 20: Extend access to legal representation to all young people accused of an offence within 24 hours of their arrest or interview.

Rec 21: Repeal section 238(1)(e) to end the use of Police cells for post-court custodial remand.

Accountabilities

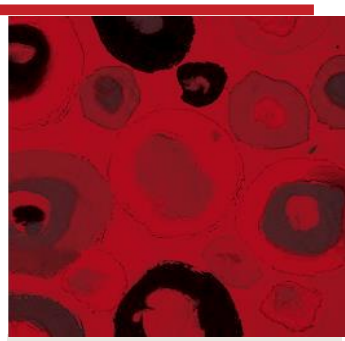
Rec 22: include in the VCA (Part 1, section 4 Purpose) the additional purpose of directing all decisions and actions undertaken as part of the Act be grounded in what is best for the child.

Rec 23: include in clause 12, new section 7(2)(b)(bad) that the complaints mechanism include an appeals process and independent oversight.

Information sharing

Rec 24: Revisit the new information sharing framework, in consultation with the Privacy Commissioner and a range of child welfare and protection organisations to better understand and mitigate the risks to children's privacy and safety.

Our approach to this submission



The UN Convention, defines 'children' as everyone under the age of 18. When we talk about 'children', we include this whole group.

In this submission, we also talk about 'children and young people' to mirror the language in the Bill and principle Act.

When talking about children and young people who are Māori we use the terms tamariki and rangatahi Māori.

24 We have focused on aspects of the Bill where we have greatest expertise, and where the views of children can best inform decisions.

25 New Zealand needs a truly transformational, child-centred care and protection and youth justice system that meets the needs and upholds the rights of children and young people, especially for the majority who are Māori. To assess how likely this is to be achieved, we have kept the following four questions at the forefront of our thinking when responding to the IIC team working on the legislation and design of the new system.

1. ***Do the proposed changes increase child-centredness?***
2. ***Do the proposed changes address the needs and reduce the deficits for Māori?***
3. ***Do the proposed changes meet New Zealand's obligations under the United Nations Convention on the Rights of the Child?***
4. ***Are the proposed changes transformational?***

26 We have used these questions to shape and guide our submission on the Bill. For each of the Bill's major areas of change, we have included:

- A brief summary of what is proposed;
- Our snapshot assessment of these four questions;
- A more detailed discussion; and
- Recommendations for improvement and specific amendments.

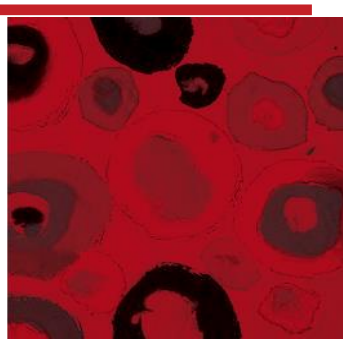
Being child-centred

27 A critical part of being child-centred is listening to the views of children and young people. This is their right under the UN Convention. We know it produces better decisions and outcomes when done well. We have been pleased that children and young people's voices have been given high priority in the EAP process and subsequently in the development of this legislation and in the ongoing service design. We commend this, and wanted to ensure that children and young people's views were also central to and visible in our submission. For that reason, the voices of children and young people who have experienced the care and protection and youth justice systems are woven throughout this submission. These were gathered by our staff between 2014 and 2016 either as part of our ongoing monitoring of Child, Youth and Family, or in focus groups and workshops we have facilitated to gather children's views on the redesign of the system.

28 Our submission is organised by the following sections:

- Section 1: Purposes of a child-centred system
- Section 2: Improving outcomes for Māori
- Section 3: Prevention and Intensive Intervention
- Section 4: Care
- Section 5: Transition
- Section 6: Including 17-year-olds in the youth justice system
- Section 7: Youth justice
- Section 8: Accountabilities
- Section 9: Information sharing

Section 1: Purposes of a child-centred system



1.1 WHAT IS PROPOSED?

- Replacing section 4 with a new section setting out the purposes of the Act. This change includes a stronger emphasis on preventing vulnerability and intervening early, and the introduction of the concepts of mana tamaiti/tamariki, whakapapa and whanaungatanga.
- Restating the principle (in new section 4A) that the wellbeing and best interests of the child are the first and paramount consideration in all matters relating to the Act, except in matters relating to youth justice, in which the wellbeing and best interests of the child are primary considerations alongside the public interest, interests of victims, and accountability of the child or young person for their behaviour.
- Amending section 5 to include a new set of principles to be applied in the application of the Act. These place the child at the centre of decision-making that affects them, with reference to their rights, and situates them in the context of their family and community.
- The new principles in section 5 introduce specific principles to be applied in decision-making about Māori children and young people – recognising and protecting the mana and wellbeing of the child or young person as well as whakapapa and whanaungatanga.
- New section 5A introduces new principles of participation: that children and young people should be encouraged to participate in decisions that affect them, decisions should set out the child's views and state how they were taken into account, and the reasons for a decision affecting a child or young person must be explained to them.

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

– Participant in youth voices workshop 2015

1.2 SUMMARY OF OUR VIEW OF PROPOSALS

Overall, we are pleased to see that the Bill explicitly places children at the centre of decision making, in the context of their families, whānau, hapū, iwi and communities. The new purposes and principles in sections 4 and 5 set out how children and young people's rights, needs, interests, and opinions must be considered in decisions that affect them.

Do the proposed changes increase child-centredness?

Yes. The proposed changes do aim to increase child-centredness. However, the draft Bill offers no definition of what it means to be child-centred, which is a significant omission.

Do the proposed changes address the needs and reduce the deficits for Māori?

Partially. It is positive and appropriate to see the inclusion of Māori concepts such as mana tamaiti/tamariki, whakapapa and whanaungatanga, and a commitment to providing and coordinating services that are culturally appropriate. This would be improved by recognising that the concepts have universal application and should be central to the principles section as it pertains to all children, rather than as a secondary consideration for tamariki and rangatahi Māori.

Do the proposed changes meet New Zealand's obligations under the UN Convention on the Rights of the Child?

Yes. The proposals are aligned with the UN Convention.

Are the proposed changes transformational?

Partially. The purposes and principles set out in the Bill do not clearly communicate a transformational vision for the wellbeing of children and young people in New Zealand. A truly transformational approach would be a system designed from a Māori world view to reflect the fact that the majority of children and young people in the care and protection and youth justice systems are Māori, and the principles of mana tamaiti/tamariki, whakapapa, and whanaungatanga apply to all children.

The inclusion of the new participation principle could be transformational for how children and young people are involved in decisions that affect them, and is a welcome inclusion. However, the intent is watered down by language such as "so far as is practicable".

1.3 DISCUSSION

29 The Office of the Children's Commissioner has been a strong proponent of a more child-centred care and protection and youth justice system. It is therefore positive to see that the Bill explicitly places children at the centre of decision making, in the context of their families, whānau, hapū and iwi and communities. The new purposes and principles sections set out how children and young people's rights, needs, interests, and opinions must be considered in decisions that affect them.

"We felt in our experience that love was one of the main things that was missing a lot of the time"

– Participant in youth voices workshop 2015

Need for system-wide change

30 We would argue that the existing objects and principles of the Act are also child-centred, but they have not led to consistent child-centred practice. We cannot rely on regulation, practice guidelines or response to 'signals' in the legislation to bring about the changes we need. This has proved ineffective in the past. Rather, we need the legislation to be clear and directive.

31 Clear and directive legislation needs to be sustained by consistent child-centred practice. This will require every aspect of Oranga Tamariki, from its organisational culture and leadership, to systems and practices at the site level, to elements of individual practice, to be aligned. This requires: upskilling and resourcing the workforce to work in child-centred ways; meaningfully engaging with children and young people; building cultural capability; and adequately resourcing Oranga Tamariki to reduce caseloads and enable children and young people to access the services they need. We will continue to provide input into the service design process for Oranga Tamariki to ensure that this happens.

Clarity of principles and purposes

32 One barrier to translation of well-intentioned purposes and principles into consistent child-centred practice is lack of clarity. It is not easy to pick up this Bill and see what New Zealand's vision is for children and young people when they come into contact with the care and protection and youth justice system, nor what children, young people and their families can expect from Oranga Tamariki. Rather, there is a long list of complex and repetitive purposes and principles to be applied in decision-making under the Act, including some that are only to be applied to Māori children.

33 In the first instance, we would like to see the principles of mana tamaiti/tamariki, whakapapa, and whanaungatanga apply to all children.

34 Secondly, we would like to have the purposes and principles articulated more clearly and simply, setting out clearly what the vision is for children and young people, and what they and their families can expect from Oranga Tamariki.

Definition issues

Child-centred

35 The Bill offers no definition of what it means to be "child-centred". Given the importance of this concept to the success of Oranga Tamariki, it is important to include a definition to ensure consistent understanding and application in practice. In our monitoring of CYF, and in our wider work with and for children, we often come across confusion about what it means to be child-centred. Examples include uncertainty about how to balance a child's immediate need for safety against their rights and wishes to stay connected with their family; tensions about what it means to be child-centred in a Māori context; or a misconception that being child-centred means enacting the wishes of the child independent of other considerations. If the concept is not clearly defined, it is likely that such confusion will continue.

36 In our 2016 *State of Care* report we offered the following explanation of what it means to be child-centred:

> *Being child-centred means all decisions and actions are grounded in what is best for the child. It means understanding the child within the context of their family and whānau. 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 child and their circumstances to make informed decisions that meet that child's needs.*[5]

37 We suggested the development of a clear statement of what child-centred practice means in our care and protection and youth justice systems, expressly addressing areas of current ambiguity, and making clear how staff in all parts of the care and protection and youth justice systems can contribute to child-centred practice. It seems this work has not been done, yet the Bill places a strong emphasis on the importance of a child-centred system. We strongly suggest a definition of child-centred is developed and included in the Bill for clarity, and staff across the entire system are involved in conversations about what child-centred practice means for them and their work.

38 It will be particularly important that the definition of what it means to be child-centred strongly emphasises that the child or young person cannot be seen in isolation from their family, whānau, hapū, iwi and wider community and that the definition is inclusive of Māori concepts and principles. Increasingly in our work, we think of child-centred decisions and actions as decisions and actions that enhance the mana of the child.

Gender-neutrality

39 An additional point on definitions relates to clause 4(2), which proposes a new definition of young person: "a boy or a girl of over the age of 14 years but under 18 years". While we recognise that this language is consistent with definitions in the Act, the use of the terms "boy" and "girl" excludes children and young people who identify as gender fluid, non-binary, or transgender. We recommend taking the opportunity to update this language. Section 2(1) in the Act should be updated so that the definition of child reads "a person under the age of 14 years" and the definition of young person reads "a person over the age of 14 years but under 18 years." In keeping with these changes, we recommend that all references to "him/her" and "his/her" throughout the *Children, Young Persons and their Families Act 1989* by replaced with the gender neutral pronouns "them/their."

[5] See *State of Care 2016*, page 2: http://www.occ.org.nz/assets/Uploads/OCC-State-of-Care-2016FINAL.pdf

Disabled children

40 New section 5(a)(x) states "for disabled children or young persons, the impact of their disability and any disadvantage resulting from that disability is considered and any impact mitigated". We do not support this language. We support the IHC's suggested replacement wording: "Disabled children and young people receive support and assistance to enjoy their rights on an equal basis with non-disabled children and young people".

41 The repeal of sections 141 and 142 means that disabled children and young people will have the same protections as non-disabled children and young people when they come into care. This is welcome. However, due to the amount of detailed work that is still being completed, the impact of the repeal of these sections is unclear. Care will need to be taken to ensure that the repeal of these sections does not lead to unintended negative consequences for disabled children.

42 Although data is limited, it is likely that a high proportion children and young people in the care and protection and youth justice systems experience disability. Disabled children need to be visible within Oranga Tamariki legislation and service design.

New participation principles

43 The inclusion of the new principles of participation in proposed section 5A is welcome and could be transformational. It is great to see children and young people's right to participate in decisions that affect them specifically addressed in the legislation with a clear expectation set about what constitutes best practice. However, it is disappointing to see these provisions qualified by language such as "so far as is practicable." Unless accompanied by practice guidance that makes clear that being 'too busy' is not grounds for declaring something to be impractical, this language provides too easy an 'out' for not involving children and young people in decisions that affect them, or for not reporting back to them about these decisions. We recommend the removal of this qualifying language.

44 Furthermore, there is a strong emphasis in the new principles on involvement of children and young people in decisions that affect them as individuals. Children and young people are also entitled to be involved in decisions at the collective level, for example to inform policy and practice decisions about how Oranga Tamariki will operate. This should be reflected in the legislation as well.

45 We are concerned at the inclusion of new section 5A(2), which states that a person who complies with section 11 (setting out that a child or young person appearing before the Family Court or Youth Court must be encouraged and assisted to participate in those proceedings) is deemed to be in compliance with new subsection 5A(1). 5A(1) goes considerably further that section 11, in that it sets out that decision makers must set out in writing how the young person's views were taken into account, and explain the reasons for the decision to the child or young person. Rather than exempting section 11 from compliance with 5A(1), we suggest amending section 11 to clarify that encouraging and assisting the child or young person to participate in decisions in the Family Court and Youth Court requires decision makers to comply with new subsection 5A(1).

Upholding children's rights and reference to all appropriate international obligations

46 There are several rights in the UN Convention to consider, including:

> *Article 3: In all actions concerning children the best interests of the child shall be a primary consideration.*

This is reflected in the Bill in the "paramountcy principle."

> *Article 12: Children have a right to express their views on matters that affect them, and for those views to be heard.*

This is reflected in the Bill in the new "participation principles" in section 5A, although we are concerned that these will be weakened by the use of "so far as is practicable."

> *Article 20: Children who cannot safely remain in their family environment are entitled to special protection and assistance from the state, including alternative care arrangements. These arrangements should take into account the importance of continuity for the child, and their ethnic, cultural, religious and linguistic background.*

These considerations are well reflected in the purposes and principles. However, we are concerned that the later removal of section 13(g)(i) giving priority to kinship care placements undermines and dilutes the emphasis on whānau and whakapapa in this part of the Bill.

> *Article 39: The state must take all appropriate measures to promote physical and psychological recovery and reintegration for children who have experienced any form of neglect, exploitation, or abuse.*

This is reflected in purposes related to preventing and responding to harm, protection from further harm, supported transition to adulthood, and responding to offending in a way that promotes the rights and best interests of children and young people.

47 It is encouraging to see a specific reference to upholding and respecting children and young people's rights under the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities at new section 5(a)(i). Given the prevalence of Māori children and young people in the care and protection and youth justice systems we strongly suggest also making reference to the UN Declaration on the Rights of Indigenous Peoples.

1.4 RECOMMENDATIONS

Rec 1: Consider simplifying and restating the purposes and principles more clearly to better reflect their intent.

Rec 2: Reframe principles of mana tamaiti/tamariki, whakapapa, and whanaungatanga and place them at the heart of the Act for all children (i.e. ensure the system is designed from a Māori world view).

Rec 3: Include a definition of child-centred in the legislation, for example: "decisions and actions that affect children and young people are grounded in their best interests, enhance their mana, uphold their rights, include their voices, and meet their needs".

Rec 4: Update Section 2(1) in the Act so that the definition of child reads "a person under the age of 14 years" and the definition of young person reads "a person over the age of 14 years but under 18 years."

Rec 5: Replace all references to "him/her" and "his/her" throughout the *Children, Young Persons and their Families Act 1989* with the gender neutral pronouns "them/their."

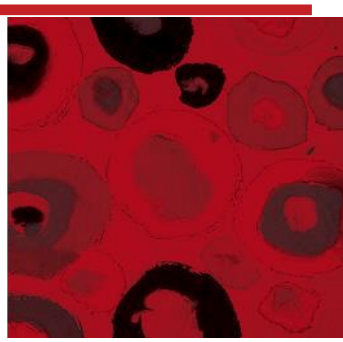
Rec 6: Remove the phrase "so far is practicable" from the new Principles of Participation at proposed subsection 5A(1)(a) and 5A(1)(c).

Rec 7: Include in new section 5A reference to the collective right of children and young people to participate in policy and service decisions that affect them as a group, as well as in decisions that affect them as individuals.

Rec 8: Remove the exemption for decision makers under section 11 to comply with new subsection 5A(1) and instead amend section 11 to clarify that encouraging and assisting children and young people to participate in proceedings of the Family Court and Youth Court requires compliance with subsection 5(A)(1).

Rec 9: Include reference to the UN Declaration on the Rights of Indigenous Peoples at proposed section 5(a)(i).

Section 2: Improving outcomes for Māori



2.1 WHAT IS PROPOSED?

- New purposes in section 4 recognising mana tamaiti/tamariki, whakapapa and whanaungatanga and supporting capability building at the whānau level, to improve life course outcomes for Māori children and young people and their whānau.
- A paragraph in the section 4 stipulating that services provided and co-ordinated under the Act will be culturally appropriate.
- Introducing specific principles in section 5 to be applied in decision-making about tamariki and rangatahi Māori – recognising and protecting the mana and wellbeing of the child or young person as well as whakapapa and whanaungatanga.
- Setting specific duties at new section 7A for the Chief Executive of Oranga Tamariki in relation to the improvement of Māori outcomes, which should include:
    - A practical commitment to the Treaty of Waitangi;
    - Policies and practices with the stated objective of reducing disparities and improving outcomes for Māori children;
    - Requiring the department to have regard to the mana and whakapapa of Māori children and young people;
    - Requiring the department to develop strategic partnerships with iwi and Māori organisations;
    - Public reporting on measures to improve outcomes for tamariki and rangatahi Māori; and
    - Provision and review of guidance to support cultural competency in the workforce.
- New principles in section 13 applying to decision-making about care placements, including the removal of the principle of priority given to placements with hapū and iwi.

2.2 SUMMARY OF OUR VIEW OF PROPOSALS

Overall, the Bill contains some very positive additions in terms of recognising and upholding the rights and improving the outcomes of tamariki and rangatahi Māori, including the introduction of the concepts of mana tamaiti/tamariki, whakapapa and whanaungatanga. Two issues are not satisfactorily addressed in this Bill:

- The sum of all the additional elements does not appear to offset the removal of the existing section 13(g)(i), concerning decision making about care placements that stated priority should be given to placing a child or young person with a caregiver who is a member of the child's family, hapū or iwi;
- The additional elements could be seen as secondary considerations for Māori children in addition to the purposes and principles that apply to all children, rather than designing the new system to meet their needs as the starting point.

Changes to address these two points are needed for us to fully support this Bill.

Do the proposed changes increase child-centredness?

Yes. The inclusion of the child's voice in decisions around interventions and placements enhances their mana and increases the likelihood of decisions meeting their needs. Recognition of mana tamaiti/tamariki, whakapapa and whanaungatanga

are positive additions. Applying these concepts to all children would further increase child-centredness.

Do the proposed changes address the needs and reduce the deficits for Māori?

Potentially. Addressing the two unsatisfactory issues above would provide greater assurances that the proposed changes will be positive.

Do the proposed changes meet New Zealand's obligations under the UN Convention on the Rights of the Child?

Partially. Children who cannot safely remain in their family environment are entitled to special protection and assistance from the state. State care needs to take into account ethnic, cultural, religious and linguistic background. Specifically, indigenous children shall not be denied the right, in community with members of their group, to enjoy their own culture and use their own language. There is a risk that this right could be breached because the removal of section 13(g)(i) may result in Māori children and young people being placed with caregivers who cannot sufficiently support their identity, culture and language rights.

Are the proposed changes transformational?

Potentially. Some of the proposed changes could be transformational for tamariki and rangatahi Māori. For example, the inclusion of mana tamaiti, whakapapa, and whanaungatanga is potentially transformational because it recognises that regardless of where a child is placed, there is still an obligation that cultural identity and connections are maintained. However we are very concerned that without a principle explicitly recognising the role of whānau, hapū and iwi in care placements when a child is removed from their usual caregivers, this will not occur in practice.

2.3 DISCUSSION

48 With Māori making up the majority of children and young people in care and protection and youth justice, it is appropriate that the Bill provide a specific focus on tamariki and rangatahi Māori. A commitment to culturally appropriate practice is vital to achieving child-centred practice for tamariki and rangatahi Māori, as is recognition of mana tamaiti/tamariki, whakapapa and whanaungatanga. The inclusion of the child or young person's voice in decisions on interventions and placements enhances their mana and increases the likelihood of decisions meeting their needs.

Start with a Māori world view

49 It is clear the system needs to change in fundamental ways to better serve the needs of tamariki and rangatahi Māori. However, we can see little evidence that the new system has been designed with the needs of the majority of children and young people it serves in mind – that is, starting from a Māori world view. Rather, these new concepts give the impression of being secondary considerations for tamariki and rangatahi Māori in addition to the purposes and principles that apply to all children who come into contact with the care and protection and youth justice systems. The additional concepts are often only to be considered "where practicable".

50 Our care and protection and youth justice systems should set high aspirations for the future lives and outcomes of tamariki and rangatahi Māori. These should be the same aspirations for all children who come into contact with the system.

51 It is positive to see the inclusion of Māori concepts such as mana tamaiti/tamariki, whakapapa and whanaungatanga, and a commitment to providing and coordinating services that are culturally appropriate in the purposes section. Likewise, the inclusion of a commitment to strengthening relationships between children and young people and their

family, whānau, hapū and iwi, and a commitment to capability building at the whānau level in the purposes section are welcome and particularly important for Māori children.

52 The principles section includes two principles that are to be applied only when making a decision about a child or young person who is Māori: protecting their mana by recognising the whakapapa and whanaungatanga responsibilities of their whānau, hapū, and iwi, and ensuring that whānau, hapū and iwi can participate in decisions. These are welcome inclusions.

53 There is no reason why these same principles – upholding the mana and dignity of the child by recognising their family and cultural connections, and meaningfully involving their family and extended family in decision-making – cannot apply to all children. Indeed, these are strongly desirable outcomes that will always be in a child's best interests.

54 We would strongly argue that these concepts should be central to the principles section as it pertains to all children, rather than a separate addition for Māori children. As well as benefiting all children, this would send a subtle but significant message that the needs of Māori children are central to the redesign of the system, rather than a secondary consideration.

Remove qualifying language

55 There is recognition of the importance of doing better for tamariki and rangatahi Māori in the Bill. For example, the Bill places new duties on the Chief Executive of Oranga Tamariki that specifically require policies and practices with the objective of improving outcomes for Māori children, and requires public reporting against this. However, the language requires only that the policies, practices and services of the department "have regard" to the mana and whakapapa of Māori children and the whanaungagatanga responsibilities of their whānau, hapū and iwi (at new section 7A(2)(b). Stronger language such as "uphold and protect" is more likely to result in meaningful change.

56 In the Bill's section 5(d)(ii) ("the importance of whakapapa and whanaungatanga is recognised by ensuring that *wherever possible*, their whānau, hapū, and iwi can participate in those decisions") changing *wherever possible* to *unless demonstrably impracticable* would signal much stronger intentions, and support culturally appropriate child-centred decision-making to occur more consistently in practice.

Understanding kinship care placements

57 This Bill has generated strong public concern about the exclusion of the existing principle in section 13(g)(i) that care placements (when a child is removed from their usual caregiver) should give priority to placing a child or young person with a caregiver who is a member of the child or young person's hapū or iwi. Despite many additional and positive elements in the Bill, the net result does not offset the removal of this existing principle. The removal of section 13(g)(i) is likely to result in decisions that do not maximise the best interests, uphold the rights, or meet the cultural needs of Māori children and young people.

58 It is our position that it is desirable as a principle and priority that children stay within their natural family structures (family, whānau, hapū, iwi) and that these structures should be supported to provide a safe, stable and loving placement. This is supported by UN Convention on the Rights of the Child and local and international evidence. The changing system, with new National Care Standards will provide a new assurance of child safety in kinship care placements.

It is the child's right

59 The priority to keep children within their own family and culture is supported by the UN Convention on the Rights of the Child:

> *Article 20: Children who cannot safely remain in their family environment are entitled to special protection and assistance from the state, including alternative care*

arrangements. These arrangements should take into account the importance of continuity for the child, and their ethnic, cultural, religious and linguistic background.

While these considerations are well reflected in both the purposes and principles of the Bill, and in some of the care principles outlined at proposed section 13, the removal of section 13(g)(i) giving priority to kinship care placements undermines the other positive inclusions.

> *Article 30: Indigenous children shall not be denied the right, in community with members of their group, to enjoy their own culture and use their own language.*

There is a risk that this right could be breached if the removal of section 13(g)(i) results in Māori children and young people being placed with caregivers who cannot provide connections with members of the child's whānau, hapū, and iwi, or lack the skills and networks to support them to access their language and culture.

It works best for the child

60 There is strong evidence, both domestic and international, that retaining connection with family and culture is a key protective factor for children and young people when it comes to preventing future harm and improving long term outcomes.[6] This was recognised by the EAP in its interim report when it stated "connecting all children, including Māori children to their families, whānau, history and culture will allow the system to meet a fundamental need for children to belong, and better support their healthy development."[7]

61 When kinship placements are safe and adequately resourced, children and young people receive at the very least equivalent levels of care that they would receive in non-kin placements, and more often higher levels of care. Combined with the benefits of retaining cultural connection, family/whānau relationships and a sense of belonging, this suggests we should retain priority for *well supported and resourced* whānau, hapu, iwi and kinship placements when making decisions about where to place a child or young person.[8]

New Care Standards will apply to kinship placements

62 We understand that the removal of section 13(g)(i) is driven by concern about rates of harm in kinship placements. We share this concern and the desire that children and young people should always be safe. However, we also know that whānau and kinship placements have historically not been well supported or resourced, and that more and better research is required to understand the complex factors that sit behind the higher rates of harm that have been recorded.

63 We also want to acknowledge that the new National Care Standards should provide clear expectations for the quality and safety of care placements. These Care Standards will apply to all placement types. This is a new enhancement to the system, and will provide the needed assurance that children placed with whānau, hapū, and iwi are in safe, stable, loving environments.

Our proposed solution

64 The new elements supporting tamariki and rangatahi Māori in the Bill, while referenced at the start of section 13, do not clearly and adequately offset the removal of the priority for kinship care placements when a child has been removed from their regular caregiver. Our suggestions for a re-framed approach are included in Section 4 of this submission.

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[6] See, for example, Jenson, J.M., & Fraser, M.W. "A risk and resilience framework for child, youth and family policy", in J.J. Jenson & M.W. Fraser (Eds.), *Social policy for children and families: A risk and resilience perspective* (pp. 5-24), 2011.

[7] See EAP Interim Report, https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/cyf-modernisation/interim-report-expert-panel.pdf, page 102.

[8] See, for example, Nixon, P: *Relatively speaking: developments in research and practice in kinship care*, Research in Practice, 2007.

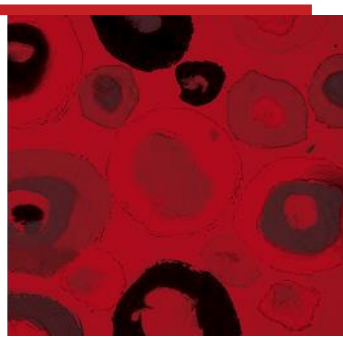
2.4 RECOMMENDATIONS

Rec 10: Remove the qualifying language "wherever possible" from new section 5(d)(ii) and replace with "unless demonstrably impracticable".

Rec 11: Replace "have regard to" with "uphold and protect" at new section 7A(2)(b) so that it reads: "the policies, practices, and services of the department must uphold and protect the mana and whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi."

Also note **Rec 2** in Section 1 (reframing Māori principles at the heart of the Act), and **Rec 12** in Section 4 (redrafting section 13 to affirm the role of whānau, hapū, iwi and extended family in decisions about care placements).

Section 3: Prevention and intensive intervention



3.1 WHAT IS PROPOSED?

- Empowering the Ministry to respond more flexibly to reports of concern (at new section 17(2A).
- Imposing a duty on the Chief Executive of Oranga Tamariki to ensure services to reduce impact of early risk factors are co-ordinated with government-funded activities (at new section 7(2)(b)(bab)).
- Enabling the Chief Executive of Oranga Tamariki to refer a case to a care and protection co-ordinator for a Family Group Conference (FGC) earlier in the process (i.e. before a young person is deemed to be in need of care and protection) to formulate a plan to meet the needs of the child or young person (at new section 18AAA).

3.2 SUMMARY OF OUR VIEW OF PROPOSALS

We support the proposals for prevention and intensive intervention.

3.3 DISCUSSION

65 The intensive intervention provisions have the potential to increase child-centredness in several ways:

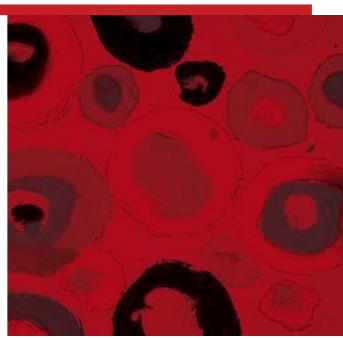
- By putting more emphasis on earlier intervention and assisting families, whānau, caregivers to provide a safe, stable, loving home;
- By putting more onus on the Chief Executive of Oranga Tamariki to provide interventions to children and young people who do not meet the statutory threshold for care and protection; and
- By placing greater emphasis on children and young people's wellbeing.

66 They have the potential to be transformational if they result in:

- The majority of families who come to the attention of Oranga Tamariki receiving the support and help they need (as opposed to what happens now which is a large proportion ending up with no further action); and
- Families and whānau who require intensive interventions consistently receiving the support they need to provide safe, stable, loving homes for their children and young people.

67 We particularly support proposed new section 18AAA enabling the Chief Executive of Oranga Tamariki to refer cases to FGC earlier in the process than when the child or young person is deemed to be in need of care and protection. This has the potential to result in better outcomes for the child or young person earlier, and potentially to avoid the need for them to come into formal care if the FGC generates a good plan that is well supported by the child or young person and their family or whānau.

Section 4: Care



4.1 WHAT IS PROPOSED?

- New care principles at section 13, strengthening requirements for a child or young person's views to be sought and focusing on preserving key relationships (especially siblings) but removing priority for kinship placements.
- Requiring the Chief Executive of Oranga Tamariki to comply with National Care Standards (new section 7(2)(b)(bac)), to be set by regulation under new section 447(fa).
- Enabling regulations to allow for a more transparent and proactive system of financial support for children in care (new sections 447(da) and (db).

4.2 SUMMARY OF OUR VIEW OF PROPOSALS

We do not support the care and protection principles outlined in section 13 as currently drafted. We do support the creation of National Care Standards and regulations for more transparent and proactive financial support for children in care.

Do the proposals increase child-centredness?

Somewhat, by placing a strong focus on the voice and needs of the child, keeping siblings together (something children and young people have consistently asked for) and ensuring that placements are stable and loving as well as safe.

Do the proposed changes address the needs and reduce the deficits for Māori?

Potentially, for tamariki and rangatahi Māori at risk of removal from their usual caregivers by clarifying that, *prior* to a decision to remove a child from the care of their usual caregivers, the child's whānau, hapū, iwi and family group should be supported to provide a safe, stable and loving home. This will be in the child's best interests.

However, by not stipulating that whānau, hapū and iwi should be supported to care for the child *after* a decision has been made to remove them from their immediate caregivers, there is a risk that whānau, hapū and iwi will be excluded from subsequent decisions. As a result, available placement options could be overlooked (especially if suitable whānau, hapu or iwi placements later emerge) and tamariki Māori could be dislocated from their whānau, hapū, iwi and culture.

Do the proposed changes meet New Zealand's obligations under the UN Convention on the Rights of the Child?

Many of the proposals are consistent with the UN Convention. However there is a risk that children's rights under Article 20 (for care arrangements to take into account the importance of continuity for the child, and their ethnic, cultural, religious and linguistic background) and Article 30 (to indigenous children to enjoy their culture and language in community with members of their group) could be undermined if the role of whānau, hapū and iwi in decision making and providing safe, stable and loving homes for tamariki and rangatahi Māori is not clarified. Regrettably, the new provisions, collectively, do not go so far as to establish quality, secure kin care as a priority.

Are the proposed changes transformational?

Potentially. The strong focus on the voice and needs of the child, on a safe, stable and loving home, and on keeping siblings together have the potential to transform the care experience for many children and young people. However there is also considerable risk of unintended negative consequences if the role of whānau, hapū and iwi in decision-making and providing care both before and after a child is removed from their usual caregivers is not affirmed.

4.3 DISCUSSION

68 There are some admirable care and protection principles outlined in proposed section 13:

- The strong focus on the voice and needs of the child (this is currently absent in the Act's principles);
- The focus on safe, stable and loving placements for children as opposed to just a 'safe' placements;
- The inclusion of the principles that, where practicable siblings should be placed together;
- Intervening early (with consent from a child and their whānau) to prevent serious or chronic long term harm;
- That families, whānau, hapū, and iwi will be assisted to provide a safe, stable and loving home for a child when the child is at risk of being removed from their usual caregivers.

"She said I was only going to be in care for a week. It's been three years."

– Participant in youth voices workshop 2015

69 We are particularly encouraged by the inclusion of new section 13(2)(c) which sets out that where a child or young person is at risk of being removed from their usual caregivers, their whānau, hapū, iwi and family group should be assisted to provide a safe, stable and loving home to the child or young person in accordance with whakapapa and whanaungatanga. This is very important because in almost all cases, it will be in the child or young person's best interests to remain in the care of their family, whānau, hapū, iwi or wider family group. This will be particularly important for disabled children.

70 This will place a significant and compelling new obligation on the State. We should remember that past experience with CYF suggests that this obligation will not be quickly met. Consistently achieving this in practice will require considerable systems and practice change and a strong focus on workforce development. Practically assisting the child's whānau, hapū, iwi or wider family group to provide them with a safe, stable and loving home will require extensive whakapapa searching, hui-a-whānau or wider family group meetings, and earlier FGCs (as anticipated in proposed section 18AAA), all of which require considerable time, effort, and resource. We found in our most recent thematic review into how well CYF sites prepare for FGCs that there is a long way to go to achieve the level of service change required. This will be a significant new challenge for Oranga Tamariki.

"CYFs children should have the option to say what they think about home placements."

– Participant in youth voices workshop 2015

71 We also have some significant concerns about proposed care and protection principles. Overall, in our view, the proposed section 13 as currently drafted does not set out clearly enough the sequential steps that should be taken to determine the best interests of the child or young person, first when they are *at risk* of being removed from their usual caregivers, and subsequently if/when they *are* removed from their usual caregivers. In blending these two steps together, (the effect of the Bill as currently drafted), the important role of the child or young person's family, whānau, hapū, iwi and wider family group in decisions about their care has been confused. There is a risk that as a result, they may only be involved in decisions about when the child or young person is at risk of removal from their usual caregivers, but not when a decision has been made to remove the child.

72 Furthermore, we note inconsistencies and confusion in this section as currently drafted in the application of the principles of mana tamaiti/tamariki, whakapapa and whanaungatanga. Proposed section 13(2)(c) applies to all children regardless of ethnicity, yet makes reference to whakapapa and whanaungatanga, which elsewhere in the Bill are defined as only applying to Māori children. As we have noted elsewhere in this submission, we consider that these principles should have universal application, and we have suggested redrafting the section accordingly.

4.4 RECOMMENDATIONS

Rec 12: Redraft section 13 as follows to a) differentiate decision-making before and after a child is removed from their usual caregivers, b) apply the principles of mana tamaiti/tamariki, whakapapa and whanaungatanga to all children, and c) affirm the role of the child's family, whānau, hapū, iwi, and family group in decision-making both prior to, and following, a decision to remove a child from their usual caregivers:

Proposed redrafted section (additions or new placements in bold)

(2) In determining the well-being and best interests of the child or young person, the court or person exercising powers referred to in subsection (1) must be guided by, in addition to the principles in sections 4(A)(1), 5, and 5A, the following principles:

(a) When the child or young person is at risk of being removed from their usual caregivers:

(i) any intervention with the whānau of a child or young person should recognise and promote the mana tamaiti (tamariki) and the whakapapa of that child or young person and relevant whanaungatanga rights and responsibilities:

(ii) intervention should occur early to improve the safety and well-being of children, young persons, and their families and to address risk of future harm (including the risk that a child or young person may offend or re-offend, or not achieve their developmental potential):

(iii) interventions with families should, where possible, occur with the consent of the child or young person concerned and their parents, guardians, or usual caregivers, and should reflect the child's or young person's views and input:

*(iv) where a child or young person is at risk of being removed from their immediate family, whānau, or usual caregivers, the child's or young person's usual caregivers, family, whānau, hapū, iwi, and family group should, unless it is **demonstrably** unreasonable or impracticable in the circumstances, be assisted to enable them to provide a safe, stable, and loving home to the child or young person in accordance with whakapapa and whanaungatanga:*

(v) where there is a risk that a child's or young person's needs for a safe, stable, and loving home may not be met by their usual caregivers, those needs should be considered and addressed concurrently with interventions to support the child or young person to remain with those caregivers:

(b) When the child or young person is removed from their usual caregivers:

(i) decisions in relation to children and young persons should recognise and promote the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga:

(ii) powers to intervene under this Part without the consent of the persons concerned should be exercised only when necessary and when there is no other reasonable way to safeguard and promote a child's or young person's well-being:

(iii) a child or young person should be removed from the care of their usual caregivers only if there is a serious risk of physical or emotional harm to them:

(iv) the child's or young person's wider whānau, hapū, iwi, and family group should, unless it is demonstrably unreasonable or impracticable in the circumstances, be assisted to enable them to provide a safe, stable, and loving home to the child or young person in accordance with whakapapa and whanaungatanga:

(v) decisions about placement should be guided by the child's or young person's best interests, and the court or person making the decision should seek the views and understand the needs of the child or young person:

(vi) children or young persons should be in a placement in which they will be safe and protected from harm:

(vii) stability and continuity of placement are important considerations when making placement decisions:

(viii) the child or young person's age and stage of development are important considerations when making placement decisions:

(ix) if practicable, a child or young person should be placed with their siblings:

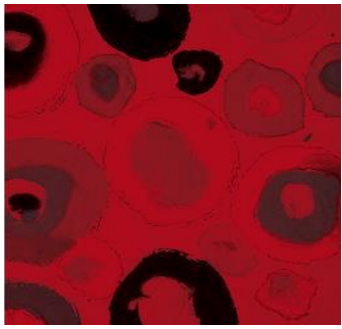
(x) children or young persons should be placed where they can develop a sense of belonging and attachment, and where their personal identity and cultural identity are maintained:

(xi) the whanaungatanga and the whakapapa of the child or young person are important and should continue to be honoured on an ongoing basis wherever the child or young person lives.

(c) where a child is considered to be in need of care and protection on the ground specified in section 14(1)(e), the principle set out in section 208(g):

(d) the well-being and best interests of any child or young person, in general, take precedence over any duty of confidentiality owed by any person in relation to that child or young person or to any person who is a family member of that child or young person or in a domestic relationship with the child or young person (within the meaning of section 4 of the Domestic Violence Act 1995).

Section 5: Transition



5.1 WHAT IS PROPOSED?

- New section 386AAD creates an entitlement to remain in care until age 21 if the young person wishes;
- New section 386A requires the Chief Executive of Oranga Tamariki to provide transition advice and assistance to young people leaving care up to the age of 25;
- New section 386C requires the Chief Executive of Oranga Tamariki to make reasonable efforts to remain in contact with a young person who has been in care or a youth justice residence until they turn 21.

5.2 SUMMARY OF OUR VIEW OF PROPOSALS

Overall we are very supportive of the proposed changes as this is an area of care that has been one of the major stains on our CYF care system. These changes are potentially transformational, although the lack of acknowledgement of the role of family/whānau/significant others in ensuring a successful transition (aside from the current/previous carer) is a significant omission.

5.3 DISCUSSION

73 These changes assure us that the voices of children and young people who have experienced/are experiencing care have been listened to. The changes also follow international trends to extend the age of care/support for young people to provide a good exit/transition out of care pathway.

74 We are concerned that new subsections 368A(3) and (4), which set out that the Chief Executive of Oranga Tamariki must respond to requests for support from young people do not include timeframes for that response. For young people who have recently transitioned to independence or are in the process of doing so, time is of the essence, and we would hate to see young people languish in precarious circumstances while the wheels of bureaucracy turn slowly.

"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."

– Participant in youth voices workshop 2015

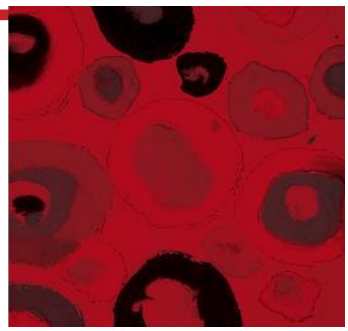
75 We would also like to see provision for specialist therapy added to the list of assistance that can be provided under section 386B(4)(d), in recognition of the high likelihood that young people using this transition service will require ongoing therapeutic support.

5.4 RECOMMENDATIONS

Rec 13: Consider including timeframes for response in section 386A(3) and (4), and section 386B(2)(a) and (b).

Rec 14: Consider adding specialist therapy (or other relevant term) to the list of options listed at section 386B(4)(d) in recognition of the high likelihood that young people using this transition service will require ongoing therapeutic support.

Section 6: Including 17-year olds in the youth justice system



6.1 WHAT IS PROPOSED?

- Amendments to section 272 expand the age-settings for the youth justice system to include most 17-year-olds.
- New section 276A means that for 17-year-olds charged with serious offences the Bill requires that they be immediately transferred to a District or High Court.
- Amendments to section 316 provide for the Youth Court to be able to cancel a Supervision with Residence order and transfer a 17-year-old to the District Court as a consequence of their "behaviour" and failure to comply with the terms of the order of their plan.

6.2 SUMMARY OF OUR VIEW OF PROPOSALS

Advocating to include 17-year-olds in the youth justice system was one of the Children's Commissioner's top three priorities upon commencing his term in July 2016. We are delighted that this has been included in the Bill and very strongly support it.

Will raising the YJ age increase child-centredness?

Yes, by ensuring that our response to offending by 17-year-olds is focused on their rights and needs (as well as the need to hold them accountable for their offending).

Do the proposed changes address the needs and reduce the deficits for Māori?

Yes, Māori are disproportionately represented in the Youth and adult Justice systems so this removes a form of systemic discrimination.

Do the proposed changes meet New Zealand's obligations under the UN Convention?

Yes, it corrects an enduring and blatant breach of the UN Convention (which defines a child as anyone under the age of 18) and brings New Zealand considerably closer in line with the Convention. However the exclusion of some 17 year olds will keep us in partial breach, and NZ remains in breach of the Convention with our minimum age of criminal responsibility. This is inconsistent with the reference to the Convention at new section 5(a)(i).

Are the proposed changes transformational?

No, because it continues to send some 17-year-olds to the adult justice system despite the evidence that even for serious offences the Youth Court is more likely to succeed and preventing re-offending and meeting the needs of young people and the community.

6.3 DISCUSSION

76 We know that the youth justice system is far more effective at reducing re-offending than the adult system. Young people go through a process that holds them to account, addresses the underlying causes of their offending and changes their behaviour. We also know that the parts of the brain that control logic and judgement are still developing at 17.

77 With over 60 percent of court cases for 17-year-olds last year involving Māori defendants, raising the age is one of the most tangible things we can do to reduce the likelihood of life-long entrenchment of 17-year-old rangatahi in the criminal justice system.

78 With that said, we are disappointed at the decision to automatically exclude some 17-year-olds depending on the nature of the charge.

"I felt very lucky to come back here to do my time because I was actually locked up in [name of prison] for two months on remand until my Family Group Conference where the police and courts decided to give me a chance to do my sentence here. Being in [name of residence] helped me refocus and think about how I want my future to be."

– Written survey response in a youth justice residence 2015

Shifting discretion from the Youth Court to Police

79 We agree that murder and manslaughter charges for 17 year olds, as for 10-16 year olds charged with these offences, must continue to be dealt with in the High Court. However, we are of the strong view that charges for all other offences should be laid in the Youth Court with a judicial discretion under s283(o) to convict and transfer to the District or High Court for sentence.

80 This discretion already exists for all such offences in respect of offending by 14, 15 and 16-year-olds. The provisions in the Bill which direct specified charges must be automatically laid in the adult courts are said to have the attraction of removing discretion and providing clarity as to which serious charges must always be dealt with by the adult courts. This attraction is illusory. In fact, the discretion is not removed, it is simply shifted from the Youth Court to the Police.

81 The reality is that much alleged criminal behaviour could legitimately be the subject of one of several different charges which vary in seriousness. Under this Bill, it is the Police (by deciding which charge to lay) who will now have the only discretion to decide whether a young person will appear in the Youth Court or the adult Courts – with drastically different consequences for the young person in each case. Unfortunately, there are different Police charging practices in different areas of New Zealand, meaning two young people involved in a similar activity in different parts of the country could result in one being dealt with in the Youth Court, and another in the adult justice system – with drastically different long-term consequences.

82 When this discretion is exercised by the Court, it can be appealed. On the other hand, Police discretion about which charges to lay is not subject to judicial oversight and cannot be appealed. We are very concerned that this could lead to inequitable outcomes.

83 There are very good and principled reasons to ensuring that all charges against 17 year olds are laid in the Youth Court, and to allow the Youth Court to retain the responsibility to decide which exact charges and young people should be the subject of adult court sentences. If this approach is adopted, then in virtually all cases very serious offences will still be dealt with by a conviction and transfer to the adult courts for sentence. However, the existence of a judicial discretion will mean that those cases where it is quite unfair, unjust or unnecessary for a 17-year-old to be dealt with in the adult Courts (even though the charge itself may be serious) will appropriately remain in the Youth Court.

The need to allow some charges back into the Youth Court

84 In its current form the Bill could result in some other serious injustices. One such (probably unintended) consequence is when a serious charge against a 17-year-old that must be laid in the adult court is later subject to amendment to become a less serious charge. As drafted, there is no provision for a young person in this situation to be transferred back to the Youth Court.

85 If the previous submission that all 17-year-olds should come under the jurisdiction of the Youth Court regardless of the charge is not accepted, then the Bill should be amended to provide for the situation when charges are reduced. There are two options:

- The amended charge could automatically be transferred to the Youth Court as soon as the amendment is made (this is the simpler and preferred option);
- The law could direct that the amended charge must be withdrawn and the fresh charge (as a result of an amendment) must be laid in the Youth Court.

Some 18-19 year old offenders transferred into the Youth Court from the District Court

86 Just as there is a discretion to convict and transfer some youth offenders to the District Court for sentence, so there should be introduced a carefully prescribed discretion to transfer some 18 and 19 year old offenders into the Youth Court.

87 This was a recommendation of the EAP. We share the EAP's view that there will be some 18 and 19-year-olds who, because of limited intellectual development, neurodevelopmental disorder (such as autism) or other unusual circumstance, will be much more appropriately dealt with by the more specialised processes and resources of the Youth Court.

88 Such discretion could be exercised after application by either the prosecution or the defence. The grounds for the exercise of such discretion could be expressed as being in the interests of justice with particular reference to factors including:

- The seriousness of the offence;
- The lack of significant previous offending;
- Special circumstances of the offence or the offender;
- The presence of any significant developmental or neurodevelopmental disorders;
- Whether it is in the public interest to make such an order; and
- Whether there are treatment and rehabilitation options for the offender in the Youth Court which are not ordinarily available in the District Court.

Minimum age of criminal responsibility

89 A separate but related issue is the minimum age of criminal responsibility, which is also an area in which New Zealand is verging on non-compliance with the UN Convention. The UN Committee on the Rights of the Child has consistently recommended that New Zealand raise the minimum age of criminal responsibility from 10. This Bill misses the opportunity to enact this change that would bring us closer in line with our international obligations.

6.4 RECOMMENDATIONS

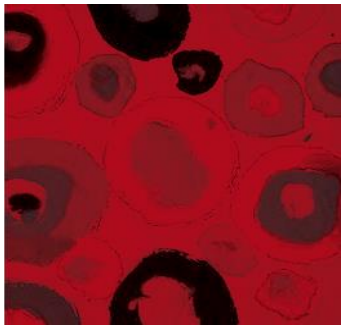
Rec 15: Remove the caveats for some offences and bring all 17-year-old offenders into the jurisdiction of the Youth Court.

Rec 16: If Recommendation 15 is not accepted, allow for young people who have serious charges reduced to be moved back from the adult justice system to the Youth Court, either by requiring that amended charges are automatically transferred to the Youth Court, or by requiring the amended charge to be withdrawn and a fresh charge laid in the Youth Court.

Rec 17: Consider flexibility to allow some 18 and 19-year-olds to come into the jurisdiction of the Youth Court under certain circumstances.

Rec 18: Raise the lower age of criminal responsibility from 10 to 12 years old.

Section 7: Youth justice



7.1 WHAT IS PROPOSED?

- Requiring the Chief Executive of Oranga Tamariki and Police to consider whether any young person in the youth justice system should be referred to care and protection services (at proposed section 208(2)(b)).
- Increasing the availability of legal representation at intention-to-charge FGCs by requiring in new section 248A that state-funded legal representation must be appointed for young people alleged to have committed offenses that carry a 10 year sentence or more.
- Strengthening the use of community-based options an alternative to remand in youth justice residences (via the amendment of section 239).
- Introducing mandatory review of remands to Police cells every 24 hours at new subsection 241(2).

"When [young people] get out [of youth justice residences], get them one-to-one help especially if they're at school, see potential – look forward not backwards."

– Young person with dual care and protection and youth justice status 2016

7.2 SUMMARY OF OUR VIEW OF PROPOSALS

Overall, we strongly support the proposals. However, they are very limited in scope and other changes are needed to this section of the Act.

Do the proposals increase child-centredness?

Yes. The proposals focus on some system improvements that will take into consideration the individual circumstances.

Do they meet the needs and reduce the deficits of Māori children?

No. There is nothing specific to Māori children in these proposals. The persistent and increasing overrepresentation of Māori in the youth justice system needs to be explicitly reflected in legislation.

Do they meet NZ's UNCROC obligations?

No, because they continue to allow for the use of Police cells as a custodial remand option.

Are the proposed changes transformational?

No because:

- They fail to take active steps to address the overrepresentation of Māori in the youth justice system
- They fail to address the use of Police cells for custodial remand of young people. The inclusion of the requirement that such remands must be reviewed every 24 hours does nothing to alleviate these concerns, and is, in fact, already current practice amongst Youth Court Judges according to a Judicial Protocol in existence since 2006.

7.3 DISCUSSION

Review of section 238(c)

90 Section 238 sets out the conditions for custody of a young person pending hearing, i.e. conditions for their remand. We consider that the opportunity has been missed to more substantially review and amend this section to ensure better outcomes for young people and the community.

91 For example, section 238(1)(c) enables a Judge to "order that the child or young person be delivered into the custody of the parents or guardians or other persons having the care of the child or young person or any person approved by the social worker". The issue with this section of the act is that while the young person is placed in the detention of parents, guardians or other persons, Police do not have any powers to act if the young person absconds. Because of this, section 238(1)(c) is little used in practice. It is important that we retain an option for remand in the custody of parents or guardians as a child-centred alternative to custodial remand. However this needs to be workable so that the provision is used in practice. We consider this section should be reviewed.

"When remands go on for months and months it's not OK. Those long delays last year when I was in [residence name] were really bad – I thought it was like that for everyone – then I told the staff and other boys at [the residence] and they said it wasn't right. That something was wrong. Now I know it was."

– Young person with dual care and protection and youth justice status 2016

Use of Police cells for remand

92 In the same section, section 238(1)(e) allows for the continued use of Police cells as a remand option for young people following their first appearance in the Youth Court.

93 Article 37 of the UN Convention on the Rights of the Child sets out that any arrest, detention or imprisonment of a child must be lawful and should only be used as a measure of last resort and for the shortest appropriate period of time, and also that any child deprived of their liberty should be separated from adults unless it is considered in the child's best interests not to do so.

94 The continued used of Police cells as a remand option for young people following their first appearance in the Youth Court is in violation of these rights to be held in an appropriate custodial environment. Police cells are not an appropriate environment for young people. In Police custody, young people often experience inadequate food, round-the-clock lighting, and little access to appropriate support, and are often required to mix with adult prisoners during movement from cell to showering and washing facilities, or during transport to and from court. It is extremely disappointing that this Bill does not take the opportunity to cease the use of Police cells for post-Court remand by repealing section 238(1)(e).

95 The decision to retain this provision for reasons of practical concern (that not enough alternatives are available) is neither child-centred nor transformational. While this section remains, there will be no meaningful incentive to develop alternatives to Police cell remand. The inclusion of the requirement that such remands must be reviewed every 24 hours does nothing to alleviate these concerns. While we support this being encoded in legislation, it is in fact already current practice amongst Youth Court Judges according to a Judicial Protocol in existence since 2006.

Legal representation

96 Another example of moving away from a transformational, child-centred proposal in favour of practical considerations is in the decision not to extend free legal representation to all young people accused of an offence within 24 hours of their arrest or interview. In the Bill as currently drafted, this is only available to young people accused of an offence that carries a potential sentence of ten years or more. While acknowledging the significant financial

implications involved with this, we believe that for this particularly vulnerable group, often with neurobiological disabilities and histories of abuse, extending free legal support is the most child-centred approach.

Provisions we support

97 We are supportive of strengthening the use of community based options for young people on remand. Currently the vast majority of young people are remanded into youth justice residences. Research is clear that this leads to poorer outcomes for these young people (and anecdotal feedback from our monitoring visits would suggest poorer outcomes too for the other young people in the residences, in longer term placements, due to the disruption caused by a constantly changing residence population). The key issue currently is the lack of appropriate carers and placements in the community for non-custodial remand options.

98 We are supportive of amending the requirements for youth justice Family Group Conferences so they are required to consider achieving restorative justice outcomes. In our experience young people having the opportunity to hear directly from the victim of their crime and put things right is a key opportunity to achieve better outcomes. This is consistent with research. What is key is that staff members have the training and understanding of the restorative justice process to ensure they are able to run a process that has integrity, is safe and meets the needs of the young person, their whānau and the victim. This is possible, but not easy, and requires skilled practitioners.

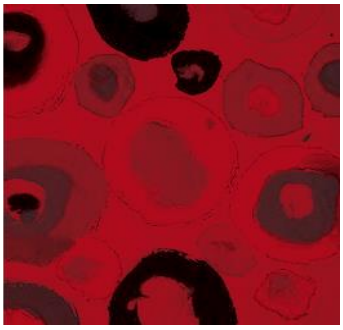
7.4 RECOMMENDATIONS

Rec 19: Conduct a full review of section 238(1)(c) with a view to ensuring an option for remand into the custody of family/support people that is workable in practice.

Rec 20: Extend access to legal representation to all young people accused of an offence within 24 hours of their arrest or interview.

Rec 21: Repeal section 238(1)(e) to end the use of Police cells for post-court custodial remand.

Section 8: Accountabilities



8.1 WHAT IS PROPOSED?

- Placing an obligation on the Chief Executive of Oranga Tamariki to establish a complaints mechanism that provides child-centred responses (at new section 7(2)(b)(bad)).
- Amending Part 1 of the Vulnerable Children Act 2014 (VCA) to place responsibility for co-ordination of the vulnerable children's plan on the Chief Executive of Oranga Tamariki.
- Amending section 8 of the VCA on the requirements for the development of a vulnerable children's plan to ensure children's agencies work together strategically around populations of interest to Oranga Tamariki, under the coordination of the Chief Executive of Oranga Tamariki.
- Amending section 9 of the VCA to create a requirement for the vulnerable children's plan to set out outcomes to be achieved, which will create a greater focus on prevention.

8.2 SUMMARY OF OUR VIEW OF PROPOSALS

Overall, we support the proposals, especially the obligation to have a child-centred complaints system, but feel they do not provide for strengthened cross-agency action.

Will the changes to cross-agency accountabilities increase child-centredness?

Partially. While the changes will focus on what children need to achieve improved outcomes, an opportunity has been missed to embed the principle of being child-centred in the VCA, which would require other agencies to improve their performance in this regard.

Do they meet the needs and reduce the deficits of Māori children?

Partially. The accountabilities do not specifically set out any special means to ensure the needs of Māori children are addressed. However, the VCA does include reducing over-representation of Māori in care and protection and youth justice as outcome measures it must plan and report on.

Will it meet NZ's UNCROC obligations?

Yes, it provides increased accountabilities to ensure the rights of children are upheld by all services they access.

Is it transformational?

No. This is an incremental approach building on VCA accountabilities, which to date have not produced significant changes. However, if the requirements set out in the Act are adhered to, and a vulnerable children's plan that reflects the intent of the Act is created, it could be transformational.

8.3 DISCUSSION

The Vulnerable Children's Act 2014 has not yet delivered results

99 The new accountabilities propose minor amendments to the Vulnerable Children's Act 2014 (VCA). This approach presents risks and limitations.

100 The EAP report in December 2016 noted that the "current system is fragmented, lacks accountability and is not well established around a common purpose" (EAP p.20). The VCA is

part of that current system, and has yet to deliver any significant change. Despite being in place more than three years, the initial Vulnerable Children's Action Plan has yet to be completed and agreed. We do not know if the contents of that plan will lead to the strengthened cross-agency action promised, or will be a re-positioning of existing work and initiatives. It is a leap of faith to assume that future work under the VCA, and the changes suggested, are adequate to address the fragmentation and the lack of accountability the EAP rightly identified.

101 However, we have identified an opportunity in amending the VCA that could be transformational. Embedding the principle of being child-centred and ensuring all decisions and actions are grounded in what is best for the child into the purpose of the VCA would ensure consistency between the two major pieces of legislation, and has the potential to drive child-centred decision-making across the social sector agencies.

Child-centred complaints mechanism

102 We fully support efforts to design and implement a child-centred complaints mechanism for Oranga Tamariki. We also suggest this could be strengthened to indicate that such a mechanism should include some form of appeals and independent oversight.

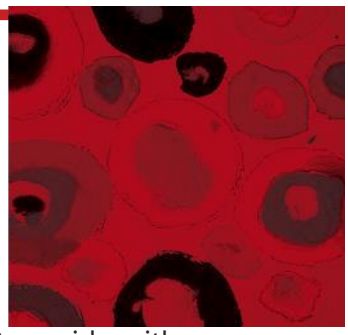
103 We would also note that the changing nature of the sector, with greater shared responsibilities, and cross-agency delivery will also require this complaints mechanism to be able to manage complaints that transcend organisational structures and traditional agency boundaries.

8.4 RECOMMENDATIONS

Rec 22: include in the VCA (Part 1, section 4 Purpose) the additional purpose of directing all decisions and actions undertaken as part of the Act be grounded in what is best for the child.

Rec 23: include in clause 12, new section 7(2)(b)(bad) that the complaints mechanism include an appeals process and independent oversight.

Section 9: Information sharing



9.1 WHAT IS PROPOSED?

- New section 66 Creates a new framework governing the exchange of personal information about individual children and young people, their family members, or anyone in a domestic relationship or likely to reside with them, for the purpose of promoting their safety and wellbeing;
- The wider child welfare and protection sector comes under the ambit of the information sharing framework, not just Oranga Tamariki;
- Makes it mandatory in some circumstances to share information when requested, not only with Oranga Tamariki but between other members of the wider sector;
- Stipulates that the welfare and best interests of children take precedence over professional duties of confidentiality (except legal professional privilege);
- Provides immunity from civil, criminal or disciplinary proceedings to anyone disclosing information in good faith;
- Provides that children and young people should be engaged in decisions about whether to share information or not;
- Sets out some grounds on which individuals or agencies can refuse to share information.

9.2 SUMMARY OF OUR VIEW OF PROPOSALS, BASED ON OUR FOUR KEY QUESTIONS

We support a more presumptive information sharing framework, but are concerned that the potential risks to children, both of their privacy being unnecessarily breached, and of their parents or caregivers disengaging from essential services because of privacy concerns, have not been sufficiently addressed.

Do the proposed changes increase child-centredness?

While they have the potential to increase child safety by facilitating the timely sharing of relevant information between professionals, there is a very real risk that some families may disengage from essential services because of privacy concerns, putting children at greater risk. We are not confident that this risk is sufficiently addressed in the Bill.

Do they meet the needs and reduce the deficits of Māori children?

If timely, relevant information sharing helps to keep tamariki and rangatahi Māori safe from harm, then there is the potential that these provisions could help to reduce high rates of abuse and neglect for Māori. The provisions do not appear to have been considered from a Māori perspective. Māori families may be more likely to disengage from services due to privacy concerns, meaning that this may not be achieved in practice.

Do the proposed changes meet NZ's UNCROC obligations?

Under the UN Convention, children have the right to life, survival and development (Article 2) and to protection from all forms of abuse and neglect (Article 19). To the extent that timely sharing of relevant information between professionals could help to keep children safe, then moving to a more presumptive information sharing model could help to uphold these rights. However, there are also risks that children's safety will be compromised if their families disengage from essential services because of lack

of trust that their information will be kept confidential, which would undermine these rights. Children also have a right to privacy under the UN Convention (Article 16).

Are the proposed changes transformational?

These changes are radical, but are unlikely to produce the transformational change in child safety hoped for because of the risk of disengagement by families concerned about privacy. We continue to support a move towards a presumptive information sharing model, but consider that more work is needed to ensure the changes do not have unintended negative consequences.

9.3 DISCUSSION

104 At present information is not freely shared because some professionals believe they are constrained by legislation. While this is usually not the case, clarification that it is safe and legal to share information to keep children safe is important, and has the potential to increase children's safety if it results in timelier sharing of relevant information.

"My last social workers always judged me by my past. It made it hard to have a future."

– Young person with dual care and protection and youth justice status 2016

105 The provisions in the Bill are to be accompanied by practice guidelines about when and how to make child-centred decisions about sharing personal information. These guidelines will be very important. We don't yet know whether practice guidelines will be sufficient to ensure child-centred decisions are made about whether to share data. We are concerned at the wide range of organisations and individuals who could potentially access information under these provisions, without specialist knowledge about how to work in child-centred ways.

106 The provisions to ensure children are consulted before sharing information may help to ensure child-centred decisions are made about when and how to share personal information.

107 However, there is a significant risk that families could withdraw from government services as a result of fears about their information being shared. This could result in children not receiving the services they need and being less safe as a result. We are not convinced that the Bill strikes the right balance between enabling timely information sharing, and potentially breaching the privacy of children and their families, risking disengagement as a result.

9.4 SUGGESTED IMPROVEMENTS

Rec 24: Revisit the new information sharing framework, in consultation with the Privacy Commissioner and a range of child welfare and protection organisations to better understand and mitigate the risks to children's privacy and safety.