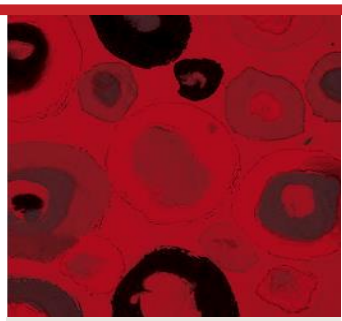
Submission from the Children's Commissioner on the Family Court (Supporting Children in Court) Legislation Bill



OCC represents the **1.2 million** people in Aotearoa New Zealand under the age of 18, who make up 23 per cent of the total population.

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

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Introduction

The family justice system needs significant strengthening of children's rights and best interests. This Bill is a small step in the right direction.

1. The Commissioner has a statutory responsibility to advocate for children's interests, rights and welfare, as well as advancing and monitoring the application of the United Nations Convention on the Rights of the Child (the Children's Convention) by departments of State and Crown instruments. The Children's Commissioner's powers, functions and responsibilities are contained in the Children's Commissioner Act (2003).
2. The Office of the Children's Commissioner (the OCC) welcomes this opportunity to submit on the *Family Court (Supporting Children in Court) Legislation Bill*.
3. The Family Court (Supporting Children in Court) Legislation Bill (the Bill) is a small but positive step in implementing the Family Court Independent Review Panel's numerous recommendations, because of its focus on supporting children.[1] However, it does not go far enough to ensure children's rights are always upheld.
4. The Bill aims to support children directly:
    - by ensuring child voice can be included both in Court and in family dispute resolution,
    - by clarifying how the Court should consider risks to children of family violence, and
    - by stipulating the required characteristics of a lawyer, when one is appointed to support a child's interests.
5. The Bill also aims to support children indirectly, by assisting parents to resolve parenting disputes in an efficient manner.
6. The Office of the Children's Commissioner (OCC) strongly supports the intention of this Bill. There are several provisions that are aligned with the United Nations Convention on the Rights of the Child (Children's Convention) to which New Zealand is a signatory. Under this convention, children have the right to be heard in all administrative proceedings affecting them. They also have rights to live with or be in contact with both of their parents when it is safe, and to be protected from family violence.
7. We have recommendations to strengthen how the Bill could be drafted, enacted and implemented to ensure that children's rights are upheld. We also recommend further implementation of the review panel's recommendations at the earliest opportunity, and highlight the areas of improvement that we have previously recommended because they are important to children.

[1] www.justice.govt.nz/assets/Documents/Publications/family-justice-reforms-final-report-independent-panel.pdf

8. In particular, this legislation should uphold children's rights in the context of Te Tiriti o Waitangi. This treaty is a founding document of Aotearoa New Zealand. Explicit inclusion in legislation is required to ensure its implementation and there are several examples of how recent legislation embeds Te Tiriti o Waitangi[2].

9. Including wording in this legislation to uphold the Te Tiriti o Waitangi needs to drive more kaupapa Māori dispute resolution processes, and support wider whānau involvement in decision-making and Family Court processes. Mokopuna Māori need access to Māori advocates who understand their particular needs and those of their whānau. The Family Court also needs to understand that for mokopuna Māori, their connection to their whānau, hapū and iwi is a core aspect of their identity as children and for the future. Mokopuna Māori cannot be viewed in isolation of their whakapapa which connects them to their whānau, hapū and iwi and in fact back to the whenua we stand on and the very environment that sustains our existence. That whakapapa knowledge remains the birth-right of every mokopuna Māori. What will be more meaningful than support to navigate the pākehā system will be the availability of kaupapa Māori processes for children and whānau.

10. **We recommend** that the Justice Committee consider **how the processes of the Family Court can more effectively give practical commitment to implement the articles of Te Tiriti o Waitangi**.

A. We support the intent of amendments to the Care of Children Act (2004) to uphold the Children's Convention, but the Bill needs strengthening to achieve those intentions.

11. The Bill proposes amendments to the Care of Children Act (2004) aiming to achieve the following intentions:

> Addition of section 5(g) is intended to enable a child to participate and have a voice in decisions that affect them. The intent of this provision is consistent with Article 12 of the Children's Convention.

> Addition of section 5A (1A) - that the Court must consider the purpose and principles of the Family Violence Act (2018) - recognises that child victims are particularly vulnerable to the long-lasting effects of family violence, including witnessing it. Protecting children from such risks is consistent with Article 19 of the Children's Convention. The Bill elevates the importance of the Family Violence Act (2018) by insisting the Court refer to its purpose and principles.

> Stating in section 6 (1AAA) that the purpose of the section is to implement Article 12 of the Children's Convention. Referring to UN conventions to which New Zealand is a signatory signals our commitment to their implementation, and in this case, it provides child-centred context to assist with legal interpretation and implementation long term.

> Addition in section 7 (2) that, when it does so, the Court must appoint a suitably qualified lawyer for child by reason of their personality, cultural background, training and experience. The intention is to provide a lawyer for child suited to the job, as well as culturally relevant to the child.

[2] For example, the amendments to the Oranga Tamariki Act (1989) included Te Tiriti o Waitangi in the principles section, and then specific mechanisms for accountability through the new s7AA provisions. The Public Service Act (2020) is committed to strengthening the Crown's relationship with Māori under Te Tiriti, and has new explicit responsibilities on government agencies to ensure cultural competence and greater understanding of te ao Māori. In addition, s4 of the Conservation Act (1987) explicitly gives effect to the treaty: "*This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi*.", as does s9 of the Education and Training Act (2020): "*This Act recognises and respects the Crown's responsibility to give effect to Te Tiriti o Waitangi, and ensures the wellbeing of children and young people, by applying the following duties to the exercise of a power or the performance of a function under this Act… "* Similarly, s9 of the State Owned Enterprises Act (1976) "*Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi*." Many of these acts have links (referring) to the Treaty of Waitangi Act (1975).

- Addition of new section 7AA that the lawyer appointed must explain the process to the child in a way they can understand.
- Addition in section 7B subsection (2) that ensures a lawyer must take steps to assist in promoting reconciliation and resolving the dispute 'as fairly, inexpensively, simply and speedily as is consistent with justice'. This supports a child-centred view that drawn-out proceedings are not in a child's best interest. A child's sense of time is different from adults, and timely resolutions reduce the length of uncertainty, upset, or trauma for the child going through care proceedings, thus reducing long-term negative impacts on children.

12. However, the Bill fails to ensure several important things that are summarised below and then addressed more fully in the following pages:
    - Firstly, the mechanisms to support children's participation are inadequate. There is an existing provision in the Oranga Tamariki Act (1989) that provides for children's participation in the decisions that affect them.
    - Secondly, a lawyer should be appointed for every child, and a broader mechanism should also be considered in family dispute resolution and Family Court processes to support children through those processes. The mechanism could include a lawyer (who is suitably qualified and trained in child participation, child rights and Te Tiriti o Waitangi), but may also, or alternatively, include a specially trained councillor, youth, iwi, community, or social worker.

B. The Bill will only achieve the intended outcomes if provisions for child participation are more substantive.

13. The above provisions, while heading in the right direction, are wholly inadequate to achieve the intended child-centred provisions. We think this is a missed opportunity to make this legislation consistent with other legislation that upholds children's participation rights.

Strengthen the requirement for children to understand the process

14. The Bill proposes in section 7AA that the lawyer should explain the process to a child. This, however, should be strengthened to align with s10 of the Oranga Tamariki Act (1989), in which, in any case where a child appears in a Family Court, the *Court and counsel shall*:
    - "explain in a manner and in language that can be understood by the child or young person or other person the nature of the proceedings" and
    - "satisfy themselves that the person whom that barrister or solicitor represents understands the proceedings" and,
    - where the Court makes a decision about the child (eg an order), they shall ensure the child understands its nature, requirements, provisions and any rights of appeal or complaints process available to the child.
15. These types of provisions are also relevant to children who are involved in cases going through the Family Court to ensure they are fully informed and have all the information provided to them in ways they understand.
16. The proposed section 7AA is inadequate to achieve this, particularly as a) there is no guarantee a Court will appoint a lawyer for every child and b) the proposed wording includes "**if it is reasonably practicable to do so…**" which weakens the requirement of the lawyer to explain the proceedings to the child.
17. In proposed section 7AA, it is clear that a lawyer should, *having regard to the age and maturity of the child*, explain the nature of the proceedings in a manner the child is most likely to understand.

We do not think there is a need for the words 'if it is reasonably practicable', as the other words provide leeway for the lawyer to alter how they do this, depending on the age of the child.

18. As ever, there are pressures on lawyers to minimise the time or effort they put in to achieve a given outcome. The 'reasonably practicable' wording in this clause could mean that best practice child and youth engagement is never used due to the time required for the process (subjectively not considered practicable). The weakness in these words risks undermining the intent of the provision.

19. **We recommend** that the Justice Committee **remove the words '*if it is reasonably practicable to do so***' from proposed section 7AA.

20. **We recommend** that the Justice Committee add provisions to ensure the Court and counsel are required to **satisfy themselves that children do understand the proceedings**, and that children understand the implications of the Court's orders, including appeal or complaint mechanisms.

Section 5 (g) should use wording from article 12 of the Children's Convention.

21. Section 5(g) wording is poorer for not using the wording of Article 12 of the Children's Convention that says: "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given* ***due weight in accordance with the age and maturity of the child***"[3] (our emphasis). Part 2 of Article 12 states: "*For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child…*" Both the Family Court and Family Dispute Resolution are judicial and administrative proceedings and therefore are required to ensure children's views be heard and given due weight.

22. There needs to be a good reason to dispense with words of the Convention, and there is no obvious reason for using different words in this case. Giving 'due weight' implies significant weight to the views of a mature child or young person.

23. **We recommend** that the Justice Committee **remove the words from proposed section 5(g) "*commensurate with their age and maturity, their views should be taken into account.***" and instead use the wording of Article 12 of the Children's Convention, i.e. "**the views of the child being given due weight in accordance with the age and maturity of the child**."

Strengthen the requirement for children to be supported to fully participate

24. When carefully analysed, the proposals do not enhance children's participation much further than the existing provision in s6 of the Care of Children Act (2004). There is an existing provision in the Oranga Tamariki Act (1989), s11 that should be seen as a starting point to strengthen this area.

25. For example, s11, of the Oranga Tamariki Act (1989) part (2)(a) starts: "*the child or young person must be* ***encouraged and assisted*** *to participate in the proceedings or process to the degree appropriate for their age and level of maturity…*" (with certain caveats; our accent). S11(2) continues, providing for best practice in child participation, as below. These clauses could be incorporated into s6 of the Care of Children Act (2004) with a minor amendment (see paragraph 26 below):

    (aa) … the child or young person must be given reasonable assistance to understand the reasons for the proceedings or process, the options available to the decision-maker, and how these options could affect them; and

    (b) the child or young person must be given reasonable opportunities to freely express their views on matters affecting them; and

[3] www.ohchr.org/en/professionalinterest/pages/crc.aspx

(c) if a child or young person has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support must be provided to assist them to express their views and to be understood; and

(d) any views that the child or young person expresses (either directly or through a representative) must be taken into account; and

(e) any written decision must set out the child's or young person's views and, if those views were not followed, include the reasons for not doing so; and

(f) the decision, the reasons for it, and how it will affect them must be explained to the child or young person.

26. The Care of Children Act (2004) should more strongly support children's participation in proceedings, *unless to do so would risk harm to the child*. The above clauses signify good practice in Court processes for child participation that could be adopted in this Bill with a few changes aimed at children's protection.

27. Some may argue that the Oranga Tamariki Act (1989) is public law relating to Crown intervention in families' lives, while the Care of Children Act (2004) relates to private disputes. However, the risks and benefits to children of full participation still apply, and it is their right, as afforded in the Children's Convention, to which New Zealand is a signatory.

28. **We recommend** that the **child or young person must be encouraged and assisted to participate in the proceedings or process** to the degree appropriate for their age and level of maturity, unless to do so would risk harm to the child. The existing approach of section 11 of the Oranga Tamariki Act (1989) should be incorporated into the bill to ensure best practice.

> *"[Children] may be more likely to accept decisions made by adults if they have been consulted as part of the decision-making process,"* Dr Megan Gollop, University of Otago.[4]

C. We support the amendment to the Family Dispute Resolution Act (2013) to allow for children's involvement, but it should ensure *all* children are supported to participate.

29. In order for Family Dispute Resolution providers to assist parties to reach an agreement that best serves the welfare and best interests of all children involved in the dispute, it is critical to understand the perspectives of children, and hearing from them is both best practice and their inalienable right [5]. The family dispute resolution process is a required process before a Court process and as such is an 'administrative proceeding'. Article 12.2 of the Children's Convention states that a child shall be provided with the opportunity to be heard in any administrative proceeding affecting them.

30. One of the significant criticisms of the 2014 reforms was the lack of children's participation in Family Court processes, and this includes dispute resolution. In the past, family dispute resolution providers have had mixed views as to the extent to which children should be afforded the opportunity to be involved in the process, if at all. They also have a commercial imperative to avoid time-consuming processes if they can. Therefore, we support the *intent* of the amendment

[4] 6 August 2020, Family justice system needs to include children's voices, Otago research, News, University of Otago, New Zealand

[5] www.occ.org.nz/publications/submissions/review-of-2014-family-justice-reforms-submission / page 3

to the Family Dispute Resolution Act (2013) in s11(2)(b) to add in (ba) 'facilitation' of participation of children in discussions, because to date there has been a lack of commitment to upholding Article 12 of the Children's Convention in this process. However, the wording of the amendment to the Family Dispute Resolution Act (2013) needs to be strengthened to ensure the policy intent of this amendment is achieved.

31. Furthermore, the process for Family Dispute Resolution providers to hear from children is still subject to the consent of parents – both parents – who are likely to be at odds with each other at the time. One parent may withhold consent to further their own cause in the dispute proceedings, which doesn't afford the children their right to participate and be heard. The Bill would be better to ensure that children's rights to participate **is the responsibility of all parties**, not just the duty of the Family Dispute Resolution provider.

32. Notwithstanding this point, the amendment that requires Family Dispute Resolution providers to include the voice of children in their procedures *when they consider it appropriate* is simply too weak. The amendment to the Family Dispute Resolution Act (2013) needs to be strengthened to ensure that providers must make the effort, so the policy intent of this amendment can be achieved.

33. **We recommend removing** the part of (ba) that states: "***to the extent (if any) that the FDR provider considers appropriate"***. We suggest this be replaced with wording similar to those used in the proposed 7AA of the Care of Children Act (2004), that would more strongly ensure children's participation without it being at the discretion of the FDR provider. For example: **(ba) facilitate the participation in those discussions of the children involved in the dispute, *having regard to the ages and maturity of the children***.

34. We consider this latter phrase will give providers some discretion where it is not feasible to include participation from children due to their age and maturity (eg babies). However, we also hope the Committee will consider strengthening this provision entirely, to be more explicit about *how* children's participation should be ensured.

35. **We recommend the responsibility to hear from children be assigned to all parties, including parents.**

36. We also recommend that facilitation in the Family Dispute Resolution process includes non-legislative support, such as training on childhood development, Te Tiriti o Waitangi, children's rights, rights of disabled peoples, care and protection issues, and child participation models and methods.

D. We recommend appointing a suitably qualified advocate for every child.

All 'lawyers for child' should be suitably qualified

37. The proposed addition to section 7(2) of the Care of Children Act (2004) intends to ensure that a lawyer appointed for a child is suitably qualified to do the work. However, we consider that the proposed wording of section 7 subsection 2 means that the legal instrument may not be as strong as intended, and in fact could do harm to children.

38. In any case where a lawyer is appointed for the child, there is no situation when the child should be appointed a lawyer who is *not* 'suitably qualified'. Such a person could undermine a child's ability to understand proceedings, to participate in processes, to have their say, and could affect the child's long term perceptions of Court processes. A person who is 'not suitably qualified' would arguably do more harm to a child, than good, and should never be appointed.

39. Furthermore, the clause is already open to some interpretation, given the characteristics that make a lawyer 'suitably qualified' are subjective (namely their personality, cultural background, training and experience).

40. **We recommend** that the Justice Committee **remove the words '*so far as is reasonably practicable*'** from the proposed section 7 subsection 2.

All children need access to support through dispute resolution and Court processes

41. Subsection 7 still does not require the Court to appoint a lawyer for *all* children. We have argued before that in a process that is intended to prioritise the needs and interests of children, it is vital those needs and interests are firmly and clearly represented[6]. The 2014 reforms limited the ability for a child to be represented by a lawyer only to cases where the child's safety or wellbeing is at risk. This has lessened the independent advocacy for children's needs. Now is a good opportunity to return to pre-2014 requirements that a lawyer for child be appointed in all cases, unless it was deemed inappropriate. This would align representation of children between the Care of Children Act (2004) an the Oranga Tamariki Act (1989).

42. **We recommend** that clause 7 require **a lawyer for child to be appointed for all cases unless the Court determines that it would serve no purpose**.

43. To further support children's participation, we encourage the Committee to consider a second option: that an alternative mechanism be developed to ensure children are supported throughout the process, by someone suitably qualified and trained for the job, such as a youth worker, iwi or community worker, counsellor or social worker. This appointee would remain with the child throughout the process and support them to have a say and for their best interests to be represented. This is consistent with the intention of the Review Panel's korowai structure that supports children in a system that is focused on giving children's needs paramount importance.

44. An example exists in the Oranga Tamariki Act (1989) s163-165 that provides for a lay advocate to be appointed "*if the Court thinks desirable, for such other purposes (including any other proceedings under this Act or any other enactment as the Court may specify*". If a lay advocate – eg an iwi or community worker – is important for children going through care and protection proceedings, it is arguably important also for children going through Care of Children Act (2004) proceedings to have support along the way.

45. Decisions in a Family Court are among the most important decisions in the life of a child involved. Whom they will live with, how much contact they will have with each parent, how they will be supported are all hugely significant decisions. It is critical that our legal instruments actively support children to have a say and for their views to be given due weight, in such decisions.

46. **We recommend** that, if a lawyer is not appointed for every child, then **a system-wide mechanism be developed to support children through the family justice system, support their full participation, and to ensure their views are sensitively gathered and given due weight.**

E. Further implementation of the Review Panel's recommendations is required before the system truly supports children to fully realise their participation rights.

47. We understand this Bill is just a step along the journey of improving the Family Court processes for children and their families and whānau. We note that many of the provisions in the proposed amendments do not have significant budgetary requirements. It is imperative that, for the system to work properly in a cohesive manner, that adequate investment be provided to uphold people's rights, particularly those of children who so often do not get to have a say.

48. As the Committee considers further implementation of the Panel's recommendations, we would like to suggest some areas that we have recommended before, because they would have a beneficial impact on children, and fulfil their rights in the Family Court process.

[6] ibid. page 5

49. **We recommend that section 133(6)(e) of the Care of Children Act (2004) preventing the use of a psychological report solely or primarily to ascertain a child's views be repealed**. As we have previously stated[7], this may be the only way for a child's views to be reasonably obtained in some circumstances.

50. **We recommend access for lawyers to training**, particularly on child-rights and participation, care and protection issues, and embedding Te Tiriti o Waitangi as a framework for their practice. They need to develop skills in engaging with children including communicating with disabled children and understanding the particular needs of diverse children. Specialised training is important to support the continuing professional development of those who specialise in working with children.

51. **We recommend comprehensive auditing** to ensure lawyers follow guidelines. It is important that lawyers for the child be audited to ensure they are following guidelines, partaking in appropriate training to upskill, and having their required professional supervision.

52. **We recommend the committee monitor the use of the Guidelines for the Lawyer for Child.** The guidelines have been updated but there is little assurance they are being followed by all lawyers for child. Their practical utility needs to be evaluated to support continual improvement.

53. There remains a necessity to progress the research and analysis that has been planned, of international models of practice in relation to child participation in family dispute resolution and Family Court processes, along with mātauranga Māori. Aotearoa New Zealand is in a position to be world-leading in child participation that reflects the needs of all children, especially tangata whenua.

54. **We recommend** the Minister of Justice instruct the Ministry to progress **planned research on best practice models of child participation in family dispute resolution and legislative processes.**

SUMMARY OF OUR RECOMMENDATIONS –

1. **We recommend** that the Justice Committee consider **how the processes of the Family Court can more effectively give practical commitment to implement the articles of Te Tiriti o Waitangi**.

2. **We recommend** that the Justice Committee **remove the words '*if it is reasonably practicable to do so*'** from proposed section 7AA.

3. **We recommend** that the Justice Committee add provisions to ensure the Court and counsel are required to **satisfy themselves that children do understand the proceedings**, and that children understand the implications of the Court's orders, including appeal or complaint mechanisms.

4. **We recommend** that the Justice Committee **remove the words from proposed section 5(g) "*commensurate with their age and maturity, their views should be taken into account.*"** and instead use the wording of Article 12 of the Children's Convention, i.e. "**the views of the child being given due weight in accordance with the age and maturity of the child**."

5. **We recommend** that the **child or young person must be encouraged and assisted to participate in the proceedings or process** to the degree appropriate for their age and level of maturity, unless to do so would risk harm to the child. The existing approach of section 11 of the Oranga Tamariki Act (1989) should be incorporated into the bill to ensure best practice.

6. **We recommend removing** the part of (ba) that states: ***to the extent (if any) that the FDR provider considers appropriate***. We suggest this be replaced with wording similar to those used in the proposed 7AA of the Care of Children Act (2004), that would more strongly ensure

[7] ibid, page 7

children's participation without it being at the discretion of the FDR provider. For example: **(ba) facilitate the participation in those discussions of the children involved in the dispute, *having regard to the ages and maturity of the children***.

7. **We recommend the responsibility to hear from children be assigned to all parties, including parents.**

8. **We recommend** that the Justice Committee **remove the words '*so far as is reasonably practicable*'** from the proposed section 7 subsection 2.

9. **We recommend** that clause 7 require **a lawyer for child to be appointed for all cases unless the Court determines that it would serve no purpose**.

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13. **We recommend comprehensive auditing** to ensure lawyers follow guidelines. It is important that lawyers for the child be audited to ensure they are following guidelines, partaking in appropriate training to upskill, and having their required professional supervision.

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15. **We recommend** the Minister of Justice instruct the Ministry to progress **planned research on best practice models of child participation in family dispute resolution and legislative processes.**