Submission on Children, Young Persons and their Families (Oranga Tamariki) Amendment Bill

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Introduction

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide the Social Services Commission with this submission on the Children, Young Persons and their Families (Oranga Tamariki) Amendment Bill (“the Bill”).

2. The Bill is the second tranche of legislation that implements the recommendations of the Expert Advisory Group on Modernising Child, Youth and Family. It follows the Children, Young Persons and their Families (Advocacy, Workforce and Age-Settings) Amendment Bill (“The CYPF AWAS Bill”) that introduced initial structural amendments to the Children, Young Person and their Families Act (“the Act”).

3. By contrast, this Bill introduces substantive reforms across the entire legislative scheme, from the provisions establishing its principles and purposes through to the operational clauses that govern practice and procedure. The Commission has focused its submission on aspects of the Bill pertaining to:
   
   a. Principles and purposes
   b. Information sharing
   c. Children with disabilities
   d. Youth justice.

4. A full summary of recommendations is set out at the end of the submission.

5. For the most part, the Bill’s human rights impact is progressive in both form and intent. For example, it explicitly recognises and affirms of the rights of children and young people under the UN Convention on the Rights of the Child (UNCROC), the UN Convention on the Rights of Persons (UNCRPD) with Disabilities to an extent that is unprecedented in New Zealand social sector legislation. It also harmonises the upper age threshold of the youth justice system with international human rights standards.

6. Other aspects of the Bill have more challenging human rights implications that will require the Committee to carefully balance conflicting rights and interests while giving paramount consideration to the safety and well-being of the child. For example, the Bill introduces
provisions that cut across current confidentiality duties and greatly increase the ability of agencies to gather and share data about children and their families. The Bill’s proposed amendments to the Act’s care and protection principles also appear to shift the current family/whānau-oriented approach towards a more interventionist model that places less priority on placing children with family, whānau, hapū or iwi, following removal from parental care. This aspect, in particular, has generated considerable concern amongst Māori social sector stakeholders.

7. Furthermore, review of the care and protection and youth justice system cannot be considered in isolation of the underlying socio-economic stressors that lead to, or precipitate, family and whānau breakdown. This includes household poverty and material deprivation as well as the adequacy of support and capacity-building services for families of disabled children, and disabled parents. The Commission reiterates its recommendation in its submission on the CYPF AWAS Bill\(^1\), that work commences in parallel on the development and implementation of a comprehensive plan designed to meet New Zealand’s commitments under the UN 2030 Agenda for Sustainable Development. This includes measures such agreeing a national definition of poverty and reducing poverty (as so defined) by at least 50% and ensuring access for all to adequate, safe and affordable housing, by the target date of 2030.

**Historic abuse claims**

8. The Bill is also being introduced against the background of increased public awareness about historic abuse and ill treatment of children while in the care of the state. This includes the establishment of the Confidential Listening and Assistance Service (CLAS). Through this process, many hundreds of people shared their experiences of serious abuse, neglect and ill treatment while in the care of the state during childhood\(^2\).

9. In her final report, the Chair of CLAS, her Honour Judge Carolyn Henwood noted the lack of any legislative “duty of care” upon state agencies towards children\(^3\) and recommended, among other things, that the Government develop and articulate a duty of care to

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\(^1\) Human Rights Commission, *Submission on the Children, Young Persons and their Families (Advocacy, Workforce and Age Settings) Amendment Bill*, at para 40


\(^3\) ibid p 13
children⁴. Judge Henwood also recommended that an urgent independent review be undertaken of the data arising from the work of CLAS and MSD’s Historic Claims Team, with the outcomes of the independent review used to “locate the key touch points of Child, Youth and Family for immediate improvements to practice”.⁵

10. The Commission supports Judge Henwood’s call for an independent review and has recently written an open letter to the Prime Minister calling for an independent inquiry into the abuse of people in state care to take place, on behalf of a range of signatories including former residents of state care institutions.⁶

11. The Commission notes that while the Bill introduces provisions that require the development of regulations prescribing national care standards⁷ and that amend the Vulnerable Children’s Act to prescribe specific duties upon government chief executives directed at children in the state care system⁸, the systemic failings that have led to abuse occurring within our state care system in the past have never been subject to a specific process of inquiry or examination.

12. A thorough examination of past failings that led to children in state care being harmed, coupled with formal recognition of the long term impact of that harm on those children, is likely to lead to more precise and meaningful policies in the future. A good example of this can be seen in Australia, where a series of public inquiries on the experiences of children in the care system⁹ has informed the development of detailed, rights-affirmative and child-centred national standards of care¹⁰.

**Recommendation 1**

The Commission recommends that the Committee:

a. Specifically acknowledges, and has regard to, the final report and recommendations of the Confidential Listening and Assistance Service, and

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⁴ ibid p 37, Recommendation 5(a)
⁵ ibid, Recommendation 6
⁶ Human Rights Commission, *Never Again; E Kore Ano, An Open Letter to the New Zealand Prime Minister;* [http://www.neveragain.co.nz/](http://www.neveragain.co.nz/); as at 1 March 2017, 2712 signatures had been added to the open letter via the *Never Again; E Kore Ano* website
⁷ Clause 119, New section 447(fa)
⁸ Clause 133 – NOTE: The Vulnerable Children’s Plan, which is the subject of this clause, is yet to be developed
b. considers whether it can be assured that the Bill contains adequate safeguards:
   (i) to maintain the safety of children while they are in the care of the state; and
   (ii) to prevent the future occurrence of systemic failures that could lead to abuse of children in the care of the state.

Terminology, Principles and Purposes

Clauses 4 and 5, terminology and general principles
13. Clause 4 of the Bill introduces some significant reforms to the current Act’s terminology. Most significantly, it amends, without qualification, the definition of “young person” to include 17 year olds. This has the effect of raising the upper age in both the care and protection and youth justice systems and is a highly important UNCROC implementation step. In doing so, it follows the recent 2016 recommendation of the UN Committee on the Rights of the Child (‘the CRC Committee’) in its 5th period review of New Zealand.

14. Clause 4 also aligns the legislation with the Vulnerable Children’s Act 2014 by defining a broad range of organisations as “child welfare and protection” agencies. In addition to the new department (the Ministry for Vulnerable Children/Oranga Tamariki) the definition includes school boards, early childhood education services, District Health Boards, the Police, Housing New Zealand and any agency defined as a ‘regulated service’ under the Vulnerable Children’s Act. This has the effect of achieving some degree of congruence between the two statutory schemes.

15. Furthermore, the Bill establishes, as the first general principle set out under s 5(1), the principle that “the child’s or young person’s rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities, which New Zealand has affirmed) must be respected and upheld and the child or young person must be treated with dignity and respect at all times.” Like the raising of the upper age of the youth justice system, this is a highly significant recognition of the human rights of children and young people subject to the Bill’s jurisdiction.

Clause 9 - Participation principles
16. Clause 9 of the Bill introduces a new s 5A that establishes “principles of participation”, which apply to all decisions made under the legislation. These principles require that:
so far as is practicable, when a person makes a decision affecting a child or young person, the child or young person must be encouraged and assisted to participate in the decision-making process and the child’s or young person’s views must be taken into account by the decision maker.

decision makers making written decisions must set out the child’s or young person’s views in their decision and, if those views were not followed, include the reasons for not doing so.

so far as is practicable, a decision affecting a child or young person, and the reasons for that decision, must be explained to them.

17. The principles of participation advance the participation rights of children under Article 12 of UNCROC, and as such should be commended. New section 5A also codifies professional best practice as a standard statutory requirement. This reform also is reflective of the child-centred approach recommended by the Expert Panel and follows on from the CYPF (AWAS) Bill’s introduction of provisions that enable the establishment of an independent advocacy service for children in the care system.

Clause 13 - Care and protection principles

18. Clause 13 of the Bill updates the care and protection principles under section 13 of the Act. These principles have particular operational importance, as they drive practice decisions made under the care and protection provisions under Part 2 of the Act.

19. Clause 13 introduces significant amendments to the current care and protection principles, perhaps the Bill’s most contentious and controversial amendments. The most obvious structural change is a refocused hierarchy of principles. Under current s 13, the first care and protection principle provides that “the primary role in caring for and protecting a child or young person lies with the child’s or young person’s family, whanau, hapū, iwi, and family group.”

20. This principle is entirely missing from clause 13 and is replaced at the top of the hierarchy with the principle that “intervention should occur early to improve the safety and well-being of children, young persons, and their families and to address risk of future harm.” The primary role of family, whānau, hapū and iwi is not acknowledged or reflected anywhere in clause 13. This is a significant change and one that is out of step with the
UNCROC principle that parents, or as the case may be, legal guardians, have the primary responsibility for a child’s upbringing and development.\(^{11}\)

21. The proposed new care and protection principle under new section 13(2)(j), which negates any duty of confidentiality that service providers and professionals have to children they are working with, is also inconsistent with UNCROC and has problematic practical implications. The Commission accordingly recommends that it is deleted from clause 13 of the Bill. This particular matter is addressed in more detail in paragraphs 52-54 of this submission.

22. It is important to note that clause 13 does not cut out the rights of families and whānau to participate and give consent to interventions that arise. It also provides that assistance should be provided to family, whānau, hapū and iwi to enable them to provide “a safe, stable and loving” home in cases where there is a risk of the child's removal. In addition, the threshold for removal is set at a higher level than the current legislation, namely circumstances where there is a serious risk of physical or emotional harm.

23. Nevertheless, the lack of any recognition of the primary role of family, whānau, hapū and iwi has significant operational implications in circumstances where a child is removed. It is notable that under clause 13, new section 13(g) does not place any explicit requirement upon decision-makers to consider the primary role of family, whānau, hapū and iwi in circumstances where a child has been removed.

24. This aspect of the Bill has particular ramifications for Māori children, who are disproportionately the subject of CYF interventions and removal orders.

*Impact/ramifications of the Bill on Māori children and their whānau*

25. In many respects, the Bill is progressive in its approach. For example, Clause 4 also introduces a number of new terms regarding Māori children and their whānau. These are:

*mana tamaiti (tamariki)*, defined as “in relation to a person who is Māori, means their intrinsic worth, well-being, and capacity and ability to make decisions about their own life”

*whakapapa*, defined as “in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend”

\(^{11}\) UN Convention on the Rights of the Child, Article 18.1
whanaungatanga, defined as “in relation to a person —

(a) the purposeful carrying out of responsibilities based on obligations to whakapapa:
(b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:
(c) the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection

26. The inclusion of these terms formally incorporates Māori cultural values into the legislative terms of reference under which decisions about children will be made. On the face of it, this can be seen as a significant step in advancing the principles of the Treaty of Waitangi and the UN Declaration on the Rights of Indigenous People within the child welfare system.

27. The Bill goes on to introduce a number of purposive clauses that, on their face, appear to enhance the responsiveness of the legislation to Māori children and their whānau.

28. This includes Clause 12, which introduces a new section 7A that establishes duties upon the Chief Executive to improve outcomes for Māori. This includes a requirement that “the policies, practices, and services of the department must have regard to the mana and whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi.” It also requires setting of measurable outcomes to reduce disparities and development of “strategic partnerships” with iwi and Māori organisations. This is broadly responsive to the recent recommendation of the CRC Committee that the New Zealand Government “strengthen its efforts to improve the cultural capability of care and protection system and its engagement with Māori communities…whanau, hapū and iwi.”12

29. While the Commission supports the intention of Clause 12, we consider that it should be strengthened through the introduction of a direct duty to develop and implement strategic partnerships with iwi and Māori organisations. Clause 12 currently contains a relatively nebulous duty to “seek to develop” such partnerships.

30. Furthermore, the omission of any mention of Whānau Ora from Clause 12 is somewhat incongruous, given that it is the key Government policy and bespoke service delivery mechanism for addressing the well-being and health of Māori whānau. The Commission

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12 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of New Zealand*, CRC/C/NZL/CO/5, 30 September 2016, para 28(b)
considers that Clause 12 ought to include a provision that requires the department to ensure that any strategic partnership entered into with iwi or a Māori organisation integrates Whānau Ora within its framework.

31. The Commission notes that Clause 12 imposes a further duty upon the Chief Executive to publicly report on performance under s 7A. The Commission supports the inclusion of this public accountability provision, but considers that, commensurate with the partnership principle, horizontal accountability to Māori iwi, hapū and whānau is also required. This could be achieved through the establishment of a statutory board comprising of representatives of iwi and Māori organisations to whom the chief executive must report to in the performance of his or her duties under s 7A(2).

**Recommendation 2**
The Commission recommends that Clause 12 (new section 7A) is amended as follows:

a. The current obligation to “seek to develop strategic partnerships” is amended to a duty to *develop and implement* strategic partnerships with iwi and Māori organisations

b. Introduce a provision in s 7A(2) to require the department to ensure that any strategic partnership entered into with iwi or a Māori organisation integrates Whānau Ora within its framework

c. Introduce a provision that establishes a statutory board of representatives of iwi and Māori organisations to whom the chief executive must report to in the performance of his or her duties under s 7A.

32. Both the Bill’s general principles and care and protection principles contain provisions that affirm the cultural rights of Māori children and their families. These include the following requirements:

That “consideration is given to the significance of the child’s or young person’s wider whānau, hapū, and iwi, and links to whakapapa or the equivalents in the culture of the child or young person”;

That when a decision under the Act is made about a child or a young person who is Māori, “the mana and well-being of the child or young person are protected by recognising the whakapapa and whanaungatanga responsibilities of their whānau, hapū, and iwi” as well as “the importance of whakapapa and whanaungatanga is
recognised by ensuring that wherever possible, their whānau, hapū, and iwi can participate in those decisions.”

That “any intervention with the whānau of a child or young person who is Māori should recognise and promote the mana tamaiti (tamariki) and the whakapapa of that child or young person and relevant whanaungatanga rights and responsibilities.”

That where a Māori child or young person is, or is to be, removed from their immediate family, whānau, or usual caregivers, all decisions made should “recognise and promote the importance of mana tamaiti (tamariki), whakapapa, and whanaungatanga” and reflect that “whanaungatanga and the whakapapa of the child or young person are important and should continue to be honoured on an ongoing basis wherever the child or young person lives.”

33. However, there is currently considerable concern amongst Māori organisations that the Bill removes the current statutory requirements under s 13(2)(b)-(d) and, in respect of removals, s 13 (f)-(h), that affirm and prioritise the primary role of whānau, hapū and iwi in care and protection proceedings.

34. This aspect of the Bill creates dissonance between its general principles and its operational provisions. For example, clause 8 introduces a general principle under new section 5(b) that affirms the primary role of a child’s whanau and immediate family in their upbringing. Clause 8 also affirms the UNCROC rights of children and young people as having overarching application. In addition, clause 12 provides that the duties upon the Chief Executive under new section 7A are “imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi.”

35. It is difficult to predict whether the Bill’s proposed amendments of the s 13 care and protection principles will result in more children, or more Māori children, being uplifted than at present. The “serious risk of harm” threshold for removal under clause 14 of the Bill is set higher than the current legislation.

36. However, this is not the only implication. By cutting across the rights affirmed in the general principles, clause 13 sends a mixed signal to care and protection practitioners

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13 The Maori Women’s Welfare League has taken the step of lodging proceedings with the Waitangi Tribunal which claims the Bill breaches the Treaty of Waitangi under Articles II and III – see Statement of Claim dated 2 December 2016; accessed http://img.scoop.co.nz/media/pdfs/1612/CCF4122016.pdf
14 Clause 8, new section 5(b)(i)
15 Clause 8, new section 5(a)(i)
and service providers. The general principles ought to be reflected throughout the body of the legislation. To do otherwise risks diluting their implementation in practice, in effect reducing them to statements of aspiration. Most importantly, this Bill should be aiming to generate support amongst whānau, hapū and iwi for the new operating model and department rather than concern or opposition.

**Recommendation 3**

The Commission recommends that the Committee:

a. review clause 13 for consistency with the general principles under clause 8; and

b. further to that review, consider whether clause 13 should be deleted and current s 13 retained.

Should the Committee retain Clause 13 of the Bill, the Commission recommends the following amendments:

a. The principle regarding the primary role of family, whānau, hapū and iwi, as currently expressed in s 13(2)(b) of the Act, is retained.

b. That new section 13(2)(g) is deleted and replaced with current sections 13(2)(f)-(h)

c. That new section 13(2)(j) is deleted

**Other issues of note**

37. Of further note is that the principle that the welfare and best interests of the child is a paramount consideration in all decisions made under the legislation has been moved from s 13(1) to its own stand-alone section under s 4A. The Commission supports this approach, which serves to highlight the overarching applicability of the principle and reflects the approach of the Care of Children Act 2004 which governs the care of children and guardianship jurisdiction.

38. Another significant change is the Bill’s amendment of s 4 of the Act which currently sets out its “objects”. Clause 6 of the Bill changes s 4 to replace “objects” with “purposes”, a subtle semantic shift. Overall, clause 6 establishes a broader set of purposes than the incumbent s 4, and is more child-centred, providing for greater recognition of the rights, well-being and interests and cultural needs of children.
39. However, unlike the incumbent section, clause 6 does not require the establishment of support services that seek to improve outcomes for children and young persons, merely the promotion of them. This weakens the Bill’s ability to provide leverage to new support service initiatives and is not reflective of the state’s duty under Article 4 of UNCROC to actively resource measures that enable the realisation of the economic, social and cultural rights of children and young people. The Commission recommends that clause 6 of the Bill be amended to retain the duty upon the department to establish support services and facilities.

**Recommendation 4**

The Commission recommends that Clause 6 of the Bill is amended to retain the obligation upon the state to establish services (through amendment of new s 4(1)(a))

**The care and protection system**

40. The Bill introduces a number of amendments to Part 2 of the Act which contains the provisions that govern the operation of the care and protection system. We have focused on the following aspects:

a. Grounds for care and protection intervention  
b. Information gathering and sharing

**Grounds for care and protection intervention**

41. Section 14 sets out the grounds for a care and protection intervention and, as such, is perhaps the most important operative provision within Part 2 of the Act. A Family Court declaration that a child is need of care and protection must be made in respect of one or more of the s 14 grounds.

42. Clause 14 of the Bill retains most of the current s 14 grounds. However, it contains a couple of significant amendments. The first is the introduction of a “serious harm” threshold. New section 14 provides that “A *child or young person is in need of care or protection if the child or young person has suffered, or is likely to suffer, serious harm*”. Clause 14 then goes on to list the current grounds as “circumstances” that may result, or likely may result, in serious harm.
43. Most importantly, clause 14 does not limit a declaration of care and protection to the listed grounds or "circumstances". Instead the existence of serious harm, or its likelihood, is enough. This differs from the current system which requires that applications must fall within one of the prescribed s 14 grounds in order for a declaration to be made.

44. The amendment provides child protection agencies and the Court with the discretion to bring proceedings/make a declaration in individual cases which may not fall within any of the prescribed circumstances but still demonstrate the existence or likelihood of serious harm.

45. The introduction of a "serious harm" requirement raises the intervention threshold. Current s 14 does not refer to "serious harm", although the grounds themselves cover circumstances where harm, deprivation, neglect and so on exists. The Bill’s explanatory note explains that the policy rationale was to simplify the law. However, this may not necessarily be the case in practice, as this approach introduces more discretion for a decision-maker to determine whether a child is in need of care and protection.

46. The threshold is consistent with the care and protection principle under clause 13 (new s 13(2)(f)) and may enable a clear delineation between those cases that qualify for differential non-statutory response, such as referral to a Children’s Team or NGO support provider, from cases that require a statutory response.

47. However, it is also notable that the "serious harm" threshold proposed under clause 14 is not reflected in the notification threshold under clause 15 which provides for confidential reporting of cases where "a child is harmed or is likely to be harmed". Nor is it reflected in the investigation provision under clause 17 which provides for no further action in cases where no identifiable risk of harm is evident. This raises the question of whether the proposed threshold of serious harm is set too high, and that harm, on its own, would have greater protective effect.

**Recommendation 5**

The Commission recommends that the Committee review clauses 14-17 of the Bill to ensure that:

a. the legislative threshold for intervention is set at a level that provides an adequate, rights-consistent level of protection; and

b. is applied consistently across the relevant Part 1 and Part 2 provisions
Information gathering and sharing

48. Clause 38 repeals the current information gathering provisions under s 66 of the Act and replaces it with a more detailed information gathering and sharing regime under new sections 65A to 66O. Information sharing and gathering practices will be guided by a Code of Practice established under s 66J.

49. While effective procedures regarding information are essential in ensuring that children at risk of harm are kept safe, the Commission shares the Privacy Commissioner’s concerns regarding the workability of clause 38 in its current form. The Commission supports the Privacy Commissioner’s position that any clause in the Bill that enables information sharing must clearly define the purposes for which information is obtained and disclosed and provide greater specificity as to the agencies to whom it applies.

50. Turning to clause 38 itself, section 65A sets in place the principle that any person or agency operating under the information gathering and sharing regime must have regard to the care and protection principle under s 13(2)(j), which states:

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\text{The well-being and interests of any child or young person, in general, take precedence over any duty of confidentiality owed by any person in relation to that child or young person or to any person who is a family member of that child or young person or in a domestic relationship with that child or young person (within the meaning of section 4 of the Domestic Violence Act 1995):}
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51. Section 13(2)(j) appears to have been tailor-made for application to this part of the Bill. It trades off the right of the child to privacy (and by association the right of the child to have their view respected in cases where a child makes a disclosure in confidence) against over-arching welfare and best interests considerations. The approach is problematic when measured against Articles 12 and 16 of UNCROC and appears inconsistent with the CRC Committee’s recent recommendation that the New Zealand Government “take all measures necessary to fully protect the right of the child to privacy”¹⁶. It also gives rise to an internal inconsistency, given that the general principles under Clause 8 [new s 5(1)(a)] of the Bill, require that the child’s UNCROC rights “must be respected and upheld…at all times”.

¹⁶ CRC/C/NZL/CO/5 paragraph 20
52. The Commission notes that legal privilege may be raised as a ground to withhold disclosure of a request under s 66(2). However, other service areas where a practitioner may owe a duty of confidentiality – such as health, psychological services or counselling – are not provided with a similar exception. This has problematic ethical and practice implications. It may also deter children and their families from accessing such services.

53. Exceptions to confidentiality already exist in law. Information Privacy Principle 11 of the Privacy Act enables agencies to make good faith disclosures to prevent or lessen a serious threat to the life or health of an individual. In respect of family members, it is an offence for members of a child’s household to fail to take reasonable steps to protect the child from risk of serious bodily harm, death and sexual assault.

54. Notwithstanding the facility for the child’s views to be taken into account under new s 66l and the inadmissibility clause under new section 66(3), the Commission re-emphasises its position that new section 13(2)(j) should be deleted from the Bill. It is important that practitioners retain a statutory basis to protect client confidentiality in cases where it is appropriate to do so. The Commission considers that clause 38 (new section 66(2)) should be amended accordingly.

55. Of further significance is the Bill’s introduction of provisions that enable information gathering for the purpose of making policy decisions regarding service provision, planning and strategy. Section 66E enables requests to be made for information regarding a class of children or young people, as well as individuals. This contrasts markedly from the current legislation which only enables information gathering in respect of an individual child or young person in an individual case.

56. The Bill provides for some public transparency regarding the use of bulk data through a dataset provision for (s66D) which sets in place obligations upon an agency to publish on an internet site the following information; the source and type of information gathered, the purpose of the datasets created and the privacy safeguards in place. However, the Commission notes the Privacy Commissioner’s concerns that the Bill does not provide any legal authority for agencies to produce combined datasets or link or analyse datasets of information and is inconsistent with other statutory authorities which expressly authorise and constrain information matching regimes.

17 Privacy Act 1993, Information Privacy Principle 11(f)(ii)
18 Crimes Act 1961, section 195A
57. The Bill (s 66C) also seeks to provide agencies with a broad discretion to use information obtained about a child or young person for a different purpose than that for which it was collected. Section 66C(a)(ii) notably enables the use of information to make or contribute “to an assessment of risk or need in relation to a child or young person, or class of children or young persons”. This appears to be intended to underpin the use of predictive risk modelling.

58. The Government’s intention to use predictive risk modelling in the child protection system has been evident since the development of the White Paper on Vulnerable Children in 2012. The Ministry of Social Development has undertaken work to develop a Privacy, Human Rights and Ethics Framework (PHRE Framework) for predictive risk modelling, which it brought to public attention through its periodic reporting obligations under UNCROC. The matter was addressed by the CRC Committee in its 2016 Concluding Observations on New Zealand, in which it recommended that the Government [ensure] that the Privacy, Human Rights and Ethics framework governing predictive risk modelling takes in consideration the potentially discriminatory impacts of this practice, is made public and is referenced in all relevant legislation.

59. However, the PHRE Framework is not mentioned in the Bill’s explanatory note, and there is little information available on MSDs website about its current status.

60. The Commission considers that any attempt to introduce predictive risk modelling in the child protection system ought to be done through the development of an Approved Information Sharing Agreement (AISA), a regulatory instrument vested under the Privacy Act. AISA’s are required to be vetted by the Privacy Commissioner and developed in consultation with relevant agencies. The Commission further considers that any AISA that seeks to authorise information sharing required for predictive risk modelling should explicitly confirm that it has been developed under the PHRE Framework and meets all applicable privacy, ethical and human rights standards.

61. Should the Committee retain clause 38, the Commission considers that, in order for the Bill to better reflect the CRC Committee’s recommendation as regards the PHRE Framework, s 66D could be amended to provide for a specific notification requirement in relation to datasets compiled for risk modelling purposes.

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19 The Commission, Office of the Privacy Commission, Crown Law, among others, were subsequently consulted with during the Framework’s development
62. Another, more wide-ranging, approach would be to ensure that the proposed Code of Practice under s 66J includes reference to the predictive risk modelling and the PHRE Framework. This could be done by amending 66J to require the application of all relevant privacy, human rights and ethical considerations in making any decision under sections 66 to 66l.

**Recommendation 6**

The Commission recommends that the Committee note the concerns of the Privacy Commissioner regarding clause 38, and make amendments to the Bill to ensure that any clause that enables information sharing:

a. provides a clearly defined set of purposes for which information may be used or disclosed and which provides for immunity from any consequences for disclosures made in good faith; and

b. clearly specifies which agencies fall under the definition of “child welfare and protection agencies.

In addition, the Commission recommends that the Committee amend clause 38 to:

a. Amend new s 66(2) to retain a statutory basis for practitioners to protect client confidentiality in cases where it is appropriate to do so.

b. Amend 66D to provide for a specific public notification requirement in relation to datasets compiled for risk modelling purposes.

c. Amend the Code of Practice (s 66J) to include within the Code an obligation to apply all relevant privacy, human rights and ethical obligations in making any decision under sections 66 to 66l.

**Care of children with disabilities**

63. The Bill introduces a fundamental amendment to the way in which the legislation responds to the care of children with disabilities. Current sections 141 and 142, which provide for agreements for the extended care of children who have disabilities which require high levels of support, have been repealed in their entirety.

64. This has the practical effect of removing any legislative distinction between the way in which children with disabilities will be dealt with under the care and protection system, as compared to other children.
65. This amendment follows the Ministry of Social Development’s 2015 review of section 141 and 142. The review considered this approach alongside other options, namely amendment of sections 141 and 142 to improve advocacy for children involved in those processes and retention of the status quo.

66. The “mainstreaming” of care decisions regarding children with disabilities was initially proposed in a 2006 independent review\(^{20}\). This review recommended, among other things, that the s 141/142 regime be amended to reflect the formal custody procedures under s 101 of the CYPF Act, noting that this would enable a more robust and inclusive FGC process, greater systemic responsiveness and would enable the repeal of s 142 placements.

67. The full repeal of sections 141 and 142 was supported by New Zealand’s Independent Monitoring Mechanism on the UNCRPD\(^{21}\) and a review of the sections was recommended by the UN Committee on the Rights of Persons with Disabilities in their 2014 Concluding Observations on New Zealand\(^{22}\). The Commission emphasised this position in our submission to MSD on the sections 141 and 142 review. However, in that submission, we noted that caution ought to be taken in applying a purely s 101 approach, as many children with disabilities who require a high level of service support would not otherwise have care and protection needs that would necessitate a statutory intervention.

68. The Commission also recommended in its submission to MSD that repeal is accompanied by provisions that enhance children’s access to independent advocacy and increase participation opportunities in decision-making. The Bill is responsive in some respect as, together with the preceding CYPF AWAS Bill, it enhances independent advocacy and participation rights for children generally. However, it does not provide for any specific advocacy support for children with disabilities per se.

69. The Commission also recommended to MSD that enhanced oversight and review processes are introduced. The Bill does this, to some degree, through mainstreaming –


\(^{22}\) UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of New Zealand*, CRPD/C/NZL/CO/1, October 2014, para 46
mainstream temporary and extended care agreements under section 139/140 are subject to frequent review and may not be extended beyond a year, compared to s 141 agreements which are subject to one year review and renewal. Furthermore, the Bill’s information gathering provisions increase the scope for data collection and monitoring of outcomes.

70. A question, arises, however, as to how the Bill will reasonably and appropriately accommodate the needs of children with disabilities and take their views into account in decision-making processes, per the UNCRPD requirements. Neither the Bill’s s 5 general principles, nor its s 13 care and protection principles, contain any specific principle regarding children with disabilities (although new s 5(a)(i) does affirm the rights of children under the UNCRPD).

71. In addition, the Bill does not introduce any new care and protection grounds under s 14 that are designed to cover children who would otherwise fall under s141 and 142. This means that the general grounds under s 14(1)(b), 14(1)(d) and 14(1)(f) are most likely to apply, and the existence of the likelihood of serious harm as a prerequisite.

72. These gaps could be addressed through the introduction of a specific care and protection principle under s 13, in the form of a new s 13(2)(l) that reflects the Article 23 UNCRPD requirements concerning the rights of children with disabilities to family life:

“any intervention regarding a child or young person with a disability must ensure that their needs are appropriately accommodated through the provision of comprehensive information, services and support, including independent advocacy, to the child, young person and their family at the earliest opportunity”

Recommendation 7
The Commission recommends that the Committee amend clause 13 to introduce a specific care and protection principle under s 13, in the form of a new s 13(2)(l), which provides:

“any intervention regarding a child or young person with a disability must ensure that their needs are appropriately accommodated through the provision of

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23 UN Convention on the Rights of Persons with Disabilities, Articles 5.3, 7.1, 7.3, 23
Youth Justice

73. As noted above, the Bill is bringing about the most significant amendment to the youth justice sector since the CYPF Act was first introduced in 1989, namely the raising of the upper age of the jurisdiction to include 17 year olds, thereby bringing it into compliance with UNCROC. The Commission also welcomes clause 109’s extension of the brief of Youth Advocates – legal counsel who are appointed by the Youth Court to represent a young person charge with an offence – to pre-Court “intention-to-charge” Family Group Conferences (FGCs) which are dealing with moderate to high level offending by a young person24.

New youth justice principles

74. Clause 92 introduces two new youth justice principles under new section 208(2), which requires decision-makers to consider:

(a) what reasonable and practical measures or assistance could be taken or provided to support the child or young person to prevent or reduce reoffending; and
(b) whether the child or young person would benefit from being referred to care, protection, or well-being services under this Act.

75. The second principle listed above is a practical amendment which may serve current practice approaches. Many of the young people who appear in the Youth Court have care and protection or general health and welfare needs, and indeed many have statutory care and protection status (ie. are in CYF care or guardianship or are subject to an extended care agreement). This has led to Youth Courts in many regions establishing a CYF “interface” or “crossover” list, which seeks to harmonise decision-making in respect of a young person who is subject to concurrent youth justice and care and protection proceedings.

76. In practice, these new principles may lead to the Youth Court more frequently referring young people to a care and protection co-ordinator under s 261. This process can be

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24 Clause 97, new section 248A – the threshold is set at offences with a maximum imprisonment of 10 years. This includes burglary and robbery (non-aggravated).
used to mitigate against the risk that a young person may be held in youth justice custody for an extended period due to factors that are ostensibly care and protection related – such as not having a viable bail address due to instability at home or through the lack of an appropriate or available caregiver or supervising adult.

77. In respect of the proposed principle to undertake “reasonable and practical measures”, it is notable that the current youth justice principle under s 208(fa) is much stronger, providing that “any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child’s or young person’s offending”.

78. The Commission considers that the current principle under s 208(fa) could be further strengthened to take specific account of the high proportion of young people with a neuro-disability who appear in the youth justice system. The Principal Youth Court Judge has previously drawn attention to the link between youth offending (and subsequent custodial incarceration) and the existence of unmet needs due to recognised or unrecognised learning and behavioural disabilities\(^\text{25}\). A major UK report produced in 2012 found that incidence rates of speech and language impairment amongst young offenders ranged from 60-90%, specific reading impairments, such as those associated with dyslexia, affected between 43-57% of young offenders, as compared to 10% across the general population; and that incidence of Autistic Spectrum Disorder amongst young offenders was around 15% as opposed to 0.6% across the general population\(^\text{26}\).

79. In addition, in its current form, section 208 is notable for not including a principle that reflects the UNCROC principle under Article 37(b) that detention of young people be as a last resort and for the shortest possible period of time. Instead s 208 provides that “a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public” and that sanctions “take the least restrictive form appropriate in the circumstances”.

80. In its 2016 submission to the CRC Committee, the Commission recommended the incorporation of the Article 37(b) UNCROC principle into s 208, a position later reflected in the CRC Committee’s Concluding Observations which recommended that the New

\(^{25}\) Judge Andrew Becroft, From little things, big things grow – emerging youth justice themes in the South Pacific, Australian Youth Justice Conference, 20-22 May 2013, p 22-23

Zealand Government “limit the use of detention to a measure of last resort and for the shortest period of time”\(^\text{27}\).

81. The Commission accordingly recommends that clause 92 is amended to incorporate the Article 37(b) principle into s 208. This would bolster current and future efforts aimed at minimising custodial outcomes wherever possible and appropriate, particularly in respect of remands.

82. The Commission also wishes to bring the Committee’s attention to the issue of seclusion within care and protection and youth justice residences. In its last report on New Zealand, the UN Committee on the Convention Against Torture recommended that the New Zealand Government prohibit the use of solitary confinement and seclusion against children and young people\(^\text{28}\). We note that the Bill does not seek to amend the secure care provisions in the current Act\(^\text{29}\).

83. The Commission welcomed the recent Supplementary Order Paper to the Education (Update) Amendment Bill which seeks to prohibit seclusion in schools, and we consider that a similar position should be considered for the care and protection and youth justice jurisdiction. We consider the prospective development and implementation of national care standards will provide an important opportunity to develop practices, procedures and facilities that will both adequately respond to incidents of crisis in youth justice and care and protection facilities, and mitigate against their occurrence.

**Recommendation 8**

The Commission recommends that the Committee amend clause 92 to introduce:

a. a new principle under s 208 that expressly requires that any detention of a child or young person under Part 4 of the Act is a last resort measure and is for the shortest appropriate period of time.

b. Amend current section 208(fa) to provide that “any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child’s or young person’s offending,

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\(^{27}\) CRC/C/NZL/CO/5 paragraph 45(d)

\(^{28}\) UN Committee Against Torture, Concluding Observations on the Sixth Periodic Report of New Zealand, May 2015, CAT/C/NZL/CO/6, paragraph 15(b)

\(^{29}\) Children, Young Persons and their Families Act 1989, Sections 367-383A
including any disability that impacts upon the child or young person’s learning or behaviour.

The Commission recommends that the Committee investigates the use of secure care under s 367-383A of the Act.

Exceptions to Youth Court jurisdiction for 17 year olds/remand to prison youth units

84. While the Bill raises the upper age of the youth justice system, it does not extend the youth justice jurisdiction to all 17 year olds who are charged with an offence. Clause 108 (which amends s 272) provides that 17 year olds who are charged with any of the serious offences listed in schedule 1A of the Bill will continue to be prosecuted as adults in the District Court

85. Furthermore, the Bill introduces a new s 238(1)(f) that enables the Youth Court to remand 17 year olds into custody of the youth wing of a prison. This is subject to the requirement that a Youth Court may only make such an order on the application of the chief executives of MSD and Corrections in circumstances where it is necessary for the safety of the young person (new clause 94/ s 239(2A)).

86. The Commission is nevertheless concerned that new s 238(1)(f) has the effect of formally integrating the adult prison system into the youth justice jurisdiction, and considers that the priority should be ensuring that youth residential facilities are adequate to accommodate all young people remanded into custody by the Youth Court. In addition, the provision will lead to the mixing of young people with adults, an outcome which breaches Article 37(c) of UNCROC, unless it can be demonstrated that the mixing is in the best interests of the young person concerned

87. The Commission thereby recommends that new s 238(1)(f) is deleted. In the alternative, the Commission would recommend that clauses 94 and 95 should be amended to incorporate the Article 37(b) and (c) requirements.

88. This could be done by amending clause 94 (by adding new s 239(2A)(d)) that requires the Court to be satisfied that the order is in the best interests of the young person, and

30 The offences listed in Schedule 1 are, for the most part, all “purely indictable” offences. Prior to the 2014 amendments to the CYPF Act, these offences did not automatically qualify for Youth Court jurisdiction.

31 New Zealand maintains a reservation in respect of Article 37(c). However, the Commission notes that the Department of Corrections have developed a “test of best interests” (TBI) operational policy for under 20 year old male prisoners – see http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03.html
amending clause 95 (by adding new s 241(3) that requires that any order made under s 238(1)(f) must be reviewed by the Youth Court within 72 hours of its issuance and within every 7 days following the first review.

**Recommendation 9**
The Commission recommends that new section 238(1)(f) is deleted from clause 95 of the Bill.

In the alternative, the Commission recommends that the Committee:

a. Amend clause 94 to introduce a new s 239(2A)(d) that requires a court to be satisfied that an order under s 238(1)(f) is in the best interests of the young person
b. Amend clause 95 to require that any order under s 238(1)(f) must be reviewed by the Youth Court within 72 hours of its issuance and within every 7 days following the first review of the order

**Police custody remands**

89. The Bill does not seek to amend or repeal s 238(1)(e), the provision that enables Courts to remand a young person into police custody. The provision is intended to be a last resort measure to cover circumstances where no CYF residential beds are available. Accordingly, various procedural checks are in place, such as a 24 hour monitoring and reporting requirement. However, external systemic stressors have periodically led to increases in the number of young people in CYF youth justice custody, leading to an increase in the numbers of young people subject to police custody orders under s 238(1)(e).

90. Police cells do not conform to international human rights standards\(^{32}\) as regards an appropriate custodial environment for young people and the practice has been subject to criticism, both domestically and internationally, for many years. The 2012 Joint Thematic Review (JTR) undertaken by the IPCA, OCC and the Commission issued a number of recommendations designed to reduce the frequency of the practice, improve related systemic processes and mitigate its detrimental impact on young people. The JTR fell short of recommending a law change (although that particular question was not part of its original brief). The CRC Committee referred to the JTR report in its 2016 Concluding

\(^{32}\) UNCROC Article 37(c); Rule 31.1-13.5 UN Standard Minimum Rules on the Administration of Juvenile Justice
Observations, recommending that New Zealand “intensify its efforts to implement the recommendations made by the Joint Thematic Review of Young Persons in Police Detention to reduce the detention of children in police custody, improve detention conditions and limit the use of detention to a measure of last resort and for the shortest period of time.”

91. However, since the issue of the JTR report, momentum in support for full repeal of s 238(1)(e) has gathered. Recent incidents of young people being held in police custody have led to judicial comment that the practice of remanding young people in police cells under s 238(1)(e) breaches UNCROC. The Children’s Commissioner has also publicly called for an end to the practice through full repeal of s 238(1)(e) due to both its inconsistency with UNCROC and the demonstrable harm it inflicts upon the young people who are subject to it.

92. The Bill provides an ideal opportunity to address s 238(1)(e) once and for all. The Commission accordingly recommends that the Committee takes the opportunity to repeal s 238(1)(e), albeit subject to a sunset clause which enables it to be phased out over time. During the phase out period, relevant JTR recommendations should be implemented (such as increasing the use of CYF monitored s 238(1)(c) remands, for example) to ensure an effective transition.

93. In addition, clause 112 amends s 364 of the Act to place an obligation upon the chief executive, when deciding upon the number of location of youth justice residences, to “consider establishing a sufficient range and number of community-based residences to be available for children and young persons who are detained in the chief executive’s custody under section 238(1)(d)”

94. This clause has particular significance in this regard, as it has the potential to increase the number of custodial remand beds, thus mitigating against the use of court-ordered police cell remands. It provides a logical basis for a phase-out repeal of s 238(1)(e).

**Recommendation 10**

The Commission recommends that the Committee repeal s 238(1)(e), subject to a sunset clause that provides that repeal comes into effect 2 years after enactment.

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33 CRC/C/NZL/CO/5 paragraph 45(d)
34 Police v BM, Youth Court, Christchurch, 28 November 2016, Minute of Judge Murfitt at [6]
During the 2 year transition period, MSD is assigned with the primary responsibility of implementing the recommendations of the Joint Thematic Review most relevant to phase out of s 238(1)(e).
SUMMARY OF RECOMMENDATIONS

Recommendation 1
The Commission recommends that the Committee specifically acknowledges and has regard to, the final report and recommendations of the Confidential Listening and Assistance Service, and considers whether it can be assured that the Bill contains adequate safeguards:
   a. to maintain the safety of children while they are in the care of the state; and
   b. to prevent the future occurrence of systemic failures that could lead to the abuse of children in the care of the state.

Recommendation 2
The Commission recommends that Clause 12 that introduces duties upon the Chief Executive to improve outcomes for Māori is amended to:
   a. provide for a duty to develop and implement strategic partnerships with iwi and Māori organisations
   b. require the department to ensure that any strategic partnership entered into with iwi or a Māori organisation integrates Whānau Ora within its framework
   c. establish a statutory board of representatives of iwi and Māori organisations to whom the chief executive must report to in the performance of his or her duties under s 7A.

Recommendation 3
The Commission recommends that the Committee review the care and protection principle in clause 13 for consistency with the general principles under clause 8 and, further to that review, consider whether clause 13 should be deleted and current s 13 retained.
Should the Committee retain Clause 13 of the Bill, the Commission recommends the following amendments:
   a. The principle regarding the primary role of family, whānau, hapū and iwi, as currently expressed in s 13(2)(b) of the Act, is retained.
   b. That new section 13(2)(g) is deleted and replaced with current sections 13(2)(f)-(h)
   c. That new section 13(2)(j) is deleted

Recommendation 4
The Commission recommends that Clause 6 of the Bill is amended to retain the obligation upon the state to establish support services that seek to improve outcomes for children and young persons.
Recommendation 5
The Commission recommends that the Committee review clauses 14-17 of the Bill to ensure that the legislative threshold for intervention is set at a level that provides an adequate, rights-consistent level of protection and is applied consistently across the relevant Part 1 and Part 2 provisions.

Recommendation 6
The Commission recommends that the Committee note the concerns of the Privacy Commissioner regarding clause 38, and make amendments to the Bill to ensure that any clause that enables information sharing:

a. provides a clearly defined set of purposes for which information may be used or disclosed and which provides for immunity from any consequences for disclosures made in good faith; and
b. clearly specifies which agencies fall under the definition of “child welfare and protection agencies.

In addition, the Commission recommends that the Committee amend clause 38 to:

a. Retain a statutory basis for practitioners to protect client confidentiality in cases where it is appropriate to do so.
b. provide for a specific public notification requirement in relation to datasets compiled for risk modelling purposes
c. Amend the Code of Practice provision to include within the Code an obligation to apply all relevant privacy, human rights and ethical obligations in making any information sharing decision.

Recommendation 7
The Commission recommends that the Committee amend clause 13 to introduce a specific care and protection principle under s 13, in the form of a new s 13(2)(l), which provides that:

“any intervention regarding a child or young person with a disability must ensure that their needs are appropriately accommodated through the provision of comprehensive information, services and support, including independent advocacy, to the child, young person and their family at the earliest opportunity”

Recommendation 8
The Commission recommends that the Committee amend clause 92 to:
a. Introduce a youth justice new principle under s 208 that expressly requires that any detention of a child or young person under Part 4 of the Act is a last resort measure and is for the shortest appropriate period of time.

b. Amend the youth justice principle under current section 208(fa) to provide that “any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child’s or young person’s offending, including any disability that impacts upon the child or young person’s learning or behaviour.

The Commission recommends that the Committee investigates the use of secure care under s 367-383A of the Act.

**Recommendation 9**

The Commission recommends that new section 238(1)(f) that provides for the remand of 17 year olds into a youth unit in a prison is deleted from clause 95 of the Bill.

In the alternative, the Commission recommends that the Committee:

a. Amend clause 94 to introduce a new s 239(2A)(d) that requires a court to be satisfied that an order under s 238(1)(f) is in the best interests of the young person; and

b. Amend clause 95 to require that any order under s 238(1)(f) must be reviewed by the Youth Court within 72 hours of its issuance and within every 7 days following the first review of the order

**Recommendation 10**

The Commission recommends that the Committee repeal remands into police custody under s 238(1)(e), subject to a sunset clause that provides that repeal comes into effect 2 years after enactment. During the 2 year transition period, the Ministry of Social Development should be assigned the primary responsibility of implementing the recommendations of the Joint Thematic Review most relevant to phase out of s 238(1)(e).