

Rewriting the 2014 Family Justice System Reforms

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Introduction

1. The Human Rights Commission welcomes the opportunity to submit on the consultation paper on "[Rewriting the 2014 Family Justice System Reforms](#)".
2. As described in the background document to this review, the 2014 reforms drew on a range of past reviews which made careful suggestions for family justice system change.¹ However, the 2014 reforms were ultimately implemented with a goal of cost saving rather than the sole goal of improving the family law system.²
3. The Panel will have access to significant data and experience demonstrating the consequences of the 2014 reforms.³
4. The Human Rights Commission supports proposals to reevaluate the findings of past reviews, and to engage in meaningful co-design, particularly with the families currently least served by the existing system, to create a family justice system that responds better to the needs of families.

A human rights approach to family law

5. A United Nations body has recently recognised safety and justice in New Zealand's current family law system as an urgent human rights issue. New Zealand must report to the Committee on the Elimination of Discrimination Against Women (CEDAW) in 2020 on five issues. One of those issues is the Family Court.⁴
6. CEDAW called for a more wide-ranging inquiry to make sure the family court system is safe and just, particularly for women and children in situations of family violence.⁵
7. The 2014 reforms were designed to respond to a range of identified issues with the family justice system, including its adversarial nature.⁶ A broader

¹ "[Background Paper: Overview of the 2014 family justice reforms](#)", at paragraph 5 and following.

² "[Background Paper: Overview of the 2014 family justice reforms](#)", at paragraph 14 onwards and at 26-27

³ See for example statistics about increased without-notice applications, collated in: Geoff Adlam, New Zealand Law Society "The 2014 Family Court changes: Their impact and what is happening now" (5 October 2018) Law Talk 922, available at www.lawsociety.org.nz/practice-resources/the-business-of-law/access-to-justice/the-2014-family-court-changes-their-impact-and-what-is-happening-now.

⁴ The Committee's Concluding Observations (25 July 2018, CEDAW/C/NZL/CO/8) are available here: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fNZL%2fCO%2f8&Lang=en.

⁵ Recommendation 48(a): "Establish a royal commission of inquiry with an independent mandate to engage in wide-ranging evaluation of the drawbacks for women, the obstruction of justice for women and the hindrances to their safety inherent in the family court system and to recommend the legislative and structural changes necessary to make the family courts safe and just for women and children, in particular in situations of domestic violence".

⁶ "[Background Paper: Overview of the 2014 family justice reforms](#)", at paragraph 25.

review would allow the New Zealand system to grapple with those fundamental issues.⁷

8. We also note the Law Commission's recent recommendations for reform of the relationship property part of the family law system, and that the full implementation of the Oranga Tamariki legislation will be completed next year. It is important that the different arms of the family law system are aligned as regards the promotion and protection of human rights standards.
9. To take a human rights approach to family justice system reforms requires recognition of:
 - The right to non-discrimination, including safety from gendered violence;⁸
 - Children's rights, including to safety, identity, and to be involved in decisions about themselves;⁹
 - The right of disabled people to be involved in decisions about themselves;¹⁰
 - The right of Māori to be involved in designing a family law system that works better for Māori.¹¹
10. A review of the family justice system necessarily involves a balancing of a wide range of human rights issues, reflecting the diversity of the participants within it. These will include addressing discrimination, participation and access to justice rights. In balancing these rights, The Human Rights Commission suggests prioritising the rights of the most vulnerable to a safe family environment. This means ensuring that the family justice system is accessible, safe and effective, particularly for those experiencing or at risk of family violence.
11. The rest of our submission expands upon these rights.

⁷ As the current Australian Law Reform Commission March 2018 "[Review of the Family Law System: Issues Paper](#)" begins to do, for example at paragraph 177.

⁸ The Committee on The Elimination of Discrimination Against Women (CEDAW) "considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated." Paragraph 10, CEDAW General recommendation No. 35 -- sixty-seventh session on gender-based violence against women, updating general recommendation No. 19 - CEDAW/C/GC/35, published in 2017 and available at <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

⁹ [Convention on the Rights of the Child](#), including Articles 3 (child's best interests) and 8 (family and identity); [United Nations Declaration on the Rights of Indigenous Peoples](#), including Article 2 (identity).

¹⁰ [Convention on the Rights of Persons with Disabilities](#) Article 12(3) and (4) – and see section later in this submission about Disability Rights.

¹¹ [United Nations Declaration on the Rights of Indigenous Peoples](#), including Articles 18 and 19 (participation and free, prior and informed consent).

Recommendation:

- **Carry out a broader review of the family justice system that includes consideration of non-adversarial, therapeutic and indigenous rights models of practice.**

Children's rights

12. The paramountcy of children's welfare and best interests under the Care of Children Act 2004 requires that the family court's care of children jurisdiction is viewed primarily as a service to children.
13. This requires creating a system that parents and whānau can and will access, and that will then give prompt and child-centred outcomes.
14. The Human Rights Commission has had the benefit of reading a draft submission from the Office of the Children's Commissioner (OCC). It is a thorough examination of changes most affecting the ability of the family justice system to determine and protect children's best interests.
15. As recommended by UN Committee on the Rights of the Child,¹² MSD has developed a Child Impact Assessment Tool to assess policy proposals for their impact on children and young people.¹³ Reform of the family justice system would be an appropriate context in which to use this tool.

Recommendations:

- **Give particular consideration to the recommendations of the Office of the Children's Commissioner in relation to the effects of the reforms on children.**
- **Apply a child rights impact assessment to family justice policy development.**

Disability rights

16. The right to family¹⁴ is equally important for disabled New Zealanders. And so is the right to access to justice to pursue that right.¹⁵ Family justice system reform needs to involve disabled people and address the barriers disabled people face to accessing the family justice system.

¹² See UN Committee on the Rights of the Child 2013 [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)](#).

¹³ MSD [Child Impact Assessment Tool](#).

¹⁴ Article 16 of the [Universal Declaration on Human Rights](#) and Article 23 of the [Convention on the Rights of Persons with Disabilities](#).

¹⁵ Article 13 of the [Convention on the Rights of Persons with Disabilities](#).

17. High proportions of disabled children grow up in single-parent households¹⁶ (indicating potential for family justice system assistance to settle their care).
18. In a recent study of the experiences of New Zealanders with intellectual disability, none of the parents in the study had their children living with them. The parents also had very limited contact with their children.¹⁷ In an earlier study, speaking about Family Court experiences in a child protection (CYFS) context, participants called for more understanding of intellectual disability: “Parents shared a perception that Family Court judges needed to be more inclusive of them during cases relating to the care and custody of their children.”¹⁸
19. Disabled women also experience disproportionately high levels of family violence.¹⁹
20. All of these factors suggest the importance of ensuring family law systems are accessible and effective for disabled New Zealanders.
21. Evidence from the criminal justice system context suggests some of the barriers that people with intellectual disabilities might also face in the family justice system: Professionals sometimes “assume that disabled people, particularly those with learning disabilities will not be able to give evidence”, or “a person with a learning difficulty is not believed and told they must have remembered it wrong or misunderstood what has happened.” “Sometimes they are even labeled as having challenging behaviour, resulting in greater abuse and disempowerment.”²⁰
22. Accessibility of the family justice system for people with intellectual disability can be enabled by supported decision making.²¹ This is a human rights

¹⁶ Statistics New Zealand [Disability and housing conditions: 2013](#), page 4:

Disabled children (under 15 years) were more likely than non-disabled children to live in a one-parent household almost 1 in 4 compared with 1 in 7 non-disabled children. Fifty-six percent of disabled children lived in couple-with-children households, compared with 70 percent of nondisabled children.

¹⁷ Conder and Mirfin-Veitch (2018). [From presence to belonging: Experiences and outcomes of living independently](#), Dunedin, The Donald Beasley Institute. See pages 16 and 23, noting that Oranga Tamariki had been involved so these were not solely Care of Children Act matters.

¹⁸ Mirfin-Veitch, Gates and others (2014) [Developing a more responsive legal system for people with intellectual disability in New Zealand](#) Dunedin, The Donald Beasley Institute. Page 20.

¹⁹ See Thematic study on the issue of violence against women and girls and disability : report of the Office of the United Nations High Commissioner for Human Rights (30 March 2012), noting in paragraph 8 that “The Convention on the Rights of Persons with Disabilities recognizes that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation ...”. Available at <http://www.refworld.org/docid/4fe070042.html>.

²⁰ CCS Disability Action Briefing to Incoming Ministers Briefing to Ministers of Justice, Courts, Corrections and Police, January 2018. Available at <https://www.ccsdisabilityaction.org.nz/assets/resource-files/Briefing-to-the-Ministers-of-Justice-Courts-Corrections-and-Police.pdf>.

²¹ See discussion in A Douglass [Mental Capacity: Updating New Zealand’s Law and Practice](#) (Report for the New Zealand Law Foundation, Dunedin, July 2016). See particularly chapter 2, including 2.19:

obligation. The Convention on the Rights of Persons with Disabilities provides that States Parties have an obligation to ensure effective access to justice for persons with disabilities through procedural, age-appropriate mechanisms that facilitate the effective participation of disabled people in legal proceedings, including at preliminary stages²².

23. Supported decision-making mechanisms like this do not currently exist in the Care of Children Act jurisdiction. The Commission considers that, given the current poor outcomes experienced by disabled people in the family justice system, the development and implementation of such a procedural mechanism should be accorded priority.

Recommendations:

- ***Involve Disabled Peoples Organisations (DPOs) and disabled children in the design of the family law system.***
- ***Develop and implement supported decision-making mechanisms that enable full and effective participation of disabled people in the family justice system.***

Indigenous rights

24. The 2014 reforms did not improve the responsiveness of the family justice system to the needs of Māori, and improved results for whānau Māori will depend on change that is broader than a rewrite of the 2014 reforms.²³

25. Two staff from the Human Rights Commission were seconded to support the Independent Panel with its consultation hui around the country. They have had the opportunity to hear experiences and whakaaro from iwi, hapū, and whānau about the family justice system. Alongside the Panel they have heard

The notion that supported decision-making should be “free of conflict of interest and undue influence” under art 12(4) of the CRPD is one of the most important provisions of the CRPD. The safeguards must ensure that:

... measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.

²² Article 13(1) of the [Convention on the Rights of Persons with Disabilities](#)

²³ Changes such as increasing access to lawyers and counsellors can only go so far for Māori when the system has not been designed to meet Māori needs or to fit whānau Māori.

Further, there are very few Māori family lawyers, so Family Court judges are unlikely to be Māori and are less likely to understand the situation of mokopuna Māori. New Zealand Law Society statistics show that just over six per cent of New Zealand lawyers are Māori, and few of those practice family law.

See Geoff Adlam, New Zealand Law Society “Lawyer ethnicity differs from New Zealand population” (3 August 2018) Law Talk 920, available at www.lawsociety.org.nz/practice-resources/the-business-of-law/legal-practice/lawyer-ethnicity-differs-from-new-zealand-population.

a range of perspectives and ideas that have the potential to transform the family justice system for Māori.

26. Māori have presented this review with a range of innovative ways to improve the family law system. To honour that participation, changes beyond the rewriting of the 2014 reforms are required.
27. The richness of thinking in relation to the family justice system was also apparent at Superu and Ngā Pae o te Māramatanga's recent 'Toi Tū Te Whānau, Toi Tū Te Kāwai Whakapapa: A workshop on whānau and whakapapa for public policy'.^{24,25}
28. Meaningful reform of the family justice system will require a thorough engagement and design plan to ensure that Māori are designing systems that work for whānau Māori, recognising Tiriti o Waitangi obligations²⁶ and obligations described in the UN Declaration on the Rights of Indigenous Peoples.²⁷
29. To honour Te Tiriti and to honour what has been heard in engagement, iwi and kaupapa Māori services also need to be resourced adequately to implement system and service changes.

Recommendations:

- ***Incorporate Te Tiriti o Waitangi and UNDRIP standards (which can be measured and monitored) in family justice system legislation.***
- ***Support, enable and resource Māori solutions and kaupapa Māori frameworks and approaches that have the potential to transform the family justice system for Māori.***

Women's rights

30. In July this year, NGOs gave evidence at the United Nation's Committee on the Elimination of Discrimination Against Women (CEDAW) examination of

²⁴ See 29 May 2018 event information and coverage linked to on Superu's website: www.superu.govt.nz/news-and-events/toi-t-te-wh-nau-workshop-wh-nau-and-whakapapa-public-policy.

²⁵ We note also that the Law Commission has recently considered issues relating to the incorporation of tikanga Māori in the context of relationship property law. See chapter 9 of the [Issues Paper IP44 Review of the Property \(Relationships\) Act 1976: Preferred Approach - Te Arotake i te Property \(Relationships\) Act 1976: He Aronga i Mariu ai](#). The Human Rights Commission submission to that process suggested that other experts sitting with the Family court bench (in the relationship property context, a Māori Land Court judge), could improve the Family Court's consideration of tikanga Māori.

²⁶ Primarily the Tiriti o Waitangi Article 2 right to tino rangatiratanga.

²⁷ [United Nations Declaration on the Rights of Indigenous Peoples](#), including Articles 18 and 19 (participation and free, prior and informed consent).

New Zealand's human rights record in relation to women's rights.²⁸ A strong focus of NGO evidence was women's experience in the family justice system.

31. Following CEDAW's examination of New Zealand, as well as recommending a broader review of the family law system, CEDAW also asked the New Zealand Government to consider renewing its invitation to the United Nations Special Rapporteur on violence against women, which could be complementary to a broader inquiry.

32. CEDAW also recommended that New Zealand:

- Increase availability of legal aid;²⁹
- Address a lack of gender responsiveness and sensitivity among the judiciary, including through training and through increasing the number of women judges;³⁰
- Improve judicial awareness of family violence;³¹
- Improve risk assessment and ensure that family violence victims are not required to attend mediation.³²

²⁸ The Committee's Concluding Observations (25 July 2018, CEDAW/C/NZL/CO/8) are available here: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fNZL%2fCO%2f8&Lang=en.

²⁹ Recommendation 14(a): "Increase the availability of legal aid for women, in particular Maori and migrant women and women belonging to ethnic minority groups, including in civil and family courts"

³⁰ Recommendation 14(c) in the [Concluding observations](#), "including by increasing the number of women judges and strengthening systematic capacity-building on the [UN] Convention [on the Elimination of All Forms of Discrimination Against Women] for judges, prosecutors, lawyers, police officers and other law enforcement officials."

³¹ Recommendation 26(c). The recommendation includes reference to criminal proceedings but need not be limited to that application.

³² Recommendation 48(b). The full text of recommendation 48 reads:

"48. The Committee reiterates its previous recommendations that the State party:

- (a) Establish a royal commission of inquiry with an independent mandate to engage in wide-ranging evaluation of the drawbacks for women, the obstruction of justice for women and the hindrances to their safety inherent in the family court system and to recommend the legislative and structural changes necessary to make the family courts safe and just for women and children, in particular in situations of domestic violence;
- (b) Take all measures, including through legislation and policy guidelines, in line [with general recommendation No. 35](#), necessary to reinstate the Bristol clause and to ensure that women who are victims of domestic violence are not forced to participate in out-of-court solutions, such as mandated mediation;
- (c) Take all measures, including through legislation and policy guidelines, necessary to ensure that domestic violence, directed at a child or mother, is properly considered in child custody disputes, in particular when shared physical custody is being contemplated, and investigate the outcomes of shared physical custody on the development and welfare of children;
- (d) Review the reliance on the parental alienation syndrome theory, with a view to limiting its usage in child custody disputes;
- (e) Expedite the adoption of the bill on amending court consent to marriage of minors so as to completely preclude parental consent as a sufficient requirement to allow marriage below the age of 18, and to allow court approval only under exceptional circumstances for marriages involving those between 16 and 18 years of age."

33. On that last point, CEDAW directed the New Zealand government to its 2017 General Recommendation number 35 on gender-based violence against women, and particularly its provisions around ensuring that family violence survivors are not compelled to take part in mediation.³³
34. Re-traumatisation of family violence survivors through family court processes has been a strong theme of the Backbone Collective's work,³⁴ and a concern internationally.³⁵
35. The Human Rights Commission suggests exploration of a broad range of options for improving the safety of family violence survivors and those at risk of family violence, for example:
- Incorporating early risk assessment by family violence specialists and expert family violence safety planning into the family justice process
 - Ensuring the prioritisation of cases involving family violence risk
36. CEDAW's scrutiny and recommendations come from experts in international best practice in women's rights, and New Zealand will be expected to report on progress in two years (in relation to Family Court reform) and four years (in relation to all other recommendations).

Recommendations:

- ***Implement all CEDAW recommendations in relation to the family justice system.***
- ***In particular, develop and implement systematic human rights training for all professionals working in the family justice sector, including judges, lawyers, social workers, police and law enforcement officers and court officials.***
- ***Scope a broad range of options for better ensuring the safety of people at risk of family violence when engaging with the family justice system.***

37. The Commission looks forward to continued engagement with the ongoing efforts to improve the family justice system.

³³ General recommendation No. 35 -- sixty-seventh session on gender-based violence against women, updating general recommendation No. 19 - CEDAW/C/GC/35, published in 2017 and available at <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

³⁴ <https://www.backbone.org.nz/>

³⁵ See for example the discussion in the report of the Victorian Royal Commission into family violence: [volume IV](#) chapter 24 beginning on page 24: Family violence and the family law system.