New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

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Andre Anderson
Principal Policy Advisor
Oranga Tamariki
Wellington

By email: legislation@ot.govt.nz

Re: Potential changes to the Oranga Tamariki Act 1989 – Feedback on Issues Papers

A. Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on Oranga Tamariki's (**OT**) issues papers as part of preliminary legislative work on the Residential Care and Other Matters Amendment Bill, aimed at supporting a new model of residential care for children and young people.
2. The Law Society's submission sets out some general comments in response to the overall work programme and provides specific feedback on each of the issues papers.
3. This submission has been prepared with the assistance of the Law Society's Youth Justice Committee and Family Law Section.[1]

B. General comments

4. Many of the issues discussed in the issues papers are interrelated (for example seclusion, detention, remand options and the safeguard/protection mechanisms papers) and are also being considered by the Abuse in Care - Royal Commission of Inquiry (**Royal Commission**) which will be the subject of both findings and recommendations by the Royal Commission when it reports back in 2023. Given the depth and breadth of that investigation, it is critical that any work undertaken by OT in advising the Minister for Children, including any recommendations to be included in the Oranga Tamariki (Residential Care and Other Matters) Amendment Bill (**Bill**), is informed by the work of the Royal Commission.
5. Further, given the significance of any proposals and their impact on children and young people, a full Child Impact Assessment should also be carried out in relation to any proposed policies and/or amendments to the Oranga Tamariki Act (**Act**) or Residential Care Regulations 1996 (**Regulations**). This will ensure that the views of children and young people are considered throughout the decision-making process. Any recommendations and proposals for change should also be consistent with international law including the United Nations Convention on the Rights of the Child (**UNCRC**), the United Nations Convention on the Rights

[1] More information on the Law Society's Youth Justice Committee and Family Law Section can be accessed via the Law Society's website here https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/youth-justice-committee/ and here: https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/

of Persons with Disabilities (**UNCRPD**)) and General comment No. 24 (2019) on children's rights in the child justice system.[2]

6. Finally, most of the issues papers discuss OT's commitment under the Act to the principles of te Tiriti o Waitangi (**te Tiriti**), and the aim of ensuring that any future amendments place tamariki and rangatahi front and centre. We therefore suggest it is necessary for the views of Māori lawyers, via Te Hunga Rōia Māori o Aotearoa, to be canvassed throughout this consultation process, particularly during the design phase, to ensure any proposed changes are consistent with te Tiriti, tikanga and te ao Māori.

C. Issues papers for residential care topics

Residential care settings (regulatory framework)

Considerations

7. This issues paper explores what types of residential care should be regulated to ensure there are the right legislative and regulatory settings to support best practice residential care in the future. The paper identifies that any changes should reflect:

    a. The purposes and principles of the Act; and

    b. The duties under section 7AA of the Act, including that the policies, practices, and services of Oranga Tamariki have regard to whakapapa, mana tamaiti and whanaungatanga responsibilities.

8. Although reference is made to the principles of the Act, which includes the obligation to uphold the child's or young person's rights, this should be made much more explicit in the issues paper. This could be achieved by adding the following words to (a) above: "including the duty to respect and uphold the child's or young person's rights (including those rights set out in the UNCRC and the UNCRPD". This would ensure consistency with section 5(1)(b)(i) of the Act.

9. We also suggest that any changes reflect the wider obligations on OT under te Tiriti including the duty of active protection;[3] the principle of partnership;[4] and the principles of inequality and deprivation.[5] These wider obligations on OT should be overarching considerations for all proposals under the Bill.

Draft issues

10. The issues papers set out several draft issues to be considered. We agree with those draft issues and suggest the following should also be included:

    a. The necessary and appropriate limitations on any powers (this issue also overlaps with issues discussed in the Rights, Protections, Safeguards and Mitigations for Use of Powers in Residential Settings issues paper).

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2 United Nations Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, accessed here: https://digitallibrary.un.org/record/3899429?ln=en

3 Discussed in *New Zealand Police v EL* [2020] NZYC 45 at [18]; *New Zealand Police v AN* [2020] NZYC 609 at [77]; *and New Zealand Police v JV* [2021] NZYC 248 at [55]-[58].

4 Discussed in *New Zealand Police v JV* [2021] NZYC 248 at [61]-[62].

5 Discussed in *New Zealand Police v EL* [2020] NZYC 45 at [19].

b. The process to be followed when the exercise of the power is being considered (i.e. consideration should not just be limited to accountability requirements once the power has been exercised when it is essentially too late given action has already been taken).

c. Positive obligations to consider alternatives to the exercise of powers and when those obligations do and do not apply (for example, the obligation to use de-escalation techniques prior to the use of restraints).

d. The relationship between the health and justice sectors whereby a young person is in need of residential care but has an underlying mental health or intellectual disability.

11. The issues should also include consistency with children and young people's rights. For example, the final issue that states "what thresholds are needed to ensure powers are proportionate to the needs and characteristics of young people?" should be amended to include "and that are consistent with young people's rights under the UNCRC".

Authority to restrict freedom of movement or freedom of liberty (detention)

12. This issues paper considers the power to detain a young person in the context of residential care. As noted in the paper, the Act allows for some children and young people to be detained in certain circumstances via use of the word "detention" in the secure care and youth justice provisions. However, "detention" itself is not currently defined in the Act. Given the significant intrusion on personal liberties and freedom of movement, the Law Society agrees it is timely and necessary for the legislation to be reviewed and to ensure any amendments provide clarity and certainty about when and how any detention or restriction on liberty and movement is permitted. This should include expressly providing for the specific use of appropriate detention or restrictions within the Act and ensuring there is clarity on the purpose for detention (therapeutic, punitive, or other purposes), who can make the decision, and what safeguards are in place to ensure that the authority is used appropriately.

13. The Law Society also agrees that if a more therapeutic approach to residential care is adopted and delivered by a range of groups (iwi, Māori organisations, non-governmental organisations), each with different focusses and approaches, consideration will need to be given to what forms of restrictions on liberty and movement may arise in different care models.

Secure care (use of seclusion)

14. This issues paper considers the power to detain a young person in seclusion ('secure care') in the context of residential care and identifies the need to ensure there is a nexus between secure care and OT's aspirations to provide therapeutic and trauma-informed care. It is essential there is clarity about the residential environments in which secure care can be provided, in legislation. Further consideration should also be given to changes that can be implemented outside of the legislative framework to ensure that secure care options are used appropriately and when they are, that they uphold the best interests of the child/young person and to ensure they are treated with dignity and respect, for example by improving the physical environments of secure care to ensure that although secure they don't have the characteristics of a prison cell.

15. As the issues paper notes, coercive powers and the physical environments children and young people are placed in during secure care, can be re-traumatising and mana diminishing. We are particularly interested in the following issues:

a. Secure care may not provide a therapeutic environment.

b. Secure care may not change a young person's behaviour.

c. Secure care is sometimes used as a punishment.

d. Secure care can diminish the mana of the young person and/or staff.

16. We also agree with the potential areas for change listed in the issues paper with specific emphasis on the following: [6]

a. The current time limit for secure care (72 hours) should be reviewed considering recent research criticising the use of secure care rooms.[7]

b. A change in practice is essential: seclusion should not be used as a threat, a punishment, a response to staffing pressures (even if appropriate intervention is not possible due to staffing, the alternative should not be secure care), or used for any child or young person who has particular needs or vulnerabilities that make it inappropriate.

c. Record keeping processes and protocols should be centralised, electronic and regularly reviewed (for example, who is being secluded, when, why, and for how long).[8]

d. Responses to children and young people who are self-harming include adding a 'removal from association' provision.

e. All staff in residences should receive training on de-escalation and physical restraint.[9] A staff member should not be permitted to impose seclusion unless they have completed training.

f. Facility requirements and the need for regular inspection.

<u>Response to challenging behaviour, including use of physical restraints</u>

17. This issues paper considers the powers available to those caring for children and young people who are in residential care including the power to use physical restraints and behaviour management programmes in residential care. The issues paper is guided by the principles that everyone should be safe in residential care and that staff should not use force on young people. With that in mind, the issues paper sets out a range of draft issues. We agree with those issues and have identified the following sub-issues which should be included:

a. How will the use of physical restraint accommodate the specific individual needs and vulnerabilities of the young person? This narrows the issue from identifying how physical restraint can *generally* be trauma-informed and therapeutic, to understanding how it will be applied in practice taking into account the *specific* vulnerabilities/flashpoints of each young person on the occasions when they display violent behaviour.

b. How can the correct use of physical restraint be applied consistently in light of the move to smaller, family-like homes as residences? What are the benefits/drawbacks to amending statutory powers in this context? This should include practices that ensure force or restraint is only used by staff members who are trained to do so.

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6 See for example *Seclusion and Restraint, Time for a Paradigm Shift, A Follow Up Review of Seclusion and Restraint Practices in New Zealand,* Dr Sharon Shalev, December 2020, at pp 27-36. Dr Shalev made several key recommendations which included that secure care rooms are inappropriate for housing children and young people and their use should stop.

7 Ibid.

8 Ibid.

9 Ibid.

c. Is the threshold contained in Regulation 22 of the Regulations[10] fit for purpose or does it require modification? For example, this could include reconsideration of allowing use of force in order to prevent damage to property, especially where the damage to property is not putting the child/young person or another child/young person/staff member at risk. It could also include reconsideration on the use of force for absconding where the child/young person is not known to pose a risk to the public.

d. Ensuring there are centralised record keeping processes and regular reviews of all instances of force used.

18. Consideration of the New Zealand Bill of Rights Act 1990 and international conventions such as UNCRC also needs to be at the forefront of any review into how to respond to challenging behaviour, including the use of physical restraints.

Searches

Issues

19. This issues paper considers the power to search a young person in residential care. The paper notes that while some level of infringement on liberty is needed to ensure safety, this can be done in a more therapeutic and mana enhancing way than current practice. The paper goes on to outline several issues with the current legislative regime. Given the significant intrusion on personal liberties as part of a search, any impingement on rights must be demonstrably justifiable as a proportionate response. The Law Society agrees with the issues identified in the paper and suggests the following additional issues should also be considered (under the corresponding main issue where appropriate):[11]

a. What are the benefits and drawbacks of having search powers in broader settings than those larger secure residences currently established under section 364 of the Oranga Tamariki Act? (i.e. in community remand homes and/or specialist NGO care services)

Sub issue: Are the search powers currently empowered by legislation and used in established secure residences appropriate for broader settings such as smaller family-like homes? Is there a "Different types of residential care may call for different thresholds / powers" consideration?

b. What, if any, need is there for search powers physically outside residences, i.e. when young people go into the community?

Sub issues: If there is such a need, should those search powers differ in application to those utilised inside residences?

c. Can replacing strip searches with other means provide the same, uniform level of assurance as to safety and wellbeing for young persons, workers, whanau and visitors alike? How will this work in practice vis-à-vis established well-resourced residences, versus those more aligned with OT's latest vision i.e. smaller family-like homes?

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10 The threshold contained in Regulation 22 is that a member of staff must have reasonable grounds for believing that the use of physical force is reasonably necessary.

11 Italicised issues/sub-issues are New Zealand Law Society suggestions.

Objectives

20. The Law Society agrees with the objectives outlined in the issues paper and suggests the following is added: that the approach to searches is consistent as to application and considers the relevant tikanga in the context of specific rohe contexts.

Stakeholder views from previous engagement

21. The Law Society considers it appropriate, when addressing stakeholder concerns as to the appropriateness of strip-searching, to also ask the following question: Is the section 384E threshold (strip searches: "…*if that member of staff believes on reasonable grounds that a child or young person has in their possession a harmful item*…") fit for purpose?

22. The Law Society has previously raised concerns about the use of strip searches in the adult context in several submissions on Bills[12] and in civil society reports to United Nations bodies[13] and these views equally apply to the youth jurisdiction.

Rights, protections, safeguards and mitigations for the use of powers in residential settings

General comments

23. This issues paper considers the protections available to counterbalance the use of significant powers in residential care. Currently there is no cohesive regulatory framework governing the protections and mitigations necessary when significant powers are used in respect of children or young people in residential care settings and considers the issues that arise from this.

24. However, the issues paper notes that alongside regulation of any significant powers, there needs to be a corresponding system that regulates the rights, protections, safeguards, and mitigations in respect of such powers. This suggests both frameworks will be considered separately, rather than looking at them both as part of an integrated system or process. We suggest it would be clearer for any regulatory framework governing significant powers to also include matters relating to children and young people's rights, protections, safeguards and mitigations.

Definitions

25. The issues paper sets out a range of definitions discussed throughout the paper. It is unclear if these definitions are used elsewhere or if they have been created specifically for the purposes of the paper. In respect of the definition of "rights", we don't consider it appropriate to refer to "asserting the rights of all children, young people, families and whānau under the United Nations Convention on the Rights of the Child, the United Nations Convention on the Rights of Persons with Disabilities". While a rights holder may assert their own rights, it is not for OT and other system actors to assert those rights for them, rather OT has positive obligations with respect to those rights. For example, the obligation under the section 5(1)(b)(i) if the Act is to respect and uphold children's rights. Similarly, Article 2 of the UNCRC provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind".

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12 See for example the New Zealand Law Society submission, *Corrections Amendment Bill*, 17 May 2018, accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0012-122232-Corrections-Amendment-Bill-17-5-18.pdf

13 See for example the New Zealand Law Society submission, *United Nations: Universal Periodic Review*, NZLS shadow report, 12 July 2018 accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0007-124396-l-United-Nations-NZ-Universal-Periodic-Review-2018-12-7-18.pdf

Draft problem

26. The Law Society agrees that the regulatory system for protections and mitigations in respect of the use of significant powers should be fit for purpose. There are significant and ongoing issues when trying to identify rights and obligations at play, inadequate and inconsistent access to and collation of data, and inconsistencies in relation to where relevant provisions (in relation to signification powers) are found (either in legislation or policy or both). As such the Law Society agrees that the current system is not sufficiently clear, transparent, or consistent.

Draft objectives

27. The issues paper sets out a range of draft objectives that the regulatory framework for the rights, protections, safeguards, and mitigations for the use of significant powers in residences should adopt.

28. In relation to upholding the rights of children and young people, there is limited reference to what children and young people's rights actually are. The only right referred to is the right to participate, suggesting that this is the primary right of relevance. Although we anticipate that more detail, in terms of the applicable rights, will become apparent as consultation progresses, we suggest that consideration is given early as to what rights do in fact apply. We are also unclear what is meant by enabling children to 'apply' their rights and suggest this is clarified.

29. As to the third objective, we suggest this should be broken down into two separate objectives:

    a. preventing any unnecessary use or misuse of these powers; and

    b. preventing children and young people in residential care experiencing harm, abuse, neglect etc.

    Both these objectives are equally important – unnecessary use or misuse of these powers should be avoided in all cases regardless of outcome and children and young people in care should not experience harm, abuse, neglect through the exercise of these powers (or otherwise).

Key policy questions

30. We agree with the key policy questions and suggest an additional question under the first bullet point: How will any protection mechanisms be integrated into, and work together with, the criteria and process for the exercise of any significant powers?

Appendix 1: Issues and gaps with specific protection mechanisms contained in the Oranga Tamariki Act 1986 and the Residential Care Regulations 1996

31. The Law Society broadly agrees with the issues and gaps identified in Appendix One and offers the following additional comments in relation to specific issues.

The rights of a child or young person

32. Although the Regulations came into force after the UNCRC was ratified by New Zealand, understanding of the meaning and effect of the rights contained in the UNCRC has continued to evolve including through General Comments issued by the UN Committee on the Rights of the Child (such as General comment No. 24 (2019) on children's rights in the child justice system) and discussion at Days of General Discussion (such as the 2021 DGD on Children's rights and alternative care). The Law Society suggests it would be timely for the Regulations to be reviewed against New Zealand's obligations under international law more generally

including the UNCRC, UNCRPD, United Nations Declaration on the Rights of Indigenous Peoples and Optional Protocol to the Convention Against Torture as well as domestic case law including Youth Court decisions following the 2019 amendments to the Act.

Communicating the rights of a child or young person to them & the types of powers

33. There are a range of other issues and concerns in relation to the timing and process of explanations of children's rights that are not identified in the issues papers. It is important that children are informed of their rights at or soon after admission into a residence. However, we agree that it can be hard for children to take in information at this point as they will often be upset, anxious and not able to retain information easily. Therefore, it is necessary for any explanation of children's rights to be given to them at multiple times and in a language that they understand. It is also important that whoever is explaining those rights, checks their understanding of the rights and ensures they have access to a trusted adult (parent/caregiver) or lawyer for child to help with that understanding.

The authority that enables the residence to use that power (legislation, regulation, operational guidance)

34. We agree that consistency concerning where the authority for a power sits in the regulatory framework is generally desirable. However, it is unclear whether the intention is that there should be consistency between the criteria for the use of different powers or something else. If so, this may not be appropriate in all cases, for example where the criteria are related to the nature of the specific power. Some matters relating to the criteria on use of a power (such as the best interests of the child as a paramount consideration) will apply across all powers.

Court oversight/ approval for continued use of the power

35. We agree there should be consideration of applying mandatory court oversight of the use of other powers (rather than primarily to secure care as is the current situation) including as to what the appropriate timeframe may be.

Time limits for the use of the power

36. Clarity on the time limits for the use of the power is important, but it is unclear which aspects of these provisions are currently considered to be hard to implement operationally. We suggest further information should be provided.

Grievance and complaints procedures

37. Practical access to advocacy (discussed further below) should also be considered when reviewing the current grievance and complaints procedures. While making changes at an operational level may address some of the issues identified (such as a complaint must be in writing), it is equally important that the Regulations also set out an accessible procedure for children and young people to make a grievance or complaint, including ensuring any lawyer for child is aware of the procedures if issues were to arise. Any changes to address these issues should also include consideration of the current Regulations.

Advocates

38. The Law Society agrees there is a lack of clarity in relation to staff obligations to ensure access to advocates and counsel when a young person is subject to other powers such as secure care

or searches. However, we note that not all advocates are volunteers given Voyce was established in 2017 and is now operating in most regions.[14]

Internal monitoring

39. Being able to effectively engage with children and young people generally and specifically with the cohort of young people in residential care is a critical part of effective internal monitoring. If children and young people do not feel safe and have the confidence in the people and the process, they are unlikely to share their concerns or experiences with the auditors meaning the resulting inspection will be missing a vital piece of data. The Law Society welcomes a review of these procedures.

Reintegration processes

40. As the issue papers notes, operational guidance currently only considers reintegration processes for secure care. There are no express regulatory requirements on how staff should support children and young people following the use of a power.

41. The Law Society suggests that the issue is wider than reintegration alone. The issues paper appears to suggest that the focus of any reintegration process/es is on the relationships with others in the residential care setting as opposed to addressing the trauma caused to the child or young person through the exercise of the power. Many children and young people in residential care have previously experienced trauma including as the victim of physical and/or sexual abuse. The exercise of these coercive powers can often exacerbate the impact of any prior trauma suffered by the child or young person. As such we suggest the focus of reviewing any reintegration processes should be centred on the wellbeing and best interests of the child/young person in and of themselves rather than tied to the operation of the residential care environment (as is suggested by the description of the issue in the paper). We also note that any improved reintegration processes will have operational impacts, and therefore consideration must also be given to measures that ensure appropriately qualified and experienced staff are available, across all shifts, to support best practice.

D. Other matters

<u>Information sharing</u>

42. This issues paper explores whether the right information is available to support young people in care. The Law Society makes the following brief comments.

43. Firstly, we agree that, as part of OT's work to consider whether the provisions are operating as intended and what changes are required, consideration must be given to how tikanga Māori can inform a new approach to information sharing. We also agree with the draft problem that there is room for improvement in how OT collects, uses and shares information with iwi and Māori partners.

44. Secondly, we note that current practice means there are often significant gaps in the flow of information. Practitioners have indicated that often it is the lawyer acting for the child or young person who needs to follow up with a specific agency/iwi to ensure information is flowing between them. Commonly this is between OT social workers and health organisations

[14] Voyce - Whakarongo Mai is an independent charity organisation that helps to advocate for the approximately 6000 children with care experience (children in foster or whanau care) in New Zealand. Voyce has offices in Auckland, Whangarei, Hamilton, Tauranga, Hawke's Bay, Wellington and Christchurch, with satellite offices in Taranaki, Levin and Dunedin.

(i.e. clinical teams). In other instances, the lawyer for child directly alerts the court to information the court is not aware of. Such information often comes to the lawyer for child from the school, caregivers, or other professionals working with the child/young person for example.

45. Practitioners also note there are many instances where work is being done by one agency without involving other relevant agencies who are also dealing with similar aspects of a child's life. This can result in two completely different approaches being taken by, for example a mental health provider and the local OT office.

46. Therefore, where children and young people are being supported by a variety of professionals, it is imperative that those professionals work together by sharing relevant information to ensure the best possible outcomes for those children and young people. If the variety of professionals operate in silos, this becomes difficult for children and young people to manage. As the paper notes, this does not always happen efficiently. It is also outside of the role of lawyer for child to facilitate information flow in these situations where the Act dictates who has overall responsibility.

47. Finally, the paper looks at the problem in one direction: information flowing from OT to iwi partners. The paper also identifies that some iwi / Māori partners fall outside the legal definition of a 'child welfare and protection agency'. This creates a gap regarding the flow of information from iwi partners to OT. Practitioners have indicated that iwi partnerships in some regions are well established and appear to be working well. While in other regions, iwi representatives are rarely present at Family Group Conferences (**FGCs**) nor seen at other stages in the care and protection system. This can cause difficulties in ensuring that the right information is available to those who need it. The Law Society agrees it is timely to review the information sharing provisions, to ensure they align with tikanga Māori and are operating as intended.

<u>Young people sentenced in the adult jurisdiction and detained in an Oranga Tamariki youth justice residence</u>

48. This issues paper reviews the current law that applies to young people sentenced to imprisonment in the adult courts and detained in a youth justice residence. The Law Society agrees the current legislative framework is not fit for purpose. As the Chief Executive now has express obligations to take into account the principles of te Tiriti, legislative amendment is necessary to ensure the framework that applies to a young person in these circumstances also upholds te Tiriti. Further, there needs to be clarity on which piece of legislation takes priority: the Act or the Corrections Act 2004. We agree that the focus of this paper should therefore be on ensuring consistency with the principles of the Act first and foremost, alongside consistency with relevant international conventions and obligations (such as the Beijing Rules which provide guidance on how children should be treated in the criminal justice system).

<u>Special guardianship orders</u>

49. This issues paper reviews the nature of the orders empowered by sections 113A and 113B of the Act. In its submission on the Oranga Tamariki Amendment Bill,[15] the Law Society expressed disappointment that the opportunity to review the overall appropriateness of

[15] New Zealand Law Society submission, *Oranga Tamariki Amendment Bill*, 17 February 2022, accessible here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/OT-Amendment-Bill-NZLS-Submission.pdf

special guardianship had not been taken. Therefore, we welcome this review and consideration of the legislation governing special guardianship orders since their introduction in 2016, particularly given inconsistencies with the principles in the Act and the duties of the chief executive in relation to the te Tiriti o Waitangi.

50. Further and as the issues paper also notes, it is important these orders are reviewed given recent Court decisions have resulted in divergent views on how special guardianship orders apply to tamariki Māori.[16]

51. In addition to the divergence of views among the judiciary, there are also divergent views among the profession in terms of the appropriateness of special guardianship. Some practitioners have noted that special guardianship should be repealed as they no longer have a place in Aotearoa New Zealand's law. While others are of the view that the special guardianship provisions leave OT, whānau, and lawyers in an untenable position about the ongoing use of the provision. Therefore, when OT begin work on developing proposed solutions to these issues, we recommend there is wide consultation with the judiciary and legal profession.

52. Finally, the Law Society's Family Law Section notes there are other options for "permanency", for example, section 101 and 110 orders in favour of caregivers together with a support/services order which the issues paper does not appear to address. Such orders ensure a social worker is still involved to manage access with difficult/abusive/addicted parents and maintain ongoing connections with whānau where relationships with caregivers may be difficult. A broader look at the permanency provisions in conjunction with special guardianship orders may be appropriate. For example, should the option of services/support orders for permanent caregivers (currently excluded under sections 86B and 92A) be reintroduced?

<u>Voluntary care agreements</u>

53. This issues paper considers the pathways available to young people and their families to enter into long-term voluntary care agreements without having to seek a Court order.

54. As the paper notes, section 141 (which allowed care agreements for children and young people termed "severely disabled" and were renewable every 12 months) has been repealed. This means the only current alternative pathways for a child or young person that is severely disabled are a section 101 or 140 order which adds a layer of formality and ongoing review. The loss of section 141 has caused some difficulties with families who having made a difficult but informed decision to place a child with disabilities in a care situation, are then subject to ongoing OT reviews which undermines their parental decision making. Therefore, we suggest the paper also includes consideration of how such children can receive care on an agreed basis without the need for a section 101 court order.

55. Voluntary care arrangements (via section 139 and 140) are the least restrictive method of intervention and can avoid the use of a section 101 court order in a wider range of appropriate situations. However, there is limited ability for a lawyer for child to be involved or some other kind of independent lens to ensure the circumstances are in fact appropriate for a section 140 order. For example, the legislation provides that a section 140 order can only be

[16] See for example *Re I* [2021] NZFC 210 (also referred to as *Chief Executive of Oranga Tamariki – Ministry for Children v BH*), Judge Otene, January 2021 and *Re WH* [2021] NZFC 4090, Judge Southwick, 5 May 2021.

made if an FGC has been held. However, practitioners have noted several examples of FGCs being by-passed. It is essential that parties have independent legal advice before applying for a section 140 order and that the right supports are being offered. This should also extend to attendance at an FGC.

56. In addition, the Law Society's Family Law Section have noted the following issues with section 140:

    a. There is no plan that goes with a section 140 order except for an FGC plan.

    b. There is no ability for the court to monitor or indeed ensure that OT is complying with the FGC plan.

    c. There is no opportunity for the lawyer for child to provide an independent voice and challenge where decisions may not be in the best interests of a child.

57. If voluntary care agreements are extended for longer durations, safeguards will need to be put in place to ensure those agreements are actively monitored and reviewed, and that the child's safety and wellbeing is kept a paramount consideration. This is particularly important for disabled children due to their significant vulnerability.

<u>Options for remand</u>

58. This issues paper considers the remand options available to the Youth Court when a young person first appears charged with an offence. The Law Society agrees that the remand options are no longer fit for purpose (considering recent reforms to the Act) and considering the ongoing need to understand how to better manage the needs of those on remand. As noted above, particular attention should be paid to international conventions and obligations including General Comment No. 24 (2019) on children's rights in the youth justice system which noted that young people with developmental delays or neurodevelopmental disorders or disabilities (for example fetal alcohol spectrum disorder) should not be in the child justice system at all.

59. Further remand options in the Act must ensure that any detention placement of a young person away from their parents, whānau, hapu, and iwi, and any other limitation on their freedom and rights, is in their best interests and is the minimum necessary to protect the interest of the public and victims of the alleged offending. However, as OT moves towards a more therapeutic operating model, greater attention on current resourcing restraints will also be paramount. With only five youth justice residences currently in operation, there are significant resourcing issues which often result in difficulties finding a placement, limited funding for support services (for example supported bail) and situations where the young person has no close family or whānau support. This lack of resourcing often means that tamariki with complex needs do not receive the level of support or intervention they are entitled to.

60. Therefore, any consideration of a wider range of remand options to provide greater flexibility to the Court, also needs to ensure there is adequate resourcing and if not, appropriate measures to address any resourcing constraints.

E. Conclusion

61. We trust the above is helpful and look forward to the opportunity to be involved during stage two of the consultation process (designing and assessing options for changing the legislation).

62. If you have any questions or comments concerning this submission, contact can be made via Aimee Bryant, Manager Law Reform and Advocacy, aimee.bryant@lawsociety.org.nz.

Nāku noa, nā

Ataga'i Esara
Vice-President