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Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill

Submission to	Social Services Committee
Regarding	Bill No 224-1
Submission by	YouthLaw Aotearoa and Action for Children and Youth Aotearoa (ACYA) C/- PO Box 200020, Papatoetoe Central 2025
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YouthLaw Aotearoa ("YouthLaw") is a Community Law Centre vested under the Legal Services Act 2000. We were established in 1987 as a national centre providing free legal advice and advocacy for children and young people under 25 years of age. We also work to promote the interests of children and young people at local and national levels when decisions, laws or policies affecting them are being created.

Action for Children and Youth Aotearoa ("ACYA") is a coalition of non-governmental organisations, which promotes the rights of children and young people through advocacy, monitoring and implementation of the United Nations Convention on the Rights of the Child ("UNCROC") and other international human rights instruments.

Scope of submission

1. YouthLaw and ACYA welcome the opportunity to submit on the bill. The bill represents the most significant set of reforms since the Children, Young Persons, and Their Families Act 1989 ("CYPFA ") and introduces the legislative framework for the new operating model for the Ministry for Vulnerable Children, Oranga Tamariki.

2. We request the opportunity to present an oral submission to the Social Services Committee.

Matters we have made submissions on

3. Our submission sets out our responses to some of the key changes proposed by the bill. The structure of our submissions is as follows:

    - changes we support
    - changes we have concerns about:
        - family placements, especially for tamariki Māori
        - youth jurisdiction
        - data sharing
    - further matters
        - affirming children's participation rights
        - lack of operational detail and overall coherence of the bill
        - embedding an overarching strategy that respects and promotes children's rights
        - repealing section 238(1)(e) – detaining young people in police cells.

Proposed changes we support

4. We note the changes introduced by the bill that we support:

    - The specific regard given to UNCROC and the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). The express recognition of these vital conventions in legislation is an important step in realising the principles of these conventions.

    - Recognition of a more child-centered operating model. This is consistent with the United Nations Committee on the Rights of the Child recommendations, which include making it clear that a child or young person is at the centre of any decisions affecting their rights; that their rights must be respected and upheld; and that the child and young person must be treated with respect and dignity at all times.

    - Specific reference to disabilities in section 5. It is evident that children and young people with disabilities are over-represented within the youth justice and care and protections systems. It is essential they are accommodated and provided

with services and supports that ensure they enjoy their rights on an equal basis with non-disabled children.

- Provisions which give effect to principles of participation. In particular, the requirements to assist a child or young person to participate in decision-making processes and making sure such views are taken into account by the decision maker. YouthLaw has received anecdotal information, as well as information through work on its legal advice line and legal education, that children and young people in contact with New Zealand's care and protection and youth justice systems, feel they lack power and ability to have their views articulated and heard. We consider these provisions to be extremely vital and the use of these

- Carrying over from the existing Act the principle that decisions be made in a time frame that is appropriate to the evolving capacity of the child or young person. It is YouthLaw's experience through legal and education work that perceptions of time differ vastly for children and young people.

- Developing national care standards. Such regulatory measures will help to ensure transparency and accountability in the provision of care services for children and young people.

- Amending New Zealand's youth justice jurisdiction to include some 17 year olds. This is a move towards consistency with UNCROC and our other international youth justice standards. However, (as outlined in further detail below) we consider further steps are possible.

- We also support increased legal representation for young persons in the youth justice system and strengthened support for community-based remand options. YouthLaw's case and education work experience has highlighted the negative impacts associated with a young person being dealt with in the adult criminal justice system. These impacts include stigmatisation and ramifications for a young person's future life opportunities. We take the view such measures will make substantial progress towards improving future outcomes for young people.

- Including a new entitlement for young persons transitioning out of care to remain or return to living with a caregiver up to age 21 and additional measures to ensure the needs of young persons transitioning out of a youth justice facility are addressed. Overall, the lack of transitionary support has been a significant issue for young people, particularly in areas such as tenancy, finance, education and employment. The proposed change provides this group of young people further support for a longer period of time, should they require this.

- Amending accountability arrangements and amendments to the duties of the Chief Executive, and indeed to all Chief Executives in the social sector, to provide a practical commitment to the principles of the Treaty of Waitangi. We also endorse the obligation to report at least once a year to the public on the

measures taken and their effectiveness. Such a report should include the views of children and young people.

Proposed changes we have concerns with

5. Although there are a number of measures in the bill which we support we would also like to raise the following matters of concern.

Changes to family placements and maintenance of family bonds

6. We are concerned about the changes in the bill that:

- remove the mandatory consideration that the placement of a child or young person be with their family, whānau, hapū, iwi and family group
- downgrade the role of family, whānau, hapū, iwi or family groups in decision-making.

7. This is a significant departure from the existing legislation and it is not clear on what basis this change is being made. The implication is that being child-centred requires diminution of family, whānau, hapū, iwi and a family group. We believe the opposite to be true.

8. We are not disputing the importance of having safeguards that protect children in need of care and support. However, we are advocating for recognition of all the rights and needs of an individual child including those to know, be cared for and guided by their families and to identity. Due consideration must be given to all (not just some) of these in the development of a child's care plan or when intervening in their lives and assessing their best interests.

9. The bill proposes to remove the existing section 13(2)(f) of the CYPFA which mandates return of a child or young person to their family, whānau, hapū, iwi or family group. The provisions further set out that where a child cannot be immediately returned, until the child or young person can be returned, the child should be placed in the same locality and that links with family are to be maintained and strengthened.

10. Section 5(c)(3) of the bill, instead proposes that "informal networks and supports of the child or young person and their family are acknowledged and *where practicable* utilised…" and Section 13 (2)(c) states "where a child or young person is at risk of being removed from their immediate family, whānau, or usual caregivers, the child's or young person's usual caregivers, family, whānau, hapū, iwi and family group should, *unless it is unreasonable or impracticable in the circumstances*, be assisted to enable them to provide a safe, stable, and loving home to the child or young person in accordance with whakapapa and whanaungatanga."

11. The shift away from mandates to place with family and maintain links in terms of locality and contact will arguably result in detriment to children and young people

and particularly tamariki Māori. The emphasis should be on the best interests of the child and preserving a child or young person's sense of family and cultural identity.

12. The Regulatory Impact Statement (RIS): *Investing in Children: Intensive intervention,* appears to emphasise capacity and resourcing the agency must consider in these circumstances rather than a child or young person's primary interests in family inclusion. The RIS refers to:

- *"where possible"* interventions with families should occur
- with consent or child or young person and parents/guardians/caregivers, where a child is at risk of being removed from their family/whānau/usual caregivers
- *"best efforts"* are to be made to provide assistance to their parents/guardians, and where there are risks a child's needs may not be able to be met by their usual caregiver, these *"should be considered and addressed concurrently"* with interventions to support them to remain with their new caregiver.

13. Interventions contemplated under the section does not seem to clearly define what should occur short of removal to address safety and wellbeing and to address the risk of future harm. The broad definition of serious harm to include "avoidable impairment or neglect of development, physical, mental, or emotional well-being" compounds this lack of clarity.

14. We are aware of reports and research, detailing the experiences of children who have been subject to care and protection, which paint harrowing pictures of children who felt displaced and disengaged and unable to access their family roots and cultural background. This information records the profound impact displacement and disengagement had on these children's sense of identity and sense of self transitioning into the adult world.

15. We acknowledge that proposed provisions in Section 13 include pronouncements such as "any intervention with the whānau of a child or young person who is Māori should recognise and promote the mana taimati and the whakapapa of that child or young person and relevant whanaungatanga rights and responsibilities." However, we note there is still a clear departure from the existing CYPFA provisions and mandates which are more protective of family inclusion. We also note comments in Hansard that references to the words "whānau", "hapū", and "iwi" will significantly decrease (estimated from 26 to 6) if the proposed changes proceed. Concern has also been expressed at the lack of consultation with relevant groups and organisations.

16. The proposed changes appear to reflect attitudinal shifts from supporting family and whānau care to removal from situations that are deemed unsafe, in terms not only of imminent abuse or neglect but future harm to outcomes. In essence, the ability of the state to intervene appears to have magnified with a corresponding decrease in family autonomy. Broad visions of "safe", "stable" and "loving" homes are articulated which are not clear and we are concerned this could result in more children and young people and especially at risk children and young people with

disabilities (who may be undiagnosed) or those who come into contact with youth justice being labelled and having to live away from their family and whānau. There does not seem to have been any consideration directed towards other factors such as poverty, housing issues, alcohol advertising, and other factors such as domestic violence which also impact the safety of children and young people in their homes.

17. The bill specifically recognises the need to take a holistic view when it comes to the wellbeing of a child or young person, and it is patent that continued bonds with family and culture are vital to the overall development and wellbeing of a child or young person. Māori makes up only 23 percent of children aged 0-14 years. However, they represent approximately half of the children receiving Child, Youth and Family Services.[1] There is a need to be more responsive to the cultural needs of tamariki Māori and their whānau. Consideration should be given to further articulating there is a primary responsibility to preserve the relationship between a tamaiti Māori and their whānau where this will not place the child at risk.

Support for IHC submissions

18. We support IHC's submission which sets out concern that '[t]here seems to be a shift from "working with" to "doing to" children, young people, and their families that risks undermining rather than enhancing their wellbeing' and that the bill has potential 'to create a stigmatising and disempowering framework for state intervention in the lives of those children, young people and their families deemed vulnerable while simultaneously leaving others without access to the services and supports that are essential to their wellbeing.'

19. We further refer to IHC's submission it is vital that any removal of children and young people from their home is a step that should not be taken lightly. It must be based on clear legislative authority and must be subject to appropriate procedural safeguards. Given systemic failures of the past, we also agree that the utmost care must be taken with this bill to avoid any more harm.

20. We endorse IHC's suggested amendments to insert changes to Section 5(b)(v) that wherever possible, a child's or young person's family, whānau, hapū, iwi and family group **should** participate in the making of decisions and a new clause 5(c)(i) to be inserted to read "wherever possible, consideration is given to the view of the child's or young person's family, whānau, hapū, iwi and family group" and "the principles of mana tamaiti (tamariki), whakapapa and whanaungatanga apply universally". We also support IHC's views that the new section 13(2)(b) be deleted from the bill and possibly replaced with a principle that as far as possible interventions should be developed jointly and by agreement with all involved.

Youth jurisdiction – further steps

21. Amending the youth jurisdiction to include 17-year-olds is an extremely welcome and positive move and we are heartened to see this has occurred.

[1] MSD. "Modernising Child, Youth and Family: Programme Business Case: Strategic case." 15 December 2014.

22. However, we posit that further measures could be considered. Ministry of Social Development ("MSD") reports acknowledge young people are not generally considered prepared for many of the responsibilities of adulthood until 18-years or older. This is reflected for example in the voting age, our residential tenancies provisions and guardianship orders under the Care of Children Act 2004. It also reflects work that has been done over the last 20 years about the brain development of children and young people. For the main part, these are legal issues frequently encountered through work at YouthLaw. UNCROC provides that a child or juvenile is a person under the age of 18-years and there exists significant scientific and sociological evidence indicating that for a young person, frontal cortex development may not completely mature until the age of 25-years. We submit that raising the age of youth jurisdiction to at least the age of 18-years would be far more consistent with practical markers of transition from adolescence to adulthood, and also international obligations.

23. We also support IHC's submission that youth advocates be appointed to represent the child or young person in family group conferences in cases involving offences punishable by imprisonment of 10 years or more.

Data sharing expansion – risks and concerns

24. The bill proposes an expansion of existing data sharing provisions that must be carefully considered in light of the following issues. We do not dispute the benefit of ensuring effective cross-agency collation and communication to better meet the needs of children in need of care and protection. However:

- this mandatory disclosure framework has limited checks and protections to give effect to a child or young person's privacy pursuant to UNCROC and other relevant covenants and legislation
- the bill expressly displaces obligations of professional confidentiality
- the scope of persons required to provide any relevant information has drastically expanded
- the provisions create a presumptive sharing framework (including datasets) which has the potential to negatively stigmatise or label some children and young people.

25. We are concerned about these issues because:

- The draconian and "heavy hand of the state" approach mooted in proposals concerning the new section 66A of the bill erodes and comes at the expense of an individual citizen's (in this case children and young people in need of care and protection) right to protect their personal information and to determine how this information is shared between professionals and agencies. We would expect the bill to be reconciled with the child's rights to, for example, their identity, privacy, freedom of expression and to participate in decisions affecting their lives, including the sharing of their personal and private information.

- The wording of the data sharing provisions in the bill is loosely constructed and defined, which could result in unintended, but significantly damaging consequences for children and young people in need of care and protection. These include potential breaches of confidentiality, the possibility that agencies and professionals make decisions to share information without consulting with the child or young person, and that agencies, organisations or individuals outside the immediate care and protection sphere may request and receive information they are not entitled to receive.

26. The current position under section 66 of the CYPFA is that government departments may be required to supply information for the purposes of determining whether a child or young person is in need of care or protection. The proposed amendments, and in particular, the requirement to disclose under the new proposed Section 66A would result in virtually any agency or person who meets the definition set out in Section 2(1) of the Privacy Act 1993 having an obligation to supply information to the Chief Executive, care and protection co-ordinator, or constable on request.

27. The breadth of these changes is concerning because virtually anyone will be subject to these disclosure provisions and the information can therefore be shared with virtually any person or entity that deals with children and young people.

28. Section 66C covers health workers, any person that works with children on a regular or overnight basis and anyone else nominated pursuant to regulations. They are empowered to use information held about a child for the purposes of protection and the welfare of that child or assisting any other work to be carried out by MSD. Section 66(b) allows child welfare agencies and defined persons to share information with any other child welfare agency or defined person if it is deemed to be helpful to promote a child's welfare or assist in MSD's work. Section 66E also empowers child welfare agencies and defined persons to request information and the other agency or person must comply with this request (Section 66F) if the provider reasonably believes the information will help the requestor protect the welfare of a child or assist the work of MSD.

29. As a consequence, a requesting agency can force a providing agency to breach confidentiality in a number of circumstances. Of note is the fact the information that can be requested is not limited to information disclosed by the government under Section 66A but ***any*** information that is held. There are risks of unintended consequences given the limited circumstances where a provider can decline a request for information under Section 66G.[2]

30. The information that will be shared is private and often very sensitive. Information can also relate to a member of the child or young person's family, any person in a

[2] Limited circumstances are outlined including: where disclosure is likely to increase the risk of the child or young person being subject to harm, disclosure will prejudice the maintenance of the law including investigation and detection of offences and the right to a fair trial, disclosure will prejudice the conduct of proceedings before any court or tribunal, will breach legal professional privilege, it is contrary to the wishes of the child or young person and not in the best interests of the child or young person.

domestic relationship with the child or young person and any person who is likely to reside with the child or young person. Moreover, irrespective of the purpose for which the information is collected, it is still subject to disclosure.

31. Existing limited protections against using information to investigate a criminal offence or specified legal proceedings or where legal professional privilege exists remain. However, we are concerned that theoretically, under the proposed Section 66E which provides for "requests for information by child welfare and protection agencies or independent persons from other child welfare and protection agencies or independent persons," a third party child welfare agency could request information from another agency such as a hospital or school and this could be shared with the police and could be used for the purposes of investigation in a criminal context.

32. It is a small comfort that section 66B sets out if information has been obtained and the Chief Executive, police or child welfare agency are aware of a breach of confidentiality, the information should not be shared (however, the information would have already been disclosed).

33. We are aware the Privacy Commissioner has also expressed concern at these changes and also noted a lack of adequate consultation with affected children and young people.

34. We urge that consideration be given to further protections with regard to sharing of a child or young person's sensitive and private information. The children and young people that will be affected by the proposed changes are inherently vulnerable and robust and adequate protection of their privacy is essential.

Other matters we have made submissions on

35. We have also provided commentary on the following matters:

- children and young people's participation rights
- a lack of operational detail, definition and overall coherence, especially regarding all children's rights under UNCROC
- the need for an overarching strategy or plan to avoid categorising and stigmatising children and young people
- repeal of Section 238(1)(e) regarding the detention of young people in police cells.

Affirm children's participation rights

36. We refer to and support IHC's submission which recommends that '[t]he purpose section of the bill be strengthened (specifically section 4(a)) to ensure children, young people and their families have timely access to flexible, integrated, quality

services that advance their wellbeing and long term outcomes' and that '[s]ection 5A be amended to affirm, more broadly children's participation rights'.

37. We also support the suggestion the proposed Section 5A be strengthened by including a general principal affirming, more generally, the right of children and young people to express their views and preferences on matters that affect them. It should also be noted that children and young people:

- have the right to express their views "freely"
- are not obliged to express their views and should not be required to do so.

38. We support IHC's submission that:

- the term "supported" be used instead of "encouraged" in 5A(1)(a)
- training, guidelines, and codes of practice be developed to ensure disabled children and young people can participate meaningfully within all service areas of Oranga Tamariki, particularly in relation to decision-making that affects them directly
- where necessary, the child or young person has access to an independent advocate to help communicate their views and preferences and ensure these are taken into account
- Section 144 of the CYPFA be amended to require all children to give their consent to agreements for extended care, either themselves or through an independent advocate.

Lack of operational detail and overall coherence

39. We echo the following comments made by IHC raising concerns about the lack of operational detail and the overall coherence of the bill.

40. Many of the details about the way the proposed changes will operate are still to be worked out. This, coupled with the lack of certainty around how new, undefined terminology will be interpreted and applied, raises concerns about the clarity and cohesiveness of the proposed legislation. This includes, more generally, the new operating model itself, particularly in the transition phase and how this will impact on children and young people.

41. Many factors outside this bill will influence the capacity of Oranga Tamariki to enhance the wellbeing of children and young people and be critical to the new operating model's effectiveness. For example:

- legislation and policy regarding standard of living, education, health, housing, drug and alcohol abuse, domestic violence
- the level of human, technical and financial resourcing applied to Oranga Tamariki
- the cohesiveness, inclusivity and quality of the universal service provision on which Oranga Tamariki rests.

42. The following Treasury advice should be noted:

> In particular, the problem definition does not sufficiently identify the root causes of the failure of system actors to take a child-centered approach. The RIS identifies the influence legislation can have on expectations and practice, but does not adequately demonstrate that current legislation is an impediment to system actors taking a child-centred approach and therefore does not establish that legislative change is a necessary response. It will therefore be important in the detailed design of new arrangements, to identify and address factors other than legislative requirements that affect agency and practitioner decision-making.

Embed an overarching strategy that respects and promotes children's rights

43. We agree with IHC's concern about the bill's potential to create an unduly complex system of child care and protection, and wellbeing that undermines rather than upholds the rights of children and young people to:

- Be safe – the new proposed section 14 sets out there must be a risk of serious harm for a child or young person to be defined as in need of care or protection. We support IHC recommendation that the word 'serious' be removed from the new proposed section 14(1).
- Know, be guided and cared for by their families and for their families to be supported in their care giving role – there are fundamental changes to the purposes and principles of the act which diminish the status and role of family, whānau, hapū and iwi under the legislation and, when separated, maintain contact with their parents and families.
- Identity - children will automatically be defined as vulnerable and their families ability to care for them called into question. This is arguably a stigmatising approach that undermines the child or young person's sense of self-worth and value.
- Privacy – these matters have been discussed in detail above.

44. There is a need for an overarching strategy or plan to avoid categorising and stigmatising children and young people in care. In its latest (2017) set of Concluding Observations, the United Nations Committee on the Rights of the Child recommended a comprehensive plan, using a child rights framework, would ensure a consistent approach to policies and practices affecting all children across government. We endorse this approach.

Repeal Section 238(1)(e) – detaining young people in police cells

45. We also wish to raise (as an ancillary matter) the Children Commissioner's submission that this bill could repeal Section 238(1)(e) of the CYPFA regarding the detention of young people in police cells. The inherent vulnerability of young people ought to lend weight towards a presumption they should never be subject to detention in police cells. Particularly given reports that the facilities are not only inadequate but, arguably, unacceptable, and such practices are inconsistent with protections set out in international law.