

Review of 2014 family justice reforms: Submission from the Office of the Children's Commissioner

INTRODUCTION

- 1 One of the issues prompting the reform of the family justice system in 2014 was that children's needs were being lost sight of by key parties and in court processes.¹ A stated objective of the reforms was to achieve a family justice system responsive to children and vulnerable people.² This emphasis on the needs and wellbeing of children in the delivery of family justice is correct and important.
- 2 In all actions concerning children, their welfare and best interests must be a primary consideration.³ Children have the right to express their views on matters that affect them, and for those views to be given due weight in decision-making.⁴ When a child is involved in any judicial or administrative proceeding, they should have an opportunity to give their views.⁵ These rights are enshrined in the United Nations Convention on the Rights of the Child (the Children's Convention) and reflected in the domestic legislation that underpins the family justice system, namely the Care of Children Act 2004 (COCA) and the Oranga Tamariki Act 1989 (OTA).⁶
- 3 From the background paper to this current review, as well as from information the Children's Commissioner and his office receive in the course of our work advocating for the rights and interests of children, it is clear that the 2014 reforms have not achieved the objective of ensuring the family justice system is more responsive to children. It may in fact have resulted in worse outcomes and experiences for children who come into contact with the Family Court.
- 4 This submission sets out the areas in which we think the family justice system can be improved to ensure children's rights, needs, and interests are placed front and centre in family justice decision-making as intended.*



The OCC represents **1.1 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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* This submission has been prepared with assistance from retired Family Court Judge Paul von Dadelszen.

SUMMARY OF RECOMMENDATIONS

- Rec 1:** that a system-wide mechanism is developed to support children through the family justice system and ensure their views are sensitively and appropriately gathered and given weight. This could take the form of a child advocate who stays with the child throughout the process, or some other child-centred mechanism.
- Rec 2:** that the Family Dispute Resolution Act 2013 be amended to ensure children's right to be heard in cases affecting them is upheld.
- Rec 3:** that clear guidance is issued to stipulate the skills, experience, training, and best practice required by those engaged to obtain children's views as part of the FDR process.
- Rec 4:** that access to free counselling is reinstated, and extended to children, as anticipated in the Family Courts Matters Bill in 2008.
- Rec 5:** that the provisions relating to the appointment of legal representation for children under COCA and OTA be aligned and return to pre-2014 requirements that a lawyer for child be appointed in all cases unless the Court determines that it would serve no useful purpose.
- Rec 6:** that the Panel engages with the Law Society to discuss updating the *Practice Note: Lawyer for Child Selection, Appointment and Other Matters* to ensure the complaints process regarding lawyer for child is simplified, and that any complaint triggers a review for removal from the approved counsel list.
- Rec 7:** that access to legal aid and representation for "standard track" applications be increased to reduce the over-reliance on "without notice" applications to the Family Court.
- Rec 8:** that decision-making processes for determining contact with a potentially violent parent or caregiver are reviewed to ensure children's views and safety are given greater consideration.
- Rec 9:** that section 133(6)(e) of COCA preventing the use of a psychological report solely or primarily to ascertain a child's views be repealed.
- Rec 10:** that consideration is given to aligning decision-making processes between COCA and the OTA to involve wider family/ whānau in care decisions when appropriate.
- Rec 11:** that consideration is given to ensuring that key actors in the family justice process, such as lawyers for children, have specialist care and protection expertise.
- Rec 12 :** that the recommendations of the 2012 Social Services Committee inquiry into the identification, rehabilitation and care and protection of child offenders should be advanced in any review of the Family Court.
- Rec 13:** that a practical commitment to implement the principles of Te Tiriti o Waitangi is included in family justice legislation, and that this enables the development of kaupapa Māori family justice decision-making models.

ENSURING CHILDREN'S VIEWS ARE HEARD IN ALL PARTS OF THE SYSTEM

- 5 An overarching concern with current practice in the family justice system following the 2014 reforms is that children's views are not given sufficient priority. As noted in the introduction, children have the right to express their views on matters that affect them and for these views to be given weight.
- 6 The decisions being made in the family justice system are of profound importance to children; decisions like where they will live, how much contact they will have with their parents/caregivers and whether or not they will live in the same community as their wider family/whānau. It is critical that children are involved in these decisions.
- 7 At the same time, it is important that children are not made to feel that they must choose between loved caregivers, and that their views or preferences are not used against them or as ammunition in disagreements between adults.
- 8 It can be stressful for children to share their views about care arrangements or recount distressing experiences to unfamiliar adults. While they need to be given the opportunity to change their views over time, especially when the process is protracted, they should not be asked or expected to repeat the same views to multiple people in different parts of the system.
- 9 A child-centred approach to the family justice system would go beyond simply giving children the opportunity to input their views, to actively supporting them through the process in a way that is responsive to their age and stage of development, cultural background, abilities and needs.

Recommendation 1: that a system-wide mechanism is developed to support children through the family justice system and ensure their views are sensitively and appropriately gathered and given weight. This could take the form of a child advocate who stays with the child throughout the process, or some other child-centred mechanism.

- 10 In the following sections we recommend legislative and regulatory changes to ensure that children's rights are upheld in the family justice system; these changes should be aligned with the development of such a mechanism.

INCLUSION OF CHILDREN'S VIEWS IN FAMILY DISPUTE RESOLUTION

- 11 Family Dispute Resolution (FDR) is a service to help separated parents and guardians reach agreement about caring for their children. The 2014 reforms introduced FDR as a mandatory requirement before an application can be made to the Family Court.
- 12 FDR providers are required by law to "assist the parties to reach an agreement [...] that best serves the welfare and best interests of all children involved in the dispute."⁷
- 13 To determine what best serves children's welfare and best interests, their views must be obtained and considered; this is both best practice and their inalienable right.[†]
- 14 However the Family Dispute Resolution Act 2013 does not mandate that children's views be ascertained as part of the FDR process. While some FDR providers seek children's views in limited circumstances, others do not. This means that some children

[†] The FDR process 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.

who would like to state their views and are sufficiently mature to do so are not given the opportunity.

- 15 The Ministry of Justice issued updated guidelines to FDR providers in July 2018 including that providers should have processes in place to ensure children's voices are represented in mediation.⁸ However, because the instruction is contained in discretionary guidance and not mandated by legislation, it is too easy for FDR providers to opt not to involve children. This means many children are missing out on this important opportunity.
- 16 Furthermore, the guidelines do not contain any specifications about the qualifications, training, or oversight of those engaged to obtain children's views as part of the FDR process. This means children could be exposed to substandard or harmful practices or have their views misrepresented by individuals without specialist child-engagement expertise.
- 17 Not consulting children (or consulting them poorly) as part of the FDR process is likely to be harmful to them and the outcome of the process. Children want to participate in decisions about their care, but most are not told the reasons for their parents' separation or how it will affect them.⁹ Giving children a safe, appropriate opportunity to be heard, without making them choose between parents, has a positive impact on children and can reduce conflict between parents. There is evidence to suggest that children cope better with family separation if they have been consulted, and their involvement in decision-making is linked to better mental health outcomes.¹⁰
- 18 This lack of mandated consultation of children is also in breach of New Zealand's obligations under the Children's Convention. Indeed it was recommended by the UN Committee on the Rights of the Child in its last report on New Zealand that the Family Dispute Resolution Act 2013 be amended to correct this.¹¹ The Office of the Children's Commissioner endorses this recommendation.

Recommendation 2: that the Family Dispute Resolution Act 2013 be amended to ensure children's right to be heard in cases affecting them is upheld.

Recommendation 3: that clear guidance is issued to stipulate the skills, experience, training, and best practice required by those engaged to obtain children's views as part of the FDR process.

ACCESS TO COUNSELLING

- 19 Prior to the 2014 reforms, separated couples or couples experiencing relationship problems could ask the Family Court to be referred to up to six free counselling sessions. They did not need to have initiated proceedings before the Court to access this counselling. Counselling could also be requested if there was a dispute about a Court order or ordered by a Judge when a Court order was being breached. The 2014 reforms removed access to this counselling. FDR replaced counselling for those who wanted help to reach agreements about care arrangements for children.
- 20 Back in 2008, the Family Courts Matters Bill was passed in Parliament but never enacted. This legislation would have enabled counselling for children to help them clarify their views before family mediation, and where a Judge considered counselling would be helpful for a child to adjust to changes in their care arrangements ordered by the Court.¹²

- 21 FDR has been a useful addition to the family justice system, but it should be available for those who wish to settle care arrangements *in addition* to free counselling, rather than instead of. Families are under pressure when they engage with the family justice system: it can be stressful and upsetting for both adults and children. At such stressful times it can be difficult for adults to see past their own grief and stress to maximise children's best interests. Access to free counselling to support families through the FDR and Family Court processes will help to protect the emotional wellbeing of both adults and children, ensure children's needs are prioritised, and ensure the care arrangements arrived at are sustainable in the long term.
- 22 For the same reasons, we consider that children should also have access to free counselling to support them through the family justice system. This was anticipated in the Family Courts Matters Bill a decade ago and should now be enacted.

Recommendation 4: that access to free counselling is reinstated, and extended to children, as anticipated in the Family Courts Matters Bill in 2008.

ACCESS TO LEGAL REPRESENTATION FOR CHILDREN

- 23 In a decision-making process intended to prioritise the needs and interests of children, it is vital that those needs and interests are firmly and clearly represented. Historically this has often been achieved by appointing independent legal representation for children ("lawyer for child").
- 24 Prior to the 2014 reforms the Court was required to appoint a lawyer for child unless it was "satisfied the appointment would serve no useful purpose." The 2014 reforms narrowed the criteria for appointing a lawyer for child, so that COCA now requires that a lawyer for child only be appointed if there are concerns for the child's safety or wellbeing.¹³
- 25 In effect this has reduced access to lawyers for children and consequently lessened independent advocacy for children's needs and interests in the decisions of the Family Court.
- 26 On the other hand, it is compulsory to appoint a lawyer for child when the proceedings are brought under the OTA.¹⁴ We think the appointment of a lawyer for child should be a requirement for proceedings under both Acts.

Recommendation 5: that the provisions relating to the appointment of legal representation for children under COCA and OTA be aligned and return to pre-2014 requirements that a lawyer for child be appointed in all cases unless the Court determines that it would serve no useful purpose.

- 27 Furthermore, we are aware that even when a lawyer for child is appointed, they may not always act in the best interests of the child. For example, we are aware of cases where a lawyer for child has represented a child without adequately ascertaining their views, and/or without reporting the child's views fully and accurately to the Court. In other cases, lawyers for child have failed to follow-up with children whose views have changed over time during protracted proceedings. This is unacceptable.
- 28 We understand there are requirements to ensure lawyers for children act in children's best interests, including that they must meet with, ascertain the views of, and adequately explain proceedings to the children they represent. We are also aware the Law Society has issued Lawyer for Child Best Practice Guidelines. While there is a

process to remove lawyers from the list of approved counsel (specified in Family Court Practice Note: Lawyer for Child Selection, Appointment and Other Matters, s 13), in practice this process is not child-centred and seems to be rarely used.

Recommendation 6: that the Panel engages with the Law Society to discuss updating the *Practice Note: Lawyer for Child Selection, Appointment and Other Matters* to ensure the complaints process regarding lawyer for child is simplified, and that any complaint triggers a review for removal from the approved counsel list.

RESOLUTION OF DECISIONS WITHIN A TIMEFRAME APPROPRIATE TO CHILDREN'S SENSE OF TIME

- 29 The 2014 reforms were intended to create a streamlined process for applications to the Family Court. It was hoped that most applications would follow the "standard track", and a new "without notice" track was created for urgent applications. Access to legal aid and representation was restricted on the "standard track" but made available for "without notice" applications.
- 30 Because of this restriction, an unintended consequence of the 2014 reforms has been that applicants are incentivised to file their cases "without notice" in order to access legal aid and representation, even when their cases are not urgent. To justify using this urgent track, parties are incentivised to emphasise potential conflict and take a more adversarial approach.
- 31 As a result, approximately seventy percent of applications are now filed without notice. This unintended consequence of the 2014 reforms has clogged the system, resulting in cases taking an average of 22 days longer to resolve than before 2014 and possibly causing more adversarial behaviour between parties than would otherwise be the case.¹⁵
- 32 Clearly this outcome is undesirable and runs counter to the stated objective that the 2014 reforms result in an efficient and effective family justice system.
- 33 From a child's perspective, it is clearly not beneficial for decisions affecting their care and wellbeing to be so delayed and conflict-ridden. Furthermore, COCA stipulates that "decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time."¹⁶ This is not happening at present. Delays as a result of the over-reliance on "without notice" applications are in breach of this provision.

Recommendation 7: that access to legal aid and representation for "standard track" applications be increased to reduce the over-reliance on "without notice" applications to the Family Court.

CHILDREN'S SAFETY WHEN IN CONTACT WITH PARENTS OR CAREGIVERS WITH POTENTIALLY VIOLENT BEHAVIOUR

- 34 The 2014 reforms also changed the decision-making processes for dealing with allegations of physical and sexual abuse of children, and determining the level of contact a child might have with a parent or caregiver who might put them at risk, either of direct abuse or violence or by exposing them to risky situations.¹⁷

- 35 Provisions stipulating a statutory process for dealing with such allegations were repealed and replaced with a principle-based approach based on sections 4 and 5 of COCA.
- 36 In general, the Office of the Children’s Commissioner is supportive of taking a principled and rights-based approach to decisions affecting children’s level of contact with parents and caregivers. We consider the principles in sections 4 and 5 of COCA, which emphasise both children’s safety and their right to maintain their identity and connection with whānau, to be sound.
- 37 However, we echo the concerns of family violence advocacy groups, summarised at paragraph 72 of the background paper that in practice the changes have lessened protections for children by removing an important safety check when making an order for care or contact with an abusive or violent party. We also agree that children’s own views about contact with a parent or caregiver whose past behaviour has been abusive and violent are not given sufficient weight.

Recommendation 8: that decision-making processes for determining contact with a potentially violent parent or caregiver are reviewed to ensure children’s views and safety are given greater consideration.

SPECIALIST REPORTS AS A POTENTIAL VEHICLE FOR CHILDREN’S VIEWS

- 38 Under section 133(5) of COCA, the Family Court can engage the services of a psychologist, and the Judge can direct that this process be used to ascertain the child’s views on the matter before the Court.
- 39 However, since the 2014 reforms, the use of the psychological report for this purpose has been limited by section 133(6)(e) which states that “the court [is not to] seek the psychological report solely or primarily to ascertain the child’s wishes.”
- 40 While we agree that, when possible, it is preferable to gather children’s views via methods other than a court-appointed psychologist, there are some cases in which this will be the best and perhaps only effective way to obtain a child’s views.
- 41 In our view, section 133(6)(e) places an unnecessary limitation on the Court’s ability to direct that children’s views are gathered in the most effective manner.

Recommendation 9: that section 133(6)(e) of COCA preventing the use of a psychological report solely or primarily to ascertain a child’s views be repealed.

OTHER MATTERS

Lack of involvement of wider whānau in decision-making unless there is a section 19 Family Group Conference

- 42 In the course of our work with children and young people and their families, our staff have become aware that a significant proportion of applications to the Family Court to settle care arrangements now come not from parents attempting to resolve those arrangements between themselves, but from other family or whānau members (grandparents, for example) seeking to resolve care when they are concerned that a child is not safe with their parents.
- 43 These are applications which might in other circumstances trigger care and protection proceedings under the OTA, but for a variety of reasons, families/whānau have chosen

to advance their concerns under COCA. This is a legitimate and often desirable pathway to resolve care arrangements within kin groups and avoid children being taken into State care.

- 44 However, the increasing use of this pathway highlights a key difference between COCA and the OTA. Under the OTA decisions about a child's care are made by a Family Group Conference (FGC) following considerable effort to identify family/ whānau members with an interest in the child's wellbeing. In contrast, under COCA care decisions can be made directly by the Court ruling for or against an applicant, without involving wider family/ whānau. This may result in care decisions that are not in the best interests of the child, if, for example, a more appropriate or sustainable care arrangement could have been reached at an FGC.
- 45 It is possible for the Family Court to refer a case to Oranga Tamariki for an FGC under section 19 of the OTA if it believes that a child or young person is in need of care and protection. However there is no particular process that must be followed to reach this conclusion. There is no requirement for a skilled care and protection assessment, nor for key actors like lawyers for child to have particular care and protection expertise.

Recommendation 10: that consideration is given to aligning decision-making processes between COCA and the OTA to involve wider family/ whānau in care decisions when appropriate.

Recommendation 11: that consideration is given to ensuring that key actors in the family justice process, such as lawyers for children, have specialist care and protection expertise.

Opportunity to improve provisions relating to child offenders

- 46 While we understand that the current review is limited to the reforms of 2014, there is a related need to update provisions related to child offenders aged 10-13, who come under the auspices of the Family Court.
- 47 In 2012 the Social Services Committee inquired into the identification, rehabilitation, and care and protection of child offenders and made a number of recommendations, including: improving Family Court processes to prioritise child offending cases; requiring that timeframes for action reflect a child's concept of time and that case files be reviewed on completion to determine whether deadlines were met; giving the Family Court similar powers to make supervision orders to those of the Youth Court; and considering introducing a new oversight and accountability order in the Family Court.¹⁸

Recommendation 12: that the recommendations of the 2012 Social Services Committee inquiry into the identification, rehabilitation and care and protection of child offenders should be advanced in any review of the Family Court.

Implementing Te Tiriti o Waitangi

- 48 The 2014 reforms of the family justice system did not set out to improve the system's responsiveness to Māori, although arguably they should have since there are very few Māori lawyers practicing family law.¹⁹ Māori whānau engaging with the family justice system are unlikely to find it culturally responsive to the needs of mokopuna Māori.
- 49 Given the Crown's commitments under Te Tiriti o Waitangi, any legislation or policy that impacts on the wellbeing of children should consider the particular needs of

tamariki Māori. This goes beyond this review's particular focus on the 2014 reforms, but should be actively pursued.

- 50 Such a commitment can be mandated in legislation. For example, new section 7AA of the OTA (which comes into force on 1 July 2019) requires that Oranga Tamariki demonstrate a *practical commitment* to the principles of the Treaty of Waitangi, including: to partner with iwi and Māori organisations, to have regard to mana tamaiti and the whakapapa of Māori children and young persons, and to recognise the whanaungatanga responsibilities of their whānau, hapū and iwi.
- 51 A culturally responsive family justice system would also require partnerships with whānau, hapū and iwi, and the development of kaupapa Māori models for care decisions that better recognise the needs of mokopuna Māori.

Recommendation 13: that a practical commitment to implement the principles of Te Tiriti o Waitangi is included in family justice legislation, and that this enables the development of kaupapa Māori family justice decision-making models.

CONCLUSION

- 52 The 2014 Family Court reforms were intended to create a family justice system that was more efficient, effective, and responsive to the needs of children. It is clear that these aims have not been achieved.
- 53 Children's rights, interests, and needs should be at the centre of family justice decision-making. Decisions should be made in their best interests, with their views gathered, heard, and given weight.
- 54 The recommendations in this submission would go a long way towards reversing the unintended negative consequences for children of the 2014 reforms, and towards a family justice system that is more child-centred.
- 55 At the same time, we would like to see the opportunity presented by this review taken to also consider how to improve Family Court processes to better involve family/whānau in care decisions, and to better meet the needs of child offenders.

SOURCES

¹ *Background Paper: Overview of the 2014 family justice reforms*, paragraph 14.

² *Background Paper*, paragraph 17.

³ *United Nations Convention on the Rights of the Child* (The Children's Convention), Article 3.1.

⁴ *Children's Convention*, Article 12.1.

⁵ *Children's Convention*, Article 12.2.

⁶ See *Care of Children Act 2004*, sections 4, 5, and 7, and *Oranga Tamariki Act 1989*, sections 5, 6, and 159.

⁷ *Family Dispute Resolution Act 2013*, section 11(2)(c).

⁸ *Family Dispute Resolution Operating Guidelines*, July 2018, page 13.

⁹ *Background Paper*, paragraph 23.

¹⁰ *Background Paper*, paragraph 24.

¹¹ *Concluding Observations on the fifth periodic report of New Zealand*, UN Committee on the Rights of the Child, 2016, paragraph 18(a).

¹² *Background Paper*, paragraph 11.

¹³ *Care of Children Act 2004*, section 7.

¹⁴ *Oranga Tamariki Act 1989*, section 159.

¹⁵ *Background Paper*, paragraphs 51-60.

¹⁶ *Care of Children Act 2004*, section 4(2)(a)(i).

¹⁷ *Background Paper*, paragraphs 62-72.

¹⁸ *Inquiry into the identification, rehabilitation, and care and protection of child offenders*, Report of the Social Services Committee, June 2012, recommendations 19, 22, 25, 29, and 31.

¹⁹ 'Lawyer ethnicity differs from New Zealand population', New Zealand Law Society *Law Talk* 920, August 2018.