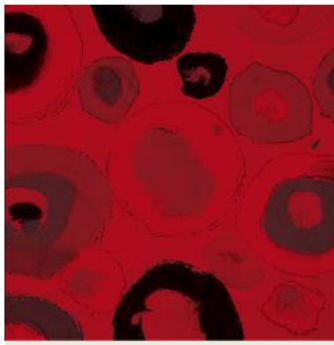

Office of the Children's Commissioner's response to the consultation document released by the Independent Panel examining the 2014 family justice reforms (January 2019)

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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Introduction

1. This document provides a high level response to the Independent Panel's (the Panel) consultation document examining the 2014 family justice reforms. We welcome the aspirational nature of the document, and the reiteration that the welfare and best interests of the child are the first and paramount consideration in decision making under the Care of Children Act 2004. The Panel review of the family justice system is needed and timely. We urge the Panel to be strong in recommendations to repair the system so that it truly is delivering in the best interests and welfare of children.
2. The January 2019 report envisages a "structure that brings together the Family Court and a range of services. Named the Family Justice Service, it would form a korowai, a cloak for separating parents, caregivers, and whānau who need help making decisions *about* their children" (page 8). The paramount consideration of the family justice system is the welfare and best interests of children. The korowai should be *for* the children, rather than for parents making decisions *about* their children.
3. A shift in thinking is required to see the system as making decisions *with*, rather than *about* children. Embedding children's rights within this korowai would help to achieve this.
4. This submission sets out how the family justice system can be strengthened by:
    a. recognising Te Tiriti o Waitangi as the founding constitutional document of Aotearoa[1], and placing the principles of Te Tiriti at the centre of the family justice system.
    b. embedding children's rights in the context of New Zealand.
5. Our feedback will strengthen the commitment to the rights and best interests of children who experience the family justice system.

[1]In this submission we will refer to the founding document of New Zealand as Te Tiriti o Waitangi, however we would also like to acknowledge He Whakaputanga o te Rangatiratanga o Nu Tirene as the document that laid the foreground for a relationship between Māori and Pākehā.

Summary of recommendations:

Recommendation 1: Note the previous recommendations made by the Office of the Children's Commissioner in our first submission, with particular attention to:

> **Previous 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.
>
> **Previous 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.
>
> **Previous 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.
>
> **Previous recommendation 4:** That access to free counselling is reinstated, and extended to children, as anticipated in the Family Courts Matters Bill in 2008.
>
> **Previous 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.

Recommendation 2: The vision for the Family Justice Service be revised with Te Tiriti o Waitangi and tikanga Māori at the centre. This includes an explicit statutory commitment to Te Tiriti o Waitangi in the Care of Children Act.

Recommendation 3: The vision for the Family Justice Service upholds children's participation rights. This includes an explicit statutory commitment to honouring children's rights in the Care of Children Act.

Recommendation 4: A broader strategic plan for embedding children's participation in all family justice processes and services is developed.

Recommendation 5: A Child Impact Assessment (using the Child Assessment Tool) be carried out for each of the proposals made by the Panel, and any further work commissioned.

The principles of Te Tiriti o Waitangi and tikanga Māori should be essential across the whole family justice system

6. Te Tiriti o Waitangi is a founding constitutional document of Aotearoa. The foundation of the family justice system in the context of New Zealand must have Te Tiriti o Waitangi at the centre.
7. The current commitments that have been made (page 9) to the principles of Te Tiriti o Waitangi (through potential partnerships, and the provision of a 'mana' voice in the Family Court, and the option for tikanga Māori to be included in processes and procedures), are not strong enough. Further research is needed as to how best to embed in the vision of the whole family justice system, a different way of working for and with mokopuna Māori and their whānau.
8. There are recent examples of how legislation can provide more clarity and direction on embedding Te Tiriti o Waitangi principles within a system. For example, the latest amendments to the Oranga Tamariki Act will include Te Tiriti in the principles section, and then specific mechanisms for accountability through the new s7AA provisions.
9. Further explanation is needed as to what is intended by the term "mana voice" as its meaning is not clear. Therefore, we suggest seeking support from the Maori Language Commission for advice on whether it's an appropriate use of the kupu "mana", and explaining the meaning of "mana voice", with support of hapū and iwi Māori, and relevant Māori organisations.

We recommend an explicit statutory commitment to Te Tiriti o Waitangi in the Care of Children Act

10. Te Tiriti o Waitangi is the founding document of Aotearoa New Zealand. However, it is an international treaty, and does not have application in domestic legislation unless explicitly included in the legislation. We recommend the incorporation of Te Tiriti obligations in the Care of Children Act.
11. We recommend aligning this addition with the Oranga Tamariki Act 1989, and specifically the new section 7AA of the Oranga Tamariki Act (which comes into force on 1 July 2019). This Act will require 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.

Recommendation 2: The vision for the Family Justice Service be revised with Te Tiriti o Waitangi and tikanga Māori at the centre. This includes an explicit statutory commitment to Te Tiriti o Waitangi in the Care of Children Act.

Enduring positive and practical changes to the family justice system must be built on a strong foundation of children's rights in Aotearoa

12. The Children's Convention should be applied in the context of Aotearoa, and implemented with recognition of Te Tiriti o Waitangi as the founding document of New Zealand. In order to understand the rights of tamariki Māori, Te Tiriti o Waitangi, Māori cultural values, and Te Ao Māori must also be central considerations.

13. All rights as outlined in the Children's Convention should be considered as part of the family justice reforms. In particular the four General Principles that underpin the Children's Convention – non-discrimination (Article 2); the best interests of the child (Article 3); ensuring the child's survival and development (Article 6) and the child's right to participate (Article 12). There are recent examples in the changes to the Oranga Tamariki Act 1989, and the Children's Act 2014.
14. Children and young people have the right to express a view, and to have their view given due weight in decisions that affect them. Enabling children's participation in decision making not only upholds their right to have a say and be heard, but also advances their best interests and leads to better decision-making overall. A child's right to participate is rarely fully upheld in legal decision-making processes. A child's right to participate is expressed in Article 12 of the United Nations Convention on the Rights of the Child, and in Section 6 of the Care of Children Act 2004, as well as other domestic legislation such as the Oranga Tamariki Act 1989. The latest Oranga Tamariki Act changes also provide for explicit provisions for any decision made to be explained to the child or young person.
15. Children's rights and Te Tiriti o Waitangi obligations should be a golden thread, woven throughout all proposals for change in the family justice system. Although explicit inclusion in legislation is a positive step forward, implementation through policies and practice will see the biggest impact for children and young people.

We recommend an explicit statutory commitment to honouring children's rights under the United Nations Convention on the Rights of the Child, in the Care of Children Act

16. We recommend inclusion of the United Nations Convention on the Rights of the Child in the Care of Children Act.. We recommend aligning this addition with the latest additions to the principles of the Oranga Tamariki Act with respect to the wellbeing of the child or young person being at the centre of decision making, in particular the child's or young person's rights (including those set out in the United Nations Convention on the Rights of the Child, and the United Nations Convention on the Rights of Persons with Disabilities).
17. This statutory commitment should include an obligation to consult with children and young people on an on-going basis at all levels of decision making. For an example, guidance on appropriate wording for this obligation can be sought from the Children's Act 2014, with regard to seeking children's views to inform the development of the Child and Youth Wellbeing Strategy.
18. Any changes made to the Care of Children Act should align with the Oranga Tamariki Act 1989 and the Children's Act 2014.

Recommendation 3: The vision for the Family Justice Service upholds children's participation rights. This includes an explicit statutory commitment to honouring children's rights in the Care of Children Act.

Further attention should be placed on children and young people's participation rights in the family justice system

19. We note that Article 12 of the United Nations Convention on the Rights of the Child has two parts, and wish to draw attention to the second part, whereby there is a particular expectation in judicial proceedings affecting the child;

> 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.
>
> For this purpose, the child shall in particular be provided the opportunity to be heard in any *judicial* and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

20. While we support further research in the area of children's participation in the family justice system, some of the recommendation provided by the OCC in our last submission, could be further advanced immediately. These include:

> **Previous 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.
> **Previous 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.

21. In addition to the above actions, we encourage further research that seeks the views of children and young people to understand their experiences, and has particular focus on mokopuna Māori. Once this has been carried out, further work to identify programmes currently being carried out by providers and to assess their appropriateness would be necessary. Cultural fluency and understanding of New Zealand's historical context should be a core requirement to deliver programmes especially involving whānau Māori.
22. 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.

Understanding the complex nature of families and the role of parents in decision making processes

23. New Zealand families are diverse, and do not reflect the traditional euro-centric view of a nuclear family. In order for the family justice system to be most effective in supporting people it must recognise this and evolve its delivery of services, and processes to match the unique make up of families and whānau.
24. The family justice system should work well to achieve outcomes that meet the needs of parents, whānau and their children. It is important that decisions made are supported by parents in order to be successful. Children's right to have a say in decisions can sometimes be seen as a challenge to parental decision making. A child's right to participate in the Children's Convention does not

detract from parents' (or their wider family's) role in that child's life. In fact Article 5 of the Children's Convention strengthens that tie. Parents responsibilities, rights and duties should be respected. Further attention to Articles 5, 9 and 18 of the Children's Convention would benefit the development of the Panel's recommendations.

25. The family justice system becomes involved in a child's life where for reasons relating to relationship breakdown, parents are challenged in their ability to make decisions with regard to their children. The role of the system should be to ensure parents have the support they need to make decisions in their children's best interests, or in rare cases, make those decisions for them. It's therefore not a conflict for the system to recognise that the paramount consideration is children's best interests. Ideally parents are empowered to act in the best interests of their children, if this can't happen, there is a system designed with the child's best interests at heart.

Assessing child inclusive models that will work best in a New Zealand context

26. Children and young people should have the opportunity to share their experiences of the family justice system, and to share their views on what they think would work best for others. There is little recent and up to date work that has sought the views of children and young people on the family justice system. The work of the Children's Issues Centre in the early 2000's is a useful starting point, and may provide some guidance on how further research should be undertaken. Further work needs to be done to ascertain children and young people's views on the current system.
27. Many family justice service providers have developed their own child inclusive processes. These processes could be considered and developed based on what is currently working in the domestic and international contexts, in order to ensure better participation practices across New Zealand. Children's feedback on what works for them should be central to this further work.
28. The comments provided by the Panel on access to quality and accessible information (page 14) raise the importance of improving information provision. In previous engagements the Office of the Children's Commissioner has found that children and young people appreciate receiving important information about their lives through face to face conversations with people they trust. One of the proposals included on page 14 of the report suggest games as a method of sharing information with children. We do not support this recommendation. We have heard from children that they prefer to keep games for fun, rather than to receive information.
29. There are many mechanisms that could be explored, one example of a working Advisory Group is YPFLAG – Young Peoples Family Law Advisory Group in South Australia. This pilot project, that ran 2016-2017 was developed by the Family Law Pathways Network, and provides insights and reflection that may be useful.
30. Another example of a more participatory mechanism is Te Kooti Rangatahi. Family Group Conferences when done well are a great example of participatory processes.
31. However, it is important to note that our recommendation for a broader strategic plan for embedding children's participation is much more than tweaks to existing processes to make them more child friendly.

Elements of a broader strategic plan for embedding children's participation

32. As well as specific child inclusive models during out of court proceedings, a broader strategic plan for embedding child and youth participation processes across the system is needed. There are many ways this could be established. We recommend further work is commissioned to assess and explore appropriate options for child participation across the system.
33. In the development of a strategic plan for children's participation throughout the family justice system, the following elements should be considered:
    - Children's international rights
    - Domestic legislative settings enabling participation rights
    - Systemic barriers to participation for children and young people such as lack of a culture of participation, structural racism, lack of cultural competency, barriers to engagement, and variable practice by practitioners and location.
    - Children, young people and their families experiences of the family justice system
    - Child development knowledge and expertise
    - Te Ao Māori worldview and matauranga Māori
    - Participation frameworks and conceptualisations of Article 12 of the Children's Convention
34. Once the above elements have been considered, the broader strategic plan can be implemented through legislative reform, policy development and implementation through family justice practice.
35. This strategy should be designed alongside children and young people and incorporate on-going consultation with children and young people.

Recommendation 4: A broader strategic plan for embedding children's participation in all family justice processes and services is developed.

The family justice system should respond to and recognise children's developmental stages, and their needs at the time of family separation

36. The family justice workforce needs up skilling, with specific emphasis on children's development and children's rights. Family separation is a challenging time for all family members, and supports available to children should be strengthened.
37. As submitted by the OCC previously, we recommend counselling for children as absolutely necessary. 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.
38. 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.

39. 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.
40. 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.

All proposals and recommendations should be re-examined using the Child Impact Assessment Tool

41. All proposals should be assessed using the Child Impact Assessment Tool. This Tool will serve as an aid to ensuring that children's rights are embedded for each of the proposals. Using the tool can be a useful first step in ensuring the General Principles of the Children's Convention are considered. It would also help to ensure particular cohorts of children are more explicitly considered, for example Māori, Pacific, children with disabilities, children from minority and refugee communities, and children of diverse sexual orientation, gender identity and sex characteristics.
42. The tool can also be useful in ensuring a proposal responds to and recognises children's developmental stages and their needs.
43. Each of the areas for focus (as outlined in the report from page 10 to 41 inclusive) would benefit from particular consideration of the place of the child within the process discussed, and changes to be considered.
44. An example of the value of carrying out a child impact assessment could be for the *Counselling and therapeutic intervention* (page 16) where it has been determined that the government's main focus should be on counselling for parents, a child impact assessment would evaluate the impact of this decision on children and raise any unforeseen issues with this decision.

Recommendation 5: A Child Impact Assessment (using the Child Assessment Tool) be carried out for each of the proposals made by the Panel, and any further work commissioned.

Responses to questions:

Question from Panel	OCC Response
What should be included in a comprehensive safety checklist?	We have heard from children and young people that safety means much than physical safety to them. Safety includes protection from physical, emotional and psychological harms. We encourage further consideration of children's rights with regards to information sharing. This could include a focus on their right to privacy, and the complexity of sharing information in separation cases, and the unintended harm that can be caused to children when some information is shared.
Do you have any other suggestions for more child-responsive court processes or services?	Further work needs to be done to explore the practices that have been developed by providers in out of court processes. Additional work should also be carried out that takes a strategic approach to child responsiveness throughout the whole of the family justice system. Children currently do not have a complaints process or feedback system that works for them in the family justice system.
Should obligations be placed on the Ministry and/ or the Government to improve family justice outcomes for Māori? What would these obligations be?	Obligations should be placed on the Ministry and the Government to ensure the family justice system serves Māori in a way that works for Māori. This requires Māori organisations, hapū and iwi being involved in the design and delivery process. Legislation or policies alone without appropriate mechanisms to implement, will continue to fail Māori. These obligations should uphold the Tiriti partnership. This work could also explore the legislative requirements of Oranga Tamariki under Section 7AA of the Oranga Tamariki Act 1989. It is strong legislation requirement, and a good example.
How could the Ministry of Justice or the Government partner with hapū, iwi or Māori organisations to deliver services?	Māori, hapū and iwi need to be at the table every level of development. From decision making, legislation and policy design and implementation. Te Ao Māori values and principles cannot be incorporated into writing without people who understand how to

	implement it. Partnering requires giving resource to those who understand te ao Māori and apply it into their work. It requires MOJ and the govt to go to Māori hapū, iwi and organisations to see what works for them. It is also not possible to access one Māori voice or decision maker, partnership looks different in every community.
How would you incorporate tikanga Māori into the Family Court?	Tikanga Māori should be underpinning the whole system, not incorporated into the existing structure.
Do you have any other suggestions to improve the Family Justice Service for Māori, including any comment on the examples provided above?	Every level of design and decision making needs to involve Māori substantively, not just through consultation. We recommend seeking advice from Te Hunga Roia Māori (the Māori Law Society).
What information do you think would help service providers, community organisations, lawyers and family justice professionals to achieve a joined-up approach to the Family Justice Service?	Essential elements of collaboration such as trust, respect, understanding, systems coordination, and relationship building should form the basis a "joined – up" approach.
Would the three proposed types of counselling meet parties' needs, or are there gaps in the counselling services that need to be filled? For example, should there be counselling available to children?	We believe there should be counselling available to children. We included rationale for counselling for children above, and in our previous submission.
What are the core skills for the role of lawyer for the child, and what training and ongoing professional development do you see as necessary to develop those skills?	A thorough and proven understanding of children's development and trauma informed practice should be seen as core skills. A lawyer for child should have proven experience working with Māori whānau and their mokopuna.
Do you see a role for an additional advocate with child development expertise to work	Yes, this could be one mechanism to better support children throughout the process. However, we recommend further work be undertaken to consider the system as a whole, and

together with the lawyer for the child, to support the child to express their views and make sure they're communicated to the judge?

how participation will be embedded throughout, before making specific changes to parts of the system.

Before introducing another new adult into the process efforts should be made to identify family members or other trusted adults who can support children.