

Access to justice for children and young people in Aotearoa New Zealand

Working paper No.1 - Children and young people in care or with care-experience

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Introduction

Context

This working paper forms part of an overall research project exploring the extent to which children and young people are able to access to justice in Aotearoa New Zealand. The findings of the research study are presented in three parts:

Part One contains my analysis of data from key informant interviews with adults with expertise in the justice system and/or working with particular groups of children and young people, as well as from a survey of children and young people aged 14 to 24.

Part Two discusses the meaning of access to justice and other related concepts such as legal empowerment as well as the specific meaning of access to justice for children and child-friendly justice. It then discusses the justice problems experienced by children and young people generally, as well as common barriers to accessing justice. The analysis in this report is based on my review of the research and literature in New Zealand and overseas as well as analysis of information obtained from the government and Crown entities.

This report is supported by a series of ten working papers discussing the justice problems and barriers to accessing justice experienced by particular groups of children and young people and is broken up into a series of reports relating to groups identified as likely to experience differing justice problems or barriers to access. These working papers are:

1. Children and young people in care or with care experience;
2. Disabled and neurodiverse children and young people;
3. Tamariki and rangatahi Māori;
4. Pacific children and young people;
5. Rainbow and takatāpui children and young people;
6. Girls and young women;
7. Boys and young men;
8. Poverty and socio-economic disadvantage;
9. Trauma; and
10. Intersectionality.

Part Three explores possible solutions or ways to close the justice gap for children and young people in Aotearoa New Zealand. This part of the study is also supported by a series of working papers in relation to possible solutions. At the time of writing working papers consider the following topics with additional working papers likely to follow:

11. Strategic litigation;
12. Legal service delivery, non-lawyer services, and integrated services;
13. Data, evidence and measuring change;
14. Technology;
15. Training for professionals;
16. Legal education and continuing professional development for lawyers and judges; and
17. Law-related education for children and young people.

The reports and working papers are available at: <https://www.cypaccesstojusticenz.com/>

Executive Summary

This working paper explores the justice problems and barriers to access experienced by children and young people in care and with care experience, followed by some of the possible solutions raised in the research and literature from Aotearoa New Zealand and overseas. Each section is briefly summarised below.

Justice problems

Children and young people in State care and those with care-experience are more likely to experience a range of justice problems including both problems relating to their care status or transition from care, as well as increased prevalence of justice problems that are also experienced by other children and young people.

Issues relating to care status. Children and young people in State care experience a range of issues relating to entry into care and whilst in care such as around contact with their parents and siblings, issues in relation to the suitability of their placements, and compliance with care standards more generally.¹

Justice issues in the education system. Child and young people in care or with care experience are more likely to experience a range of justice issues in the education system including bullying and discrimination, special educational needs (or the provision to meet them), being the subject of school disciplinary action such as stand-downs, suspensions, exclusion and expulsion, and the right to education more generally.²

Victimisation. A range of sources including Oranga Tamariki Safety of Children in Care reports,³ reports by the Office of the Children's Commissioner,⁴ and submissions from lawyers representing survivors of abuse in care⁵ demonstrate that children in care continue to suffer abuse. Studies in other countries also identify children in care or leaving care as vulnerable to victimisation including criminal exploitation.⁶

Transition from care. Young people transitioning from care can experience a range of additional challenges moving into independence including multiple and high needs and a lack

¹ Independent Children's Monitor. (2021). [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021; Brief of Evidence of Tanisha Batten](#) (Wai 2915, #A143) at para 46 & 50.

² VOYCE – Whakarongo Mai. (2022). [Children in State Care. Thematic Report to the United Nations Committee on the Rights of the Child](#); Oranga Tamariki Voices of Children and Young People Team. (2019). [Experiences of Education for Children in Care in Aotearoa New Zealand / Part 1: Voices of children in care and key adults in their lives](#). Oranga Tamariki—Ministry for Children; Oranga Tamariki Voices of Children and Young People Team. (2019). [Experiences of Education for Children in Care: Part 2: Review of New Zealand Government Data](#). Oranga Tamariki—Ministry for Children; Oranga Tamariki Voices of Children and Young People Team. (2019). [Experiences of Education for Children in Care. Part 3: Literature scan](#). Oranga Tamariki—Ministry for Children.

³ Oranga Tamariki—Ministry for Children. (2022). [Safety of Children in Care Annual Report July 2020 to June 2021](#).

⁴ Office of the Children's Commissioner. (2019). [A Hard Place to be Happy](#); Office of the Children's Commissioner. (2021). [Oranga Tamariki Residence Visit \(Unannounced OPCAT monitoring\) Office of the Children's Commissioner OPCAT Monitoring – Unannounced visit Epuni Care and Protection Residence](#)

⁵ Cooper, S., Benton, S. & Raibel, C. (2022). [Alternative report in advance of New Zealand's review at the 93rd session of the United Nations Committee on the Rights of the Child](#).

⁶ Commission for Children and Young People. (2021). [Out of sight: systemic inquiry into children and young people who are absent or missing from residential care](#); Moore, T., McArthur, M., Death, J., Tilbury, C. & Roche, S. (2017). Young people's views on safety and preventing abuse and harm in residential care: "It's got to be better than home". *Children and Youth Services Review*, 81, 212-219.

of the 'normal' support provided by families.⁷ Although amendments have been made to the Oranga Tamariki Act to provide for increased transitional support and transition services have been established, recent reports including those by the Independent Children's Monitor and VOYCE Whakarongo Mai raise serious concerns about Oranga Tamariki's failure to comply with the Care Standards around transition support and the effectiveness of the transitional support on offer.⁸ Overseas research and literature also identifies the challenges in transitioning from care and related legal and non-legal problems that can result if insufficient support is provided.⁹

Housing instability and homelessness. New Zealand based research by independent researchers and commissioned by Oranga Tamariki identifies the inadequacy of housing support and services for young people leaving care with research in 2022 reporting that Oranga Tamariki Transition Support Services in 20 only provided 134 supported accommodation places leaving the 5,200 other young people transitioning from care reliant on personal support and universal adult housing services.¹⁰ Similar gaps between need and provision also exist overseas with research in Australia linking lack of suitable housing with criminalisation.¹¹

Involvement in the youth and criminal justice systems. There is clear evidence that the vast majority of children and young people in the youth justice system have had contact with the care & protection system as either 'crossover kids' (those who have been subject to a report of concern to Oranga Tamariki) and 'dual status' kids (those who are the subject of concurrent proceedings in the Youth and Family Courts).¹² This phenomenon and the practices that result in it are sometimes described as the criminalisation of care and protection.¹³ Again, this picture is repeated in other jurisdictions with literature discussing the drivers of the criminalisation of care including both individual factors (experiences of child maltreatment, exposure to violence, and prevalence of trauma, neurodisability, emotional and behavioural difficulties) and systemic factors (increased surveillance and supervision, less support in navigating the system, and systemic failures to meet children and young people's support needs).¹⁴ Research and literature

⁷ Oranga Tamariki— Ministry for Children. (2022). [Prioritising housing services for young people moving to independence from care and youth justice settings](#); Oranga Tamariki Evidence Centre. (2018). [Transitions Cohort Needs Assessment](#).

⁸ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 77; Independent Children's Monitor [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#); VOYCE – Whakarongo Mai. (2022). [Whakamānawatia tōku taiao! He hononga rangatira! Honour my world – my noble connections: Rangatahi experiences of leaving care in Aotearoa New Zealand](#).

⁹ Commission for Children and Young People. (2020). [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#); McDowall, J. (2020). [Aboriginal and Torres Strait Islander Care-Leaver Experiences](#). Create Foundation; Martin, R., Cordier, C., Jau, J., Randall, S., Thoresen, S., Ferrante, A., Chavulak, J., Morris, S., Mendes, P., Liddiard, M., Johnson, G., and Chung, D. (2021). [Accommodating transition: improving housing outcomes for young people leaving OHC, AHURI Final Report No. 364](#), Australian Housing and Urban Research Institute Limited.

¹⁰ Oranga Tamariki— Ministry for Children, [Prioritising housing services for young people moving to independence from care and youth justice settings](#) at 15.

¹¹ Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#) at 17.

¹² Fitzgerald, A. (2021). *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People*. (unpublished paper) at 28; Ministry of Justice. (2023). [Youth Justice Indicators Summary Report](#) at 17-18.

¹³ For example see Werry, K. (2021). Crossover kids in New Zealand. *New Zealand Law Journal*, 312-315 at 313-314.

¹⁴ Baidawi, S. & Ball, R. (2022). [Multi-system factors impacting youth justice involvement of children in residential out-of-home care](#). *Child & Family Social Work*. 1–12 at 2 & 7.

also identifies the additional challenges that children and young people in care experience when they have contact with the criminal justice system.¹⁵

Barriers

Children and young people in State care and those with care-experience experience are also more likely to experience a range of barriers to accessing justice. Some of these barriers are common to other children and young people, some are similar but operate in different ways, and others are distinct to this group.

Attitudinal barriers. Research and literature in Aotearoa New Zealand and overseas discusses the stigma and prejudicial attitudes experienced by children and young people in care including stereotypes that children in care are 'bad', just like their parents,¹⁶ or as one young person recalled being told by a social worker "future justice".¹⁷ Research overseas also points to the stigmatising effect of using language like 'absconding' instead of running away from care,¹⁸ and how prejudice about children in care can also be compounded by other factors such as gender stereotypes.¹⁹ A key challenge to accessing justice is an attitude that children and young people in care or with care experience are more likely to lie or exaggerate including the failure to believe children in care when they report abuse as well as when care-experienced young people seek the assistance of authorities after victimisation as an adult.²⁰

Experiences of prejudicial or negative treatment by system actors then has an impact on how children and young people in care or with care experience go on to view those in authority with many having a 'trust deficit' making them reluctant to engage due to their own experiences.²¹ The 'no-narking' culture in residential care in particular can also operate as a barrier to accessing justice for this cohort.²² More generally, children and young people may be concerned about what will happen if they make a complaint or challenge a decision.

¹⁵ See Howard League for Penal Reform. (2019). [Representing looked-after children at the police station: a step-by-step guide for lawyers](#). Howard League for Penal Reform, Youth Justice Legal Centre & Just for Kids Law at 2. See also Lightowler, C. (2022). [Improving legal support for children and young people in conflict with the law: A scoping study](#). Clan Childlaw at 31.

¹⁶ Royal Commission of Inquiry into Abuse in Care (n.d.) [State Institutional Response Hearing Transcript of Proceedings 25 August 2022](#) at 964.

¹⁷ [Witness Statement of Tupua Urlich dated 10 August 2021](#). Royal Commission of Inquiry into Abuse in Care at 4.

¹⁸ Commission for Children and Young People, [Out of sight: systemic inquiry into children and young people who are absent or missing from residential care](#) at 30.

¹⁹ Harris, M., Goodfellow, P. & Bridge, M. (2021). [Young Women's Justice Project Falling Through the Gaps: Young women transitioning to the adult justice system](#). Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice at 19.

²⁰ Egan-Bitrán, M. (2012). [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#). Office of the Children's Commissioner at 24; Howard League for Penal Reform, [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 4; Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice. (2022). [We've not given up": Young women surviving the criminal justice system](#). Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice at 31.

²¹ Peek, C. & Kallmier, M. (2021). [LevelUP: An innovative legal project to help young people in Out Of Home Care](#). Mid North Coast Community Legal Centre at 18; Moore, T., & McArthur, M. (2022). [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#). Institute of Child Protection Studies, Australian Catholic University at 85; Howard League for Penal Reform [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 4.

²² Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 85; Royal Commission of Inquiry into Abuse in Care (n.d.) [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 813-814.

Structural / systemic barriers. A consistent theme in recent research and reviews is the power imbalance between children and young people in care who lack power and Oranga Tamariki staff (social workers and residential care staff) who can “do powerful things like separate children from their parents”.²³ This power imbalance operates as a significant barrier to making complaints or challenging decisions made about children and young people in care.

A lack of knowledge and awareness about their rights also operates as a barrier.²⁴ A key problem is a lack of clarity in relation to exactly what rights are with this lack of clarity experienced both by children and young people who the Independent Children’s Monitor reported did not always know the difference between rights and rules,²⁵ and by Oranga Tamariki whose ‘Statement of Rights’ is more akin to an explanation of the social workers’ role than an explanation of children in care’s legal rights and entitlements.²⁶

Practical barriers. Another barrier to accessing justice is a need for support that is not always available. Children and young people in care generally do not have the same access to support systems as other children, and although there are advocacy services available to support children in care, many young people do not all know about it or how to contact them.²⁷

Perhaps the most significant barrier to accessing justice is the lack of any clear mechanism to enforce the rights of children and young people in care. Children in care do have a technical ability to apply to vary or discharge orders made about their care. However, there are challenges to exercising this right in practice. It also does not translate into a general ability to challenge decisions made about their day to day care. Oranga Tamariki’s complaints system has also been heavily and consistently criticised in a series of reviews and reports repeatedly identifying the same issues and barriers in particular, that the complaints system is adult-centred and inaccessible to children and young people in care.²⁸ Repeated commitments to improve practice have also failed to result in any meaningful change. Children and young people in care have also lost their ability to make complaints to the Office of the Children’s Commissioner despite opposition from across the children’s sector.²⁹

²³ Egan-Bitran, [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#) at 24. See also Office of the Children’s Commissioner [A Hard Place to be Happy](#) at 23; Royal Commission of Inquiry into Abuse in Care (n.d.) [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 986; Oranga Tamariki Evidence Centre. (2018). [Changing Feedback and Complaints: An evaluation report informing the Oranga Tamariki feedback and complaints system](#). Oranga Tamariki—Ministry for Children at 11.

²⁴ Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 11.

²⁵ Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 115.

²⁶ See [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, Schedule 2](#).

²⁷ Robin, 20-years-old, Youth Hui speech, Auckland, July 2013 quoted in Ashton, *The Rights of Children and Young People in State Care* at 1083; Independent Children’s Monitor [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 75, n71. Interestingly, the publicly available version of the Oranga Tamariki, *Te Matatiki Report* does not report on responses to these questions about Voyce Whakarongo Mai see: Oranga Tamariki Voices of Children and Young People Team (2021) [Te Mātātiki 2021: Findings from the 2019/2020 survey of tamariki and rangatahi in care](#). Oranga Tamariki—Ministry for Children at 21.

²⁸ See the Case Study: Oranga Tamariki complaints process - ten years of reviews in *Working paper no. 1 - Children and young people in care or with care experience*.

²⁹ See Children’s Rights Alliance Aotearoa New Zealand. (2022). [Joint Children’s Sector Submission to the Social Services and Community Select Committee: Oversight of the Oranga Tamariki System and Children and Young People’s Commission Bill](#) at 2. Many of the organisations supporting the joint

Possible solutions

I discuss a number of ways that the justice gap for children and young people in care or with care experience could be reduced starting with improvements to the provision of legal services to children and young people involved in the Oranga Tamariki system and the need for tailored legal services for children and young people in care or with care-experience in relation to other legal issues. There is very little guidance for Lawyers for the Child in Aotearoa New Zealand in comparison to other jurisdictions. I advocate for the development of substantive guidance and training with the content developed by experienced practitioners in partnership with children and young people with care experience and other key stakeholders. It is also important that children and young people in care or with care-experience have access to tailored and specialist legal services for other common areas of legal need including in the education system, criminal justice system and when transitioning from care.

Non-lawyer services such as VOYCE Whakarongo Mai can also play a critical role with the benefit of more education and training about the law and access to other support such as legal secondary consultations and legal health checks. Other possible solutions include finally making long overdue changes to the Oranga Tamariki complaints system and the need for justice system professionals to receive training in relation to the rights of children in care or with care experience as well as in relation to their particular needs and challenges.

The section on possible solutions is not a complete analysis, nor an attempt to identify all possible ways to resolve the access to justice challenges experienced by children and young people in care or with care experience. It should be read together with working papers 11-17 which discuss possible ways of increasing access to justice for children and young people more generally.³⁰

submission also made their own submissions for example see: Save the Children New Zealand (SCNZ). (2022). [Save the Children Submission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill](#).

³⁰ Working papers 11-17 discuss Strategic litigation; Legal service delivery, non-lawyer services, and integrated services; Data, evidence and measuring change; Technology; Training for professionals; Legal education and continuing professional development for lawyers and judges; and Law-related education for children and young people.

Justice problems

A 2014 article by Sarah Ashton, then working at the Dingwall Trust, a New Zealand NGO which provides a range of services to children including residential care and transition services, describes some of the overall challenges for this group of children and young people:³¹

Young people in the general population are staying for longer periods of time within family environments, while vulnerable young people leaving care are expected to live independently and become fully functioning members of society at 17 years of age. Comparative to the general population, young people in the care system have experienced significant trauma, grief or loss in their lives; have had less success within the education system; have inadequate family/whanau networks or support; have greater mental health problems; less resilience to risk; are less confident and significantly lacking in the skills required to live independently (Cashmore & Paxman, 1996; Stein, 2005).

These disparities are common across similar jurisdictions as the Australian Commission for Children and Young People explains:³²

While some young people thrive after care, people with an experience of care on average have significantly poorer life outcomes than their peers. This includes increased risk of poor physical and mental health, unemployment, homelessness, early parenthood and involvement in the justice system.

Information requests

The Office of the Children's Commissioner (OCC)³³ does not operate a formal complaints system but it does employ a member of staff to answer calls and respond to emails from the public through what is called the 'Child Rights Advice Line'. I requested information from the OCC in relation to the subject matter of issues raised by children who had contacted this line over the last ten years.³⁴ The OCC provided me with information in relation to 166 contacts where the 'caller type' had been identified as a child or a young person. Of these 166 contacts, 37 related to care & protection issues or children in care.³⁵ Of these, 8 related to placements, 18 related to support and the remaining 11 related to a range of other issues including investigation, access, transition, behaviour problems, CYFS referral, and policy / guidelines.

Although the Ombudsman is not subject to the Official Information Act, I contacted them to request the same information in relation to the subject matter of complaints made by children and young people under the age of 25.³⁶ The Ombudsman's Office responded to advise that their document management system did not provide the ability to easily collate and consolidate complaint information based on demographic information of the complainant.³⁷ Following

³¹ Ashton, S. (2014). The Rights of Children and Young People in State Care. *Educational Philosophy and Theory*, 46(9), 1082-1088 at 1083.

³² Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#) at 13. See also Chiappetta, C. (2019). Reducing Domestic Violence and Improving Outcomes for Children: Funding Civil Legal Aid to Maximize Impact. *Family Court Review*, 57, 465-477 at 467.

³³ The Office of the Children's Commissioner will become the Children and Young People's Commission on 1 July 2023: [Children and Young People's Commission Act 2022, ss2 & 11](#).

³⁴ See [Letter from Jennifer Braithwaite to the Office of the Children's Commissioner dated 21 June 2021](#).

³⁵ See [Letter from Office of the Children's Commissioner to Jennifer Braithwaite dated 21 September 2021](#) and [Appendix 1: Child Rights Enquiries Data \(CRED\)](#). This is the raw data provided.

³⁶ See [Letter from Jennifer Braithwaite to Office of the Ombudsman dated 21 June 2021](#).

³⁷ See [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#).

correspondence in relation to the information that they would be able to provide, the Ombudsman's Office provided information in relation to the complaints they had received made by or on behalf of young people in relation to children in care.³⁸

There were 243 complaints to the Ombudsman by or on behalf of children in care in the period from 1 July 2019 to 30 June 2021.³⁹ Of these:

- 123 related to the conduct of staff or officials;
- 91 related to complaints procedure or complaints handling;
- 55 related to decision making or administrative processes;
- 13 related to delay; and
- The remainder related to a large range of other issues including advice or information given to the complainant, privacy interference, reasons for a decision, record keeping, and standard of service.

Other contextual information

A recent series of reports by the Adolescent Health Research Group's using data from the Youth19 Rangatahi Smart Survey compare outcomes between students who reported involvement with Oranga Tamariki and those who had never been involved identified a range of disparities⁴⁰ with those ever involved:

- Less likely to report feeling part of school, feeling safe at school, that adults at school care about them, and that teachers treat students fairly, and more likely to report frequent bullying.⁴¹
- More likely to have been hit or harmed by others, been hit or harmed by an adult in the home, and experienced sexual violence, abuse or unwanted sexual behaviours; more likely to have been in trouble with the police and treated unfairly by the police because of their ethnicity.⁴²
- More than twice as likely for to have experienced housing deprivation with differences higher again for those indicating current involvement. Differences in severe housing deprivation were even starker.⁴³
- Much more likely to report that their family had to split up because of housing costs and that they had moved two or more times in the last 12 months.⁴⁴

³⁸ Information in relation to complaints in relation to children in care included all complaints made by or on behalf of children and young people since 1 July 2019 when the Children in Care team was created. See [Email from Office of the Ombudsman to Jennifer Braithwaite dated 21 July 2021](#).

³⁹ Some complaints related to more than one issue. Where this occurred each issue was counted separately. See [Excel spreadsheet of children in care complaints for the raw data provided](#).

⁴⁰ Archer, D., Clark, T.C., Fenaughty, J., Sutcliffe, K., Ormerod, F., & Fleming, T. (2021). [Young people who have been involved with Oranga Tamariki: Community and contexts](#). The Youth19 Research Group, The University of Auckland and Victoria University of Wellington, New Zealand; Fleming, T., Archer, D., King-Finau, T., Ormerod, F., Clark, T.C., (2021). [Health and Wellbeing of young people who have been involved with Oranga Tamariki: Home and Housing](#). The Youth19 Research Group, The University of Auckland and Victoria University of Wellington, New Zealand; Fleming, T., Archer, D., Sutcliffe, K., Dewhirst, M., & Clark, T.C. (2021). [Young people who have been involved with Oranga Tamariki: Mental and physical health and healthcare access](#). The Youth19 Research Group, The University of Auckland and Victoria University of Wellington, New Zealand.

⁴¹ Archer et al., [Young people who have been involved with Oranga Tamariki: Community and contexts](#) at 4.

⁴² Ibid.

⁴³ Fleming et al., [Health and Wellbeing of young people who have been involved with Oranga Tamariki: Home and Housing](#) at 13.

⁴⁴ Ibid at 13.

- reporting high rates of emotional distress, with almost half reporting symptoms of depression, close to half reporting serious thoughts of suicide in the last year and approximately one in five reporting attempting suicide in the last year⁴⁵
- More than twice as likely to report a disabling condition (students were classed as having a ‘disabling condition’ if they reported having a long-term disability, chronic condition, or pain that impacts their day-to-day functioning).⁴⁶
- Reporting markedly higher rates of period poverty and missing school due to period poverty.⁴⁷

It is important to note that reporting involvement with Oranga Tamariki does not mean that a child or young person has been ‘in care’ as the student may have interacted with Oranga Tamariki in another way such as being involved in a Family Group Conference.⁴⁸ However, these data contribute to the understanding of the challenges faced by children and young people in this cohort especially given the limited data in relation to children in care. Although Youth19 Rangatahi Smart Survey did not ask about legal issues or legal problems, it is easy to how the differences in experiences outlined above translates to difference in the experience of legal problems.

Issues relating to care status

Children and young people in State care also experience a range of issues whilst in care such as around contact with their parents and siblings, issues in relation to the suitability of their placements, care planning, and their rights or ability to have their say more generally. For example, the Independent Children’s Monitor’s report for the year from July 2020 to June 2021 reported comments from children in care who felt that their rights had not been upheld including in relation to care planning:⁴⁹

When we spoke with tamariki and rangatahi some knew about, and could exercise, their rights. Most talked about ways their rights are not upheld, for example, when they are not involved in their care planning; do not get things they are entitled to; have their privacy broken; or feel forced to do things they have the right to say no to. One rangatahi told us that they feel isolated in their placement as they are “mocked” by their caregivers for holding different religious beliefs. Another said, “No one is listening to me. Who is giving rights to kids?”

Tanisha Batten, then 17 years’ old, gave evidence at the Waitangi Tribunal hearing in 2020 about her experiences in the care system:⁵⁰

Oranga Tamariki do not listen to us when we are growing up. We have no voice. We are told ‘this is adult stuff, stay out of it’. We tried to say, ‘this is about us!’ but we were always silenced.

Children and young people in care’s inability to effectively challenge day to day decisions about their care has also been identified as a barrier in other jurisdictions. The Independent Inquiry

⁴⁵ Ibid at 14.

⁴⁶ Ibid at 15.

⁴⁷ Ibid.

⁴⁸ Archer et al., [Young people who have been involved with Oranga Tamariki: Community and contexts](#) at 44, Appendix 3. This term / criteria also has some other limitations: a student cannot report engagement with Oranga Tamariki if they are not aware of it and some students might report engagement if their immediate family has been involved (parents, siblings) whereas others may not.

⁴⁹ Independent Children’s Monitor. (2022). [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 75.

⁵⁰ [Brief of Evidence of Tanisha Batten](#) (Wai 2915, #A143) at para 46 & 50.

into Child Sexual Abuse in the United Kingdom also raised issues with children in care's inability to apply for orders to control a local authority's exercise of its parental responsibility,⁵¹ and recommended that the legislation be amended to allow children "to bring an application under the 1989 Act so that a court's paramount consideration is the child's welfare".⁵²

Disability

As discussed in the Working paper in relation to disabled and neurodiverse children and young people, a series of reports by the Human Rights Commission and the Independent Children's Monitor have raised concerns about Oranga Tamariki's lack of data in relation to the disability status of children and young people in care. For example, a 2021 report by the New Zealand Human Rights Commission (HRC) raises concerns that there is little information about the abuse of disabled children in Aotearoa⁵³ citing a response from Oranga Tamariki "that they were unable to provide details about the numbers, or situations, of disabled children in care".⁵⁴ The HRC argued that this lack of data collection constitutes a failure to adequately monitor the wellbeing of disabled children.⁵⁵

The Independent Children's Monitor's report for the July 2020 to June 2021 year found that they could not say whether Oranga Tamariki are meeting all obligations for disabled tamariki due to gaps in their self-monitoring data.⁵⁶ These gaps include the fact that Oranga Tamariki could only provide data for 5% of the 199 measures in the monitoring framework meaning it needed to rely on reviewing and analysing samples of case files and QPT for its self-monitoring.⁵⁷ The ICM report for the July 2021 to June 2022 repeated these concerns before concluding that data gaps mean that neither Oranga Tamariki nor the Monitor can adequately see what the quality of care looks like for tamariki with disabilities.⁵⁸ The UN Committee on the Rights of the Child also raised concerns about Oranga Tamariki's lack of disability data in its 2023 Concluding Observations on New Zealand.⁵⁹

Another study by the Youth 19 research team in relation to the mental and physical health of young people who had been involved with Oranga Tamariki found that young people ever or currently involved with Oranga Tamariki reported nearly double rates of reporting a disabling condition as compared with young people without involvement.⁶⁰ A 'disabling condition' is defined as "a long-term disability, chronic condition, or pain that impacts their day-to-day functioning".⁶¹ Although this definition differs from that used by Oranga Tamariki and in the

⁵¹ 'Parental responsibility' means "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property": [Children Act 1989, s3](#).

⁵² Inquiry Panel. (2022). [The Report of the Independent Inquiry Into Child Sexual Abuse](#). Independent Inquiry into Child Sexual Abuse at 179-180. See also Kozlowicz, K. (2022). [Children's rights legal digest – October 2022](#). Article 39.

⁵³ New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2021). [Whakamahia te tūkinokore ināianei, ā muri ake nei: Acting now for a violence and abuse free future](#) at 33.

⁵⁴ Ibid at 34.

⁵⁵ Ibid.

⁵⁶ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 9.

⁵⁷ Ibid at 43.

⁵⁸ Independent Children's Monitor. (2023). [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 12.

⁵⁹ United Nations Committee on the Rights of the Child. (2023). [Concluding observations on the sixth periodic report of New Zealand](#). The Office of the High Commissioner for Human Rights at 8.

⁶⁰ Fleming et al., [Young people who have been involved with Oranga Tamariki: Mental and physical health and healthcare access](#) at 15.

⁶¹ Ibid at 15.

Disability Survey, the relative proportions shows a clear over-representation of disabled children and young people.

The ICM also reported comments from some Oranga Tamariki staff and caregivers about a lack of disability knowledge and support as well as concerns over poor communication between agencies providing support to disabled children and young people.⁶² In particular, the ICM found that Oranga Tamariki support of health needs, especially mental health needs is variable including low screening for substance abuse, psychological distress and suicide risk.⁶³

Reports by the Office of the Children's Commissioner into Oranga Tamariki residences have also identified shortcomings in care. For example, an unannounced visit to Epuni Care & Protection residence found that that staff were unable to provide adequate care for children and young people with complex mental health needs⁶⁴ as well as an increase number of self-harming and suicide attempts with some that could have resulted in fatalities.⁶⁵

Education

VOYCE Whakarongo Mai's thematic report to the United Nations Committee on the Rights of the Child summarises the additional challenges children and young people in care experience in the education system.⁶⁶

Students who have been in care are more likely to have challenges around school engagement, achievement, and education pathways¹⁴. ...Fewer young people with experience of care (55%) achieve Secondary School NCEA qualifications than young people with no experience of care (84%)¹⁵. They also have a higher rate of disengagement from education (exclusion or enrolment in alternative education) and change schools more frequently. 25% of children with experience of care have at least three school changes, compared with 3% of children with no experience of care.¹⁶

Child and young people in care or with care experience are more likely to experience a range of issues in education that have a legal element or a legal solution including bullying and discrimination, school disciplinary decisions, special educational needs (or the provision to meet them) and the right to education more generally.

Bullying and discrimination

In 2019 the Oranga Tamariki Voices of Children team undertook three pieces of research in relation to the experiences of children in care in the education system – a qualitative study involving interviews with children in care, caregivers, social workers and education staff, a review of New Zealand Government data and a literature scan.⁶⁷ Participants in all groups

⁶² Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 106.

⁶³ Ibid at 21 & 104-105.

⁶⁴ Office of the Children's Commissioner, [Oranga Tamariki Residence Visit \(Unannounced OPCAT monitoring\) Office of the Children's Commissioner OPCAT Monitoring – Unannounced visit Epuni Care and Protection Residence](#) at 9.

⁶⁵ Ibid at 8.

⁶⁶ VOYCE – Whakarongo Mai, [Children in State Care. Thematic Report to the United Nations Committee on the Rights of the Child](#) at 12.

⁶⁷ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care in Aotearoa New Zealand / Part 1: Voices of children in care and key adults in their lives](#); Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care: Part 2: Review of New Zealand Government Data](#); Oranga Tamariki Voices of Children and Young People

involved in the qualitative study talked about children in care experienced stigma and bullying in school environments including children in care feeling anxious about being stigmatised when their peers found out about their care status and some children in care and caregivers believing that schools were ineffective at dealing with bullying.⁶⁸ Participants also described how social workers' practices including visiting and transporting children to school can detrimentally affect children who can experience "unwelcome attention, questions, teasing and bullying from peers".⁶⁹ Participants in the study also noted that children in care could be vulnerable to bullying because of their inability to manage their behaviour towards those who initiated the bullying.⁷⁰

The literature scan cited research by Benbenishty et al in relation to the educational experiences of care-experienced young people in California which found that care-experienced young people were "significantly more likely to report more negative school-related experiences, including higher rates of discrimination, victimisation, feeling unsafe at school, and lower rates of belongingness, having adult support in school, and school participation".⁷¹ They also found evidence suggesting that some of the gap in achievement between care-experienced young people and their peers was due to this negative schooling environment.⁷² Other research cited in the literature scan highlighted the stigmatisation of children in care including teachers, caregivers and social workers having lower academic expectations of children in care.⁷³ Another recent study in Germany also found that children in out of home care experienced a higher prevalence of bullying victimisation than youth in biological families with 18% of youth in out of home care reporting having experienced one form of bullying victimization, 3% reporting two forms, and 1 % reporting experiencing all three forms as compared with only 5% of youth in biological families reporting having experienced one form of bullying victimisation.⁷⁴

Research by the Adolescent Health Research Group's using data from the Youth19 Rangatahi Smart Survey relating to students who reported involvement with Oranga Tamariki found that those ever involved reported poorer outcomes on every school indicator including being:⁷⁵

- particularly less likely to feel that adults at school care about them (69.2% versus 80.2% of those never involved)
- less likely to feel that teachers treat students fairly (49.8% versus 70.8% of those never involved)
- over twice as likely to experience bullying in the past 12 months (12.3% versus 5.1% of those never involved) and less likely to feel safe at school (73.5% versus 88.6% of those never involved).

Team, [Experiences of Education for Children in Care. Part 3: Literature scan](#). The findings of these three reports were then summarised in Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care. Part 4: Summary of Key Findings](#).

⁶⁸ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care in Aotearoa New Zealand / Part 1: Voices of children in care and key adults in their lives](#) at 17.

⁶⁹ Ibid at 6.

⁷⁰ Ibid at 73.

⁷¹ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care. Part 3: Literature scan](#) at 21.

⁷² Ibid.

⁷³ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care. Part 4: Summary of Key Findings](#) at 12.

⁷⁴ Wiemann, A., Werner, A., Konrad, K., Niestroj, S.C., Steden, S., & Lohaus, A. (2023). Lifetime poly-victimization and later bullying victimization: Associations with internalizing problems and out-of-home care. *Child Abuse & Neglect*, 135, 105970.

⁷⁵ Archer et al., [Young people who have been involved with Oranga Tamariki: Community and contexts](#) at 14 & 17 (Table 2).

Data for those young people currently involved with Oranga Tamariki was even worse with very few reporting that they felt that teachers treated students fairly (43.4%) and many not feeling safe at school (69%).⁷⁶

Special educational needs

The Oranga Tamariki Voices of Children team qualitative study found that many children in care have individual learning needs for which they would benefit from learning support and that the failure to recognise or meet these needs can impact on children's ability to access or make progress in education.⁷⁷ In particular, a number of participants described the increasing prevalence of foetal alcohol spectrum disorder (FASD) and the impact this disorder has on children's ability to learn and engage with their peers.⁷⁸ Education staff described not feeling trained or equipped to meet their needs, this was supported by social workers who felt that schools were not always able to meet their needs.⁷⁹

A study in the United Kingdom using data from the National Pupil Database and the all-of-England children looked after return and children in need census found that 83% of children ever in care during school had SEN provision at some point as compared with 65% of children in need but not care, and 37% of children who had neither been in care or found to be in need.⁸⁰

Disciplinary processes

The Oranga Tamariki Voices of Children and Young People Team analysis of government data found that children in care are more likely to have been stood down in the past year (9% versus 1% of those with no care experience).⁸¹ The disparity between children in care and those with no care experience increases with age with the rate of stand-downs among 5 to 9-year-olds 4% for children in care versus <1% for those with no care experience), while among 10 to 13 year olds it was 11% versus 1% and among 14 to 17 year olds it was 12% versus 3%.⁸² There were also similar but less extreme disparities in suspension rates e.g. the suspension rate among 10 to 13 year old children in care was 4% versus less than 1% for those with no care experience, and the suspension rate among 14 to 17 year old children in care was 6% versus 1% for those with no care experience.⁸³

The Oranga Tamariki Voices of Children and Young People Team qualitative study discussed some of the reasons children in care experience disciplinary action in school including difficulties with interpersonal relationships that can lead to children behaving in ways that result in them being excluded as well as difficulties in learning associated with health and trauma, which can lead to behavioural issues and exclusion.⁸⁴ Some participants also raised concerns about the

⁷⁶ Archer et al., [Young people who have been involved with Oranga Tamariki: Community and contexts](#) at 14 & 17 (Table 2).

⁷⁷ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care in Aotearoa New Zealand / Part 1: Voices of children in care and key adults in their lives](#) at 34.

⁷⁸ Ibid at 39.

⁷⁹ Ibid at 40.

⁸⁰ Jay, M.A. & Gilbert, R. (2021). [Special educational needs, social care and health](#). *Archives of Disease in Childhood*, 106, 83-85.

⁸¹ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care: Part 2: Review of New Zealand Government Data](#) at 10.

⁸² Ibid at 11.

⁸³ Ibid.

⁸⁴ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care in Aotearoa New Zealand / Part 1: Voices of children in care and key adults in their lives](#) at 72.

decreasing support and tolerance for mistakes as children in care move from primary school to intermediate and secondary school which increase the risk of exclusion from school.⁸⁵

The literature scan reviews overseas research in relation to these disciplinary disparities in other jurisdictions as well as possible reasons for the disparities including the higher rates of behavioural problems demonstrated by care-experienced children and young people.⁸⁶ The summary report used an extract from an interview with a care-experienced child to illustrate the point that difficulties with personal relationships could lead to children behaving in ways that lead to exclusion:⁸⁷

This boy is really mean to me. Heaps of people are really mean to me and I am just one of those people who can't put up with it. I just get really angry coz things do hurt me and I just get really angry when I ask them to stop and if they don't stop, I get into fighting and stuff like that. I can't handle things like that, and I hurt people because it hurts me about what they say to me. Well I tried to stab someone. He was just like in my face and annoying me. The teacher didn't care what he said but as soon as I like threatened him, I got into trouble more. So, I got sent home, then had a meeting and then got kicked out for three months. [Māori female, age 14]

The summary report also notes that children in care may experience disorders such as foetal alcohol spectrum disorder (FASD) and attention deficit hyperactivity disorder (ADHD) which may be associated with behavioural issues.⁸⁸

Rather than the deficit focussed approach used in these reports, another way of looking at this would be to consider whether Oranga Tamariki are providing the young person with the support that they need, and if not, whether it is this failure that is the real cause of any behavioural issues. That is, Oranga Tamariki have obligations under the Care Standards to provide assistance to children and young people in care to support their education and training needs including “additional support needed for the child or young person, and in particular a child or young person with disabilities, to succeed in education”⁸⁹ and it may be that providing this support could reduce, if not eliminate, the risk of behavioural issues and therefore disciplinary action by a school.

Ministry of Education guidelines for principals and boards of trustees on stand-downs, suspensions, exclusions and expulsions provides that decision makers should consider “the student’s individual circumstances and the context of the incident” including whether “there any pastoral concerns or mitigating factors”.⁹⁰ While there is no a specific reference to care status, arguably a child or young person’s experiences of abuse or neglect and care status could well be part of the student’s individual circumstances that should be considered by school decision makers. This of course requires the school to be aware of it which raises other issues in terms of whether this information is available to the school and the child’s right to privacy.

A study relating to children and young people in State care in South Australian government schools found that children in care in government schools are suspended at a rate over four

⁸⁵ Ibid at 72.

⁸⁶ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care. Part 3: Literature scan](#) at 17.

⁸⁷ Oranga Tamariki Voices of Children and Young People Team, [Experiences of Education for Children in Care. Part 4: Summary of Key Findings](#) at 7.

⁸⁸ Ibid.

⁸⁹ Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018, r41.

⁹⁰ Ministry of Education. (2009). [Guidelines for principals and boards of trustees on stand-downs, suspensions, exclusions and expulsions Part I Legal options and duties](#) at 6.

times higher than government school students who are not in care,⁹¹ and between 8 and 12 times as likely to be excluded from school.⁹² Other research in Australia and the United States has found that around one third of children and young people in care or with care-experience who went on to criminal justice system involvement had experienced school exclusion (suspension or expulsion).⁹³ This research also found that school exclusion often occurred in the context of the child or young person's emotional and behavioural regulation challenges and was more common for disabled and neurodiverse children and young people.

United Kingdom data presents an interesting picture where children in care are permanently excluded at around the same rate as all children but more than five times more likely to have a fixed period exclusion (similar to a stand-down or suspension). Children in Need⁹⁴ were over two times more likely to be permanently excluded and three and a half times more likely to be excluded for a fixed period.⁹⁵ The *Timpson Review of School Exclusion* suggests that this could be down to the statutory exclusion guidance which sets out that "head teachers should 'as far as possible' avoid permanently excluding a looked after child, but does not say the same for fixed period exclusion".⁹⁶ The *Timpson Review of School Exclusion* suggests a number of reasons for the disparity in disciplinary action more generally.⁹⁷

Children who have experienced domestic violence, loss or separation can find it hard to trust adults around them or form positive attachments. This can result in behaviour that may look like defiance but is often rooted in mistrust, fear or negative examples of behaviour they have seen in their own lives. These children may respond differently to particular sanctions which, rather than leading to changing their behaviour, can further damage relationships with adults around them.

It also describes the impact of fixed term exclusions quoting a parent who "described the impact of repeated fixed period exclusions on her adopted son as 'enormous. It is another rejection ... you were rejected by your birth family and now the school'".⁹⁸

Right to education

Both of the two full reports by the Independent Children's Monitor cite Oranga Tamariki staff concerns about the impact of poor communication and collaboration between Oranga Tamariki and education providers on the education of children and young people in care.⁹⁹ The report relating to the year July 2021 to June 2022 quotes an Oranga Tamariki social worker saying:

⁹¹ Office of the Guardian for Children and Young People. (2020). [Children and Young People in State Care in South Australian Government Schools, 2009-2019](#). Government of South Australia at 14.

⁹² Ibid at 16.

⁹³ Baidawi et al., [Research Report: Care criminalisation of children with disability in child protection systems](#) at 30.

⁹⁴ Under [Section 17 of the Children Act 1989](#) a child will be considered in need if (a) they are unlikely to achieve or maintain or to have the opportunity to achieve or maintain a reasonable standard of health or development without provision of services from the Local Authority; (b) their health or development is likely to be significantly impaired, or further impaired, without the provision of services from the Local Authority; or (c) they have a disability:

⁹⁵ Secretary of State for Education. (2019). [Timpson Review of School Exclusion](#). Department for Education at 39.

⁹⁶ Ibid at 39.

⁹⁷ Ibid at 41.

⁹⁸ Ibid.

⁹⁹ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 114; Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 13.

“[s]chools not wanting Oranga Tamariki kids make it difficult. The minute they do anything out of line they get kicked out.”¹⁰⁰

The report also cites concerns from education staff about inadequate communication and collaboration particularly when tamariki and rangatahi transitioned to a new school with one reporting that the Ministry often are not told when a child moves school or where they have gone resulting in their learning support not transferring with them.¹⁰¹

The Education Review Office has raised “persistent issues with the quality of education” of children and young people in Oranga Tamariki residences in a series of four reviews over the last 11 years.¹⁰² The key findings of the most recent evaluation in 2021 included that students often studied credits with limited pathways, students’ learning was disrupted and disconnected when they move between placements, there is “no agreed education model or a clear picture of what high quality education looks like”, there are high levels of variable provision, and “lack of opportunities for whānau and caregivers to connect to their children’s learning”.¹⁰³

Lightowler’s scoping study on the legal issues for children in conflict with the law in Scotland found that the right to education was one of the most important legal issues for young people in the community.¹⁰⁴ Young people participating in her research described having their education blocked or curtailed including through being taken out of class to attend meetings or to talk to the police, information about them being given to their teachers without their knowledge or consent which affected their relationship with their teachers, and not being provided with the support they needed whilst in school.¹⁰⁵ Research in Canada has also identified challenges in education for children in care including that they are about half as likely to graduate from high school as are their counterparts in the general population concluding that “[l]ow educational achievement is just one of many negative long-term consequences experienced by youth in care.”¹⁰⁶

Victimisation

Oranga Tamariki Safety of Children in Care Annual reports provide evidence that children in care continued to be victimised and abused in care. In the July 2020 to June 2021 year 486 children or eight percent of all children in care suffered 742 instances of harm.¹⁰⁷ The proportion of tamariki Māori in care with findings of harm in this period (76%) was more than the overall numbers of tamariki Māori in care in the period (68%), a 6% increase on the previous year.¹⁰⁸

¹⁰⁰ Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 13.

¹⁰¹ Ibid.

¹⁰² Te Ihu Waka Education Evaluation Centre. (2021). [Learning in residential care: They knew I wanted to learn](#). Education Review Office at 64.

¹⁰³ Ibid at 56.

¹⁰⁴ Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 30.

¹⁰⁵ Ibid at 30-31.

¹⁰⁶ Bergman, J. (2020). [Intersectionality: A Means for Addressing the Needs of Children with Mental Health Issues who are Engaged with the Family Law and Criminal Justice Systems?](#) *Windsor Yearbook of Access to Justice*, 36, 115-137 at 130-131.

¹⁰⁷ Oranga Tamariki— Ministry for Children, [Safety of Children in Care Annual Report July 2020 to June 2021](#) at 8.

¹⁰⁸ Ibid at 9.

The proportion of tamariki Māori Pacific in care with findings of harm (13%) was also proportionately greater than the number of tamariki Māori Pacific in care (10%).¹⁰⁹

During the July 2021 to June 2022 year the numbers reduced very slightly with 453 children in care or 7% of all children in care experiencing 711 incidents of harm.¹¹⁰ The proportion of tamariki Māori and Māori Pacific in care with findings of harm was still slightly more than the overall numbers of tamariki Māori and Māori Pacific in care (73% as compared with 69%).¹¹¹ A key finding was that there was a significant increase in the number of findings for children and young people in residential placements (from 32 to 88 findings) with at least part of this increase reflecting findings from the investigation at Te Oranga Residence.¹¹² There was also an increase in the number of findings of physical harm caused by other (from 40 to 70 findings) and in the number of findings of physical harm caused by staff (from 27 to 49 findings) with most of these relating to inappropriate responses to behaviour including the use of force and unapproved restraint techniques.¹¹³

The Office of the Children's Commissioner's report exploring the experiences of children and young people in the secure care and protection residences reported that "several children and young people said they'd been bullied by others in the residence – physically, sexually or verbally" including an incident where a young person was choked by another resident and others involving sexual behaviour.¹¹⁴ Children and young people also told OCC staff that they worried about their own and other young people's safety with one saying it was better to be in the secure unit as she was afraid of other young people in the residence.

Other reports from the Office of the Children's Commissioner have made positive findings of children being harmed in residential care. For example, the report of an unannounced visit to Epuni found that "children and young people being harmed by staff".¹¹⁵ Children and young people also described being anxious, scared and powerless as a result of previous incidents where staff had failed to protect them.¹¹⁶ There were instances where children had been incited to undertake assaults on others and staff used the threat of other young people hurting them to intimidate.¹¹⁷

Other sources also provide evidence of continuing abuse in care. For example, Cooper Legal a prominent law firm representing survivors of abuse in care, report that their experience is that children and young people in care "have continued to be subjected to violence, including torture and other cruel, inhuman and degrading treatment" and that their youngest clients, "still in their late teens, have disclosed being subject to assaults by other residents, poor supervision (which

¹⁰⁹ Ibid at 9. The proportions of Pacific and New Zealand European and Other children in care with findings of harm were both proportionally lower than the overall proportions in care.

¹¹⁰ Oranga Tamariki— Ministry for Children. (2023). [Safety of Children in Care Annual Report July 2021 to June 2022](#) at 8.

¹¹¹ Ibid at 9.

¹¹² Ibid at 10. For further information about the investigation at Te Oranga see Oranga Tamariki— Ministry for Children. (2022). [Response to recommendations from the Office of the Children's Commissioner monitoring visit to: Te Oranga Care and Protection Residence](#).

¹¹³ Oranga Tamariki— Ministry for Children, [Safety of Children in Care Annual Report July 2021 to June 2022](#) at 11 & 17.

¹¹⁴ Office of the Children's Commissioner, [A Hard Place to be Happy](#) at 19. The report also notes that they heard both that staff react quickly to protect children and that sometimes staff did not react quickly enough when bad things happen.

¹¹⁵ Office of the Children's Commissioner, [Oranga Tamariki Residence Visit \(Unannounced OPCAT monitoring\) Office of the Children's Commissioner OPCAT Monitoring – Unannounced visit Epuni Care and Protection Residence](#) at 5.

¹¹⁶ Ibid at 7.

¹¹⁷ Ibid.

has exposed them to psychological and sexually exploitative behaviour by others) and the ability to access drugs while in State residences”.¹¹⁸

A recent literature review commissioned by Oranga Tamariki identifies young people in care as being at a higher risk of sexual and labour exploitation through additional trauma and/or continued maltreatment with those living in residential or other out-of-home care at particularly high risk.¹¹⁹ Specific sub-groups are at further heightened risk including children and young people of colour, girls and young women, rainbow children and young people, and disabled and neurodiverse children and young people.¹²⁰

The UN Committee on the Rights of the Child Concluding Observations issued in February 2023 raised concerns about “incidents of harm disproportionately experienced by” children in care and allegations that children in secure residential care facilities experience injuries from the use of restraints by staff, are subjected to bullying and unsanitary conditions”.¹²¹

The Australian Commission for Children and Young People’s Inquiry into children and young people who are absent or missing from residential care found that an “alarmingly high number” were sexually exploited, abused and assaulted, often by adult men with this exploitation, abuse and assault sometimes going on ongoing for long periods of time with devastating and long-term consequences.¹²² Other studies have also found that children and young people’s experience of residential care is “marked by a lack of safety, sustained violence, and ongoing threats of physical, emotional, and sexual abuse” including adult-child sexual abuse, peer sexual violence, and abuse and sexual exploitation by adults outside the residential care setting.¹²³ These risks are even more acute for some groups of children and young people in care with research suggesting that children and young people with neurodisability are particularly vulnerable to peer pressure and criminal exploitation by older youth and adults.¹²⁴

Transition from care

The challenges for young people transitioning to independence from care and youth justice placements have also be recognised in recent research by Oranga Tamariki.¹²⁵ This group of young people “often have multiple and high needs as well as fragmented personal support systems” with these challenges compounding for some population groups such as Māori, Pacific, disabled people, and rainbow communities.¹²⁶

Research conducted by Oranga Tamariki in 2018 in preparation for amendments coming into force the following year found that 40% of the young people currently in the care of Oranga

¹¹⁸ Cooper et al., [Alternative report in advance of New Zealand’s review at the 93rd session of the United Nations Committee on the Rights of the Child](#) at 16-17.

¹¹⁹ Cording, J., Collinson, Z. & Carter, M. (2023) [Child Exploitation Literature Scan: Extended review](#). Allen & Clarke at 8.

¹²⁰ Ibid at 20.

¹²¹ United Nations Committee on the Rights of the Child, [Concluding observations on the sixth periodic report of New Zealand](#) at 8.

¹²² Commission for Children and Young People, [Out of sight: systemic inquiry into children and young people who are absent or missing from residential care](#) at 33.

¹²³ Moore et al., Young people’s views on safety and preventing abuse and harm in residential care: “It’s got to be better than home” at 213.

¹²⁴ Baidawi, S., Ball, R., Newitt, R., Turnbull, L., Kembhavi-Tam, G., Avery, S., & Sheehan, R. (2023) [Research Report: Care criminalisation of children with disability in child protection systems](#). Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability at 64.

¹²⁵ Oranga Tamariki— Ministry for Children, [Prioritising housing services for young people moving to independence from care and youth justice settings](#) at 2.

¹²⁶ Ibid.

Tamariki, and likely to become eligible for transitional support, had a high or very high level of need.¹²⁷ A follow-on survey found that:

- 78% of the young people surveyed (about a third of the transition cohort) had mental health needs, most commonly trauma or stressor-related disorders;¹²⁸
- 89% of the young people surveyed (over a third of the transition cohort) were identified as exhibiting behaviour that put themselves or others at risk of harm;¹²⁹
- 54% of the young people surveyed (about one in five for the transition cohort) were identified as having, or were suspected to have, a substance abuse problem;¹³⁰
- 47% of the young people surveyed (about one in five for the transition cohort) were identified as having, or were suspected to have, a disability;¹³¹
- Co-morbidity was common with 63% presenting with two or more of the mental health, disability and substance abuse needs;¹³² and
- 27% of the young people with a disability or suspected disability were not having their disability-related needs addressed and were not in the process of setting up services.¹³³

The amendments to the Oranga Tamariki Act which came into force in July 2019 in relation to transition support included:

- The provision of advice and non-financial assistance with financial assistance being at the discretion of the Department and may only be considered after first considering “what other financial assistance is available to the young person”.¹³⁴
- Housing assistance but this is limited to staying or returning to live with a caregiver. The caregiver must also agree and it is expected that the rangatahi will contribute up to 60 percent of their total net income towards their weekly board costs.¹³⁵

Oranga Tamariki also established a new Transition Support Service to provide young people who are leaving care with supports to better enable them to transition from care to adulthood in order to implement its new obligations under amendments to the Oranga Tamariki Act and the National Care Standards.¹³⁶ An Oranga Tamariki commissioned evaluation of the transition services highlighted a number of ‘key insights’ including that the Transition Support Service was working well for the majority of young people accessing it¹³⁷ but there was still a small proportion of eligible young people who are not faring as well including those experiencing mental health challenges and emotional and cognitive longer-term difficulties.¹³⁸ It also noted that rangatahi Māori had more negative than positive messages about the transition service and suggested improvements.¹³⁹ Other findings in the evaluation that were not highlighted as ‘key insights’

¹²⁷ Oranga Tamariki Evidence Centre. (2018). [Transitions Cohort Needs Assessment](#) at 4.

¹²⁸ Ibid at 5.

¹²⁹ Ibid at 5.

¹³⁰ Ibid at 6.

¹³¹ Ibid at 6.

¹³² Ibid at 7.

¹³³ Ibid at 21. Only 44% were having their needs met with the others either having their needs partly met (17%) or in the process of setting up services (3%).

¹³⁴ [Oranga Tamariki Act 1989, s386B](#).

¹³⁵ Oranga Tamariki Practice Centre. (n.d.). *Transition to adulthood — Entitlement to remain or return to live with a caregiver*. <https://practice.orangatamariki.govt.nz/policy/transition-to-adulthood-entitlement-to-remain-or-return-to-live-with-a-caregiver/#telling-rangatahi-about-their-entitlements-and-responsibilities>

¹³⁶ Oranga Tamariki Practice Centre, *Transition to adulthood*. See also Part 5 of the National Care Standards: <https://www.legislation.govt.nz/regulation/public/2018/0111/latest/whole.html#LMS56178>

¹³⁷ Malatest International. (2021). [Survey of rangatahi/young people eligible for a transition worker](#). Oranga Tamariki at 29.

¹³⁸ Ibid.

¹³⁹ Ibid.

included a finding that around a third of respondents who were eligible for a transition worker did not have one¹⁴⁰ and that only 12% of respondents had heard about Entitlement to Remain or Return (ETRR).¹⁴¹

Some of the report's conclusions also do not seem to be well supported by the evidence. For example, the heading "[t]ransition plans are developed, acted on and updated" was followed by the results from four survey questions only one of which actually referred to a plan "[h]as anyone talked with you and worked out a plan for after you turn 18?".¹⁴² Only 52% of the 46 respondents answered 'yes' to this question (35% answered 'no' and 13% answered 'not sure')¹⁴³ which is hardly evidence that transition plans are even developed, let alone acted on or updated. The evaluation report also noted that "responses were limited by not being able to reach many young people as their contact details were not recorded in the Oranga Tamariki central database".¹⁴⁴ The report does not comment on why young people's details were not in the central database but it is reasonable to assume that if Oranga Tamariki did not have these young people's details, they are not in contact with them nor could they be providing them with any support. As such, while the survey respondents may have been "broadly representative" in terms of their demographic characteristics,¹⁴⁵ they are much less likely to be representative of the experiences of young people who were eligible for support.

The Independent Children's Monitor's first full report also notes that Oranga Tamariki reviewed a sample of 268 cases of the 732 rangatahi who were eligible for transition services and found that half of the sample (136) had not had a life skills assessment and only nine per cent of the sample (23) had a complete assessment¹⁴⁶ despite these assessments being mandatory under the Act and the National Care Standards.¹⁴⁷ The ICM also reported that only 177 (43 percent) had a transition plan and of these, rangatahi were only involved in the planning process in 65 percent of cases.¹⁴⁸ Again, both a transition plan and the involvement of rangatahi its development are expressed as mandatory obligations in the National Care Standards.¹⁴⁹

The second full report a year later showed little improvement with only 43% of the sample of 209 cases showing that life skills were assessed to some extent.¹⁵⁰ The ICM also reported that care partners told ICM staff that there are challenges in the way Transition Services contracts

¹⁴⁰ Ibid at 7.

¹⁴¹ Ibid at 16.

¹⁴² Ibid at 9.

¹⁴³ Ibid at 9.

¹⁴⁴ Ibid at 2.

¹⁴⁵ Ibid at 2. The report doesn't explain what is meant by this term so I have made an assumption here.

¹⁴⁶ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 77.

¹⁴⁷ [Oranga Tamariki Act 1989, s386A\(2\)](#); [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, r75](#). The other questions were 'Have you had a FGC to talk about what to do after you turn 18?', 'When you turned 18, had you been part of a FGC?' and 'Have you talked with a TW?'

¹⁴⁸ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 91.

¹⁴⁹ [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, r72](#); [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, r73](#). The involvement of the current caregiver, the manager of any residence the rangatahi is placed in, and the whānau is also mandatory but caregivers were only involved in 57% of cases and whānau in only 43%: Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 91.

¹⁵⁰ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 59.

are issued including in relation to provider's connections with rangatahi (or lack thereof) and the timing of transition planning which often does not begin until shortly before a young person's 18th birthday.¹⁵¹ The ICM report quotes a care partner saying

In 2021 staff at the Hillcrest Remand Home expressed their frustration at the lack of support that young people receive when they leave Hillcrest. The OCC recommended that Hillcrest improves its Transition Service to help young people returning to their whānau and communities.¹⁵² The Ministerial Advisory Board also raised concerns about transition support in their 2021 review of the provision of care in care and protection residences.¹⁵³ A key gap in transition support services in Aotearoa is in relation to housing as discussed further below.

Another report by Malatest International for the New Zealand Government notes that take-up of ETRR has been lower than expected.¹⁵⁴ Some of the reasons for this low take-up could be related to the weaknesses identified by social work academic Nicola Atwool:¹⁵⁵

- Lack of differentiation between different categories of need;
- The reliance on young people remaining with their caregivers;
- Lack of national consistency of funding provider; and
- The culturally inappropriate emphasis on individualism and independence as desirable and valuable traits.

A 2022 study by VOYCE – Whakarongo Mai involving interviews with 23 rangatahi from across Aotearoa about their experiences of leaving care gives further indications of the reasons for low uptake of ETRR.¹⁵⁶ Of the 23 rangatahi interviewed, 16 rangatahi were eligible for ETRR, but only one had taken this up.¹⁵⁷ The reasons rangatahi gave for not accessing ETRR included not being aware of it, not living with an approved caregiver, choosing to live independently, and not having a suitable caregiver.¹⁵⁸

Of those who described not living with an approved caregiver, three rangatahi reported being placed with members of their extended birth whānau who Oranga Tamariki did not consider to be approved caregivers. They described having to find their own living arrangements whilst in care with the caregiver approval process either getting in the way being inconsistently applied leaving these rangatahi unable to take up ETRR.¹⁵⁹

Of those who described not having a suitable caregiver, eleven did not think their relationship with their caregiver was strong enough to continue after care and were eager to leave the placement.¹⁶⁰ Nine felt that caregivers didn't want rangatahi to remain living with them and seven described circumstances that prevented them staying in the home such as caregiver poor health, conflict or overcrowding.¹⁶¹ Others described the lack of caregivers resulting staying in

¹⁵¹ Ibid at 66. See also the more detailed discussion at 76.

¹⁵² Office of the Children's Commissioner. (2021). [Oranga Tamariki Remand Home \(OPCAT monitoring\) Hillcrest Remand Home, Hamilton](#) at 5 & 7.

¹⁵³ Oranga Tamariki Ministerial Advisory Board. (2021). [Review of provision of care in Oranga Tamariki residences: Report of the Ministerial Advisory Board](#). Oranga Tamariki—Ministry for Children at 18-19.

¹⁵⁴ Malatest International. (2021). [Literature review: Jurisdictional literature review of accommodation support](#). Oranga Tamariki at 1.

¹⁵⁵ Atwool, N. (2020). Transition from care: Are we continuing to set care leavers up to fail in New Zealand? *Children and Youth Services Review*, 113, 104995.

¹⁵⁶ VOYCE – Whakarongo Mai, [Whakamānawatia tōku taiao! He hononga rangatira! Honour my world – my noble connections: Rangatahi experiences of leaving care in Aotearoa New Zealand](#).

¹⁵⁷ Ibid at 22.

¹⁵⁸ Ibid at 23-24.

¹⁵⁹ Ibid at 30.

¹⁶⁰ Ibid at 9.

¹⁶¹ Ibid at 32.

“non-family environments, such as hotel rooms, group homes, boarding schools, and even an agency office” leaving them unable to take up ETRR.¹⁶² Of particular concern:¹⁶³

Five rangatahi felt considerably let down by the care system and its workers, and therefore didn't want to stay connected to the system. Four rangatahi talked about having lost trust in the system as a result of their experiences and that this impacted on their willingness to engage with workers. Five rangatahi said they felt the lack of support they were provided has set them up to fail, and that they have at times felt ignored and isolated within the system. These rangatahi did not see any benefit in remaining connected to the care system any longer than necessary.

A series of studies in Australia have all raised similar issues in relation to the need for support to transition from care into adulthood and independence with housing being a key challenge.¹⁶⁴ Research by the New South Wales Office of the Advocate for Children and Young People which involved 99 children and young people in out of home care (OOHC) or with OOHC experience found that the overwhelming majority felt quite strongly that 18 years was too young to exit care and the leaving care age should be raised.¹⁶⁵ Young people also asked for “more financial support, career advice, mental health support and independent living skills such as budgeting and cooking skills” as well as additional supports for young people with complex needs.¹⁶⁶

The Australian Commission for Children and Young People also held an inquiry into services for young people transitioning from out-of-home care in 2020. Their report commented on the lack of an enforceable legal right to receive services and supports as young people transition to independence and how this contributes to reduced options when planning for leaving care, an increasing gap in between the availability and demand for discretionary post-care services, and the relatively poor life outcomes of care leavers.¹⁶⁷ Another Australian study in relation to Aboriginal and Torres Strait Islander Care-Leaver Experiences found 29% of young people wanted more support for the transition process.¹⁶⁸

A report describing a two-year project to respond to the needs of young people transitioning from out of home care in Australia describes the nature and types of legal issues experienced by this cohort.¹⁶⁹ Clients of the service experienced “multiple, intertwined legal issues” averaging between five and eight legal issues per client. Common issues included domestic and family violence (within biological family, intimate relationships and in care), issues in relation to Victims Services claims (claims not being made, processed, or having stalled due to inability to contact the client), benefit issues, minor criminal law matters including fines, debts and complaints about policing and care providers.¹⁷⁰

A United Kingdom scoping study in relation to the needs of children and young people in contact with the justice system discussed the justice related implications of a failure to meet care leavers

¹⁶² Ibid at 31.

¹⁶³ Ibid at 50.

¹⁶⁴ Office of the Advocate for Children and Young People. (2022). [The Voices of Children and Young People in Out-of-Home Care](#); Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#); McDowall, [Aboriginal and Torres Strait Islander Care-Leaver Experiences](#); Martin et al., [Accommodating transition: improving housing outcomes for young people leaving OHC, AHURI Final Report No. 364](#) at 11.

¹⁶⁵ Office of the Advocate for Children and Young People, [The Voices of Children and Young People in Out-of-Home Care](#) at 57.

¹⁶⁶ Ibid at 60.

¹⁶⁷ Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#) at 22.

¹⁶⁸ McDowall, [Aboriginal and Torres Strait Islander Care-Leaver Experiences](#) at 3.

¹⁶⁹ Peek & Kallmier, [LevelUP: An innovative legal project to help young people in Out Of Home Care](#).

¹⁷⁰ Ibid at 12.

legal entitlements to continuing care, after-care, housing, benefits, and education.¹⁷¹ Lightowler gave the example that a care experienced young person who was not receiving their entitlements may not have what they need to obtain bail rather than being placed on remand, such as suitable accommodation. She also describes hearing about care experienced young people in a young offenders institute not receiving benefits and being unable to purchase clothes, toiletries, and food whilst in custody.¹⁷²

Who Cares? Scotland heard similar things in their research with care-experienced people with a quote from one participant illustrating why transitional support is needed:¹⁷³

Your parents don't just say you're too old, goodbye, it doesn't happen to other people why should it happen to me? You don't stop experiencing care, trauma, financial support, parenting in general. It would be nice to know if I fall on hard times, or I feel lonely, then that door is open.

As Ara & McVie explain leaving care is often challenging for young people “[t]he shift from being fully looked after (e.g., not having to worry about cooking or managing household bills) to independent living is difficult but especially so for young people who are returning to their pre-care contexts and environment.”¹⁷⁴ They argue that the failure to treat homeless care leavers with dignity and respect increases the likelihood of involvement in further offending and heavy drug use.¹⁷⁵

Quinn et al. describe how the experience of care leavers who do not have “any of the culturally ‘normal’ supports provided by families” differs from most young people who “are not usually expected to become fully self-sufficient until their mid- or late 20s, and even then know that they can usually turn to the family network to meet challenges and find in it – with all its tensions and limitations – a place of retreat at a time of crisis.”¹⁷⁶ There is growing evidence that care leavers experience “high levels of mental health difficulties, homelessness, social isolation and exclusion from employment or education” which can in turn lead to further legal and non-legal problems including offending behaviour, substance misuse and early parenthood.¹⁷⁷

Homelessness

Research by Brook Turner based on information provided to him under the Official Information Act which indicated that in September 2020 Oranga Tamariki had 756 young people in its transition out of care service but only 59 funded beds.¹⁷⁸ Information provided to Mr Turner under the OIA also indicated that Oranga Tamariki does not record “where the remaining 697 young people live, what their housing circumstances are, or how many care leavers are at risk

¹⁷¹ Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 28.

¹⁷² Ibid.

¹⁷³ Who Cares? Scotland. (2020). [Navigating a World of Rights: Views from our Care Experienced membership](#) at 24.

¹⁷⁴ McAra, L. & McVie, S. (2022). [Causes and Impacts of Offending and Criminal Justice Pathways: Follow-up of the Edinburgh Study Cohort at Age 35](#). The University of Edinburgh at 42. See also Alliance for Youth Justice. (2023). [Young people in transition in the criminal justice system: Evidence review](#) at 24-25.

¹⁷⁵ McAra & McVie, [Causes and Impacts of Offending and Criminal Justice Pathways: Follow-up of the Edinburgh Study Cohort at Age 35](#) at 42.

¹⁷⁶ Quinn, N., Davidson, J., Milligan, I., Elsley, S. & Cantwell, N. (2017). [Moving Forward: Towards a rights-based paradigm for young people transitioning out of care](#). *International Social Work*, 60(1), 140-155 at [20].

¹⁷⁷ Ibid.

¹⁷⁸ Turner, B. (2022). [Self-determined housing choices for young people leaving the care system in Aotearoa New Zealand](#). [Masters Thesis, Unitec Institute of Technology] at 36.

of falling into permanent homelessness”.¹⁷⁹ Turner raised concerns about the lack of any comprehensive housing strategy and the absence of data and evidence on the housing journey for New Zealand care leavers in academic literature and government reports.¹⁸⁰

Oranga Tamariki’s own research published in 2022 also recognises that the Government’s existing housing services and supports do not meet the needs of this population group. This research noted that the only tailored housing service and support, that delivered by Oranga Tamariki Transition Support Services, provides only 134 supported accommodation placements leaving the rest of the 5,200 young people in this population group to rely on their personal supports and universal adult housing services.¹⁸¹ This research report also set out new funding from Budget 2022 to expand the delivery of youth focused transitional housing and for a new supported accommodation service for young people who are at risk of homelessness and who have higher and more complex needs.¹⁸² Further research in relation to youth homelessness is also being funded.¹⁸³

Research overseas shows the gap between need and available placements is a common challenge – in 2019 more than 2,500 young people in Victoria were eligible for leaving care supports but only a little over 300 funded places.¹⁸⁴ Data also showed that one third of the young people who left care in Victoria between 2013 and 2015 were identified as homeless in 2015–2016 housing data with young people whose final placement was residential care being the most likely to experience homelessness.¹⁸⁵ A study in the Australian Capital Territory found that there were two pathways out of unsatisfactory foster care placements both of which led young people into homelessness – either voluntarily moving out of home or being placed into residential care settings which were not considered to be ‘home’.¹⁸⁶

Homelessness is also linked to other legal problems. For example, a recent report in relation to an Australian legal service for homeless youth gave a case study of a young man who ended up homeless after leaving care at 18. He started sleeping in his car and accrued several fines whilst doing so, he also had debts with a telecommunications provider and a gym membership that he had stopped using since he became homeless. He also had several mental health issues in his last year of school so stopped attending school for a month which breached the attendance requirements of his youth benefit leading to another debt with Centrelink (the benefits service). The legal service for homeless youth was able to assist this young man by supporting him to apply for victims’ compensation which gave him the funds to access accommodation. They also supported him to challenge the Centrelink debt and negotiate with debt collectors to have his other debts waived on compassionate grounds.¹⁸⁷

¹⁷⁹ Ibid at 36.

¹⁸⁰ Ibid at 43.

¹⁸¹ Oranga Tamariki— Ministry for Children, [Prioritising housing services for young people moving to independence from care and youth justice settings](#) at 15.

¹⁸² Ibid at 24.

¹⁸³ Unitec. (2023). *Kaupapa Māori Researchers shed light on severity of youth homelessness*. <https://www.unitec.ac.nz/about-us/kaupapa-m-ori-researchers-shed-light-on-severity-of-youth-homelessness>

¹⁸⁴ Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#) at 17.

¹⁸⁵ Ibid at 13.

¹⁸⁶ Noble-Carr, D., & Trew, S. (2018). [“Nowhere to go”: Investigating homelessness experiences of 12-15 years olds in the Australian Capital Territory](#). Institute of Child Protection Studies, Australian Catholic University at 16.

¹⁸⁷ Peek & Kallmier, [LevelUP: An innovative legal project to help young people in Out Of Home Care](#) at 14.

Other Australian research has also identified how homelessness or lack of suitable accommodation is also a driver of criminalisation. In interviews magistrates described having to remand children in custody because no viable accommodation options were available with the researchers raised concerns that custody can only lead to further criminalisation.¹⁸⁸

Involvement in criminal justice system

It is now well recognised that the vast majority of children and young people who enter the youth justice system have had contact with the care & protection system.¹⁸⁹ The most recent available Youth Justice Indicators show that 92 percent of children and 88 percent of young people who participated in a youth justice FGC had previously been the subject of a “report of concern” to Oranga Tamariki as to their care and safety.¹⁹⁰ The 2020 Youth Court decision of *New Zealand Police and Oranga Tamariki v LV* explains how the pathway from the care & protection system into the youth justice system operates:¹⁹¹

Most crossover kids come in to the Youth Justice system with a background of running away from placements in which they are unhappy, usually to try and get back to their family. It is often how they have learned to cope with the trauma they have suffered both before and after state intervention. When they are very young such behaviour is a concerning feature of their care and protection concerns.

For years the practice has been that when they are old enough to enter the youth justice system, care and protection steps back with the result that youth justice powers and facilities are used to manage that behaviour. For example, the 218 times [L] had run away from places she did not want to be, become “absconding”. That is responded to by the police using powers of arrest, detention in cells, being put before the Court with bail opposed. In other words, we take these highly traumatised children and further traumatise them by dealing with the issue in that way, thereby greatly increasing the likelihood of further offending – as the latest UN general comment mentions.

Young people who have been subject of a ‘report of concern’ to Oranga Tamariki as to their care and safety are often referred to as ‘crossover kids’ whereas those who are before the Youth Court and are also the subject of care and protection proceedings in the Family Court are described as ‘dual status’.¹⁹²

The crossover group have poorer wellbeing indicators across all spheres of life as they are aging out of the youth justice system and as young adults. At age 17, they were more likely to have been in a youth justice placement both in the past year or their life to date,¹⁹³ and had a report of concern or had an out of home placement in the last year.¹⁹⁴ They were also more

¹⁸⁸ McGrath, A., Gerard, A. and Colvin E. (2021). 18. Care-experienced children and the criminal justice system. In M. Phelan (Ed.), *Crime and justice research 2021*. Australian Institute of Criminology at 11.

¹⁸⁹ For example see Fitzgerald, *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People* at 28; Lambie, I. (2018). *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand*. Office of the Prime Minister’s Chief Science Advisor at 17.

¹⁹⁰ Ministry of Justice. (2023). *Youth Justice Indicators Summary Report* at 17-18.

¹⁹¹ *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at para [107]-[113].

¹⁹² Fitzgerald, *Ko Te Rongoā, Ko Te Aro, Ko Te Whai Kia Tika Ai, Mo Ngā Rangatahi: Solution-Focused Justice For Young People* at 23-24.

¹⁹³ Oranga Tamariki Evidence Centre. (2021). *Youth Justice Pathways: An examination of wellbeing indicators and outcomes for young people involved with youth justice*. Oranga Tamariki—Ministry for Children at 14-15.

¹⁹⁴ *Ibid* at 16-17.

likely to live in an area of high socioeconomic deprivation,¹⁹⁵ be less engaged in school, more likely to be involved in alternative education and/or special education,¹⁹⁶ or had mental health or substance use treatment.¹⁹⁷

Werry identifies several practices which amount to the criminalisation of care and protection:¹⁹⁸

- Criminal proceedings being brought in the Youth Court where the underlying concerns stem largely or entirely from care and protection matters.
- The Family Court ceasing involvement when a young person enters the Youth Court resulting in the Youth Court being required to deal with both care and protection issues and the criminal charges.
- Youth justice facilities and powers being used to manage behaviours that stem from care and protection issues e.g. behaviours like running away from placements and acting out.

Werry also points to other concerning practices including young people in need of care and protection being held in youth justice facilities only because a suitable placement could not be found in the community and insufficient information sharing between the two jurisdictions resulting in the Youth Court being unaware of important information about care and protection concerns that could help explain the young person's behaviour.¹⁹⁹ As Werry notes, the ongoing criminalisation of care and protection post the 2019 legislative amendments is particularly concerning.²⁰⁰

A similar picture is also seen overseas. The Australian Commission for Children and Young People cite data that showed almost a quarter (24 per cent) of young people leaving care were involved in the youth justice system, with the proportion increasing to half of the young people whose final placement was residential care.²⁰¹ Baidawi and Ball point to a slightly lower proportion (up to 10%) of child welfare-involved children being convicted of later youth offending,²⁰² although this difference may simply reflect differing definitions e.g. involvement as versus conviction. Either way, this group is clearly overrepresented in the youth justice system.²⁰³ Baidawi and Ball's research study found a greater likelihood of charges in two areas:²⁰⁴

- Offences related to criminal damage and justice procedure which they considered to be consistent "with the observed criminalization of behaviours related to trauma, psychological distress, and neurodisability" and increased surveillance of young people in residential care;
- Offences related to their interaction with the criminal justice system such as damaging property in custody or giving a false name. Baidawi and Ball posit that this may be due to their higher level of contact with police including for welfare reasons such as running away, police not being properly trained to respond to the complex developmental needs

¹⁹⁵ Ibid at 18.

¹⁹⁶ Ibid at 19.

¹⁹⁷ Ibid at 21.

¹⁹⁸ Werry, *Crossover kids in New Zealand* at 313-314. See Cooper et al., [Alternative report in advance of New Zealand's review at the 93rd session of the United Nations Committee on the Rights of the Child](#) at 42-44 for a discussion of some case examples.

¹⁹⁹ Werry, *Crossover kids in New Zealand* at 312.

²⁰⁰ Ibid at 315.

²⁰¹ Commission for Children and Young People, [Keep caring: Systemic inquiry into services for young people transitioning from out-of-home care](#) at 13.

²⁰² Baidawi & Ball, [Multi-system factors impacting youth justice involvement of children in residential out-of-home care](#) at 1.

²⁰³ Ibid.

²⁰⁴ Ibid at 8-9.

of this group, potential differences in police attitude towards this cohort of young people, and the legacy of trauma associated with system involvement.

Baidawi and Ball also explore the reasons for this over-representation explaining that the factors said to contribute to this overrepresentation broadly fall into two groups: the individual characteristics of children placed in residential care, and the criminalizing influence of these environments.²⁰⁵ They also identify systemic factors including disproportionate surveillance and supervision, lower support in navigating this system, and systemic thoughtlessness regarding the unique needs of young people in care.²⁰⁶ O'Hare et al.'s population based-study also identified a number of characteristics of out-of-home care associated with increased risk of police contact including placements with foster carers or other types of carers (as opposed to placement with parents or kinship carers), placement instability, number of preplacement maltreatment events, age at care entry and longer exposure to maltreatment prior to OOHC placement.²⁰⁷

Another recent study in Australia by McGrath et al. "investigated the links between care experience and contact with the criminal justice system through observations of Children's Court hearings, reviews of court files, and interviews with Children's Court magistrates".²⁰⁸ They also highlighted how young people's care status affected their involvement with the criminal justice system including that delays finding appropriate accommodation could lead to time spent in custody and noting that responses to young people's problematic behaviour in care, such as police involvement and the use of apprehended violence orders, contributed to their criminalisation. They explain:²⁰⁹

Although many of our respondents recognised the traumatic histories of care-experienced children, it appears the management of their problematic behaviour was prioritised over a holistic understanding of their individual circumstances.

A young person participating in research by Leaders Unlocked in the United Kingdom described the difference between how their 'corporate parent' and a biological parent' respond to behaviour and how this can affect what happens in court:²¹⁰

You have your corporate parent (social services) vs your biological parent. Everytime you do something wrong your corporate parent writes it down, it goes on your report. By the time you get in front of a judge, they have all this evidence and 'risk factors' mounted up to justify their sentence - thus you are more likely to obtain a prison sentence as more reports are taken into account whereas, when you have a biological parent, where social services are not involved, they have no reports to go on to determine your risk factors.

²⁰⁵ Ibid at 2.

²⁰⁶ Ibid at 7.

²⁰⁷ O'Hare, K., Tzoumakis, S., Watkeys, O., Katz, I., Laurens, K.R. Butler, M., Harris, F., Carr, V.J., & Green, M.J. (2023). [Out-of-home care characteristics associated with childhood educational underachievement, mental disorder, and police contacts in an Australian population sample](#). *Child Abuse & Neglect*, 139, 106120 at 9.

²⁰⁸ McGrath et al., [Care-experienced children and the criminal justice system](#) at 10.

²⁰⁹ Ibid.

²¹⁰ Leaders Unlocked. (2020). [Young Adult Advisors on Criminal Justice: Hearing from young adults in the criminal justice system](#) at 22.

Similar concerns over-representation and pathways from care to custody have also been identified in Canada where studies found that one in six children in care have been in custody as compared with one in fifty in the general population.²¹¹

In addition to increased involvement in the criminal justice system, some research also shows that children and young people involved in the care system have worse experiences with and in the criminal justice system. For instance, the Youth '19 study also found that young people with Oranga Tamariki involvement experienced higher rates of ethnic discrimination by police.²¹² The Howard League for Penal Reform's guide to representing looked after children at the police station some of the ways care system involvement can affect children and young people's experiences in the criminal justice system:²¹³

Looked-after children are more likely than their peers to experience police contact and criminalisation. They are less likely to receive support at the police station from family or a trusted adult which can affect both their experience of custody and the criminal justice outcome...Being held in police custody, particularly in a police cell, can be extremely disturbing and damaging for any child. Children's emotional and physical responses to trauma and fear can exacerbate their distress and their criminal justice outcomes, for example if they resist arrest or injure a police officer. Children may be subjected to distressing procedures such as strip searching, restraint or the taking of intimate samples. The experience of being arrested and held in police custody can be particularly acute for looked-after children who may have histories of trauma.

Fitzpatrick et al. raise particular concerns that care experienced girls and women may be escalated through justice systems due to their gender and care status:²¹⁴

[G]irls and women in general are treated more punitively for their transgressions because they are deemed unfeminine as well as delinquent (Carlen, 1988; Gelsthorpe & Worrall, 2009; Sharpe, 2011; Sharpe & Gelsthorpe, 2009). Girls' offending behaviour is often linked to their experiences of violence and victimisation; their survival strategies, such as running away and not attending school, can influence magistrates' decisions and result in more punitive outcomes (Chesney-Lind, 1999; Gelsthorpe & Worrall, 2009).

²¹¹ Bergman, [Intersectionality: A Means for Addressing the Needs of Children with Mental Health Issues who are Engaged with the Family Law and Criminal Justice Systems?](#) at 130-131: "Children in out-of-home placements, particularly those residing in group homes, are reported to police more frequently than their counterparts in the general population, often for minor offences (e.g. pushing someone).¹⁰⁴ Once children in care have become engaged with the youth criminal justice system, many find themselves facing additional (repeated) charges for "administration of justice" offences.¹⁰⁵ These offences primarily involve breaches of the conditions imposed on the child through bail or probation orders, such as missing a curfew.¹⁰⁶ Once a child has been found guilty of breaching more than one non-custodial sentence, they may be committed to custody.¹⁰⁷"

²¹² Archer et al., [Young people who have been involved with Oranga Tamariki: Community and contexts](#) at 7.

²¹³ Howard League for Penal Reform, [Representing looked-after children at the police station: a step-by-step guide for lawyers](#); Youth Justice Legal Centre; Just for Kids Law at 2. See also Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 31.

²¹⁴ Fitzpatrick, C., Hunter, K., Staines J. & Shaw, J. (2019). [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#). Lancaster University Centre for Child & Family Research at 28.

Barriers

Attitudinal Barriers

Attitudes about children and young people in care or with care experience

VOYCE Whakarongo Mai's thematic report on children in State care submitted to the United Nations Committee on the Rights of the Child in 2020 raised concerns that children in care continue to face discrimination and arguing that the Human Rights Act be amended to include 'state care-experienced' as a prohibited ground for discrimination.²¹⁵ At the Abuse in Care Royal Commission of Inquiry's institutional response hearing the Children's Commissioner Judge Frances Eivers explained:²¹⁶

These young people are often treated more harshly because of being stereotyped as bad or just like their parents, but the vast majority of these rangatahi were victims long before they began offending. Their trauma has formed their response to the world around them, a world that has never shown itself to be on their side.

Tupua Ulrich, a care-experienced young man of Māori and Croatian descent, gave evidence to the Abuse in Care Royal Commission about an incident when he was around 15 years old:²¹⁷

I went into the Children and Young Persons Office (CYFS) in Takapuna. I was hanging around waiting for a Social Worker. I had not long been discharged from hospital after an attempted suicide. One of the Youth Justice Workers said to me "Oh are you youth justice?" I replied "No, I'm care and protection." He replied, "Oh future justice then." I will never forget that comment, it really stuck with me. This attitude was coming from a person who is working in care and protection and is supposed to be offering us hope for our future and that is their attitude?

He went on to conclude: "[c]hildren in care are viewed as less than other children and young people."²¹⁸

Lakiesha Cummings also gave evidence to the Waitangi Tribunal Inquiry into Oranga Tamariki about her internalised shame of being a 'foster kid':²¹⁹

When I was young, I did not know how to deal with the perception that I was a "foster kid" and I used to hide it because it was shameful. When people said I was a foster kid I would say "no that is a lie". I felt like people thought I was a target and a lot more vulnerable because of the fact that my parents did not want me, or they were too high to care about me. That was hard to deal with as a child. I found it hard to express how I was feeling to everybody.

The Commission for Children and Young People in Victoria describes similar prejudicial attitudes to children in care who go missing from care including the use of criminalising language such as 'absconding' and the general attitude to this group of children: "[t]hese children and young people are sometimes viewed as the 'undeserving missing', the risks they face are at

²¹⁵ VOYCE – Whakarongo Mai. (2020). *Thematic report: Children in State care* (Information for the 87th Pre-Sessional Working Group of the Committee on the Rights of the Child: List of Issues Prior to Reporting - New Zealand – March 2020) at 1 & 3.

²¹⁶ Royal Commission of Inquiry into Abuse in Care. (n.d.). [State Institutional Response Hearing Transcript of Proceedings 25 August 2022](#) at 964.

²¹⁷ [Witness Statement of Tupua Ulrich dated 10 August 2021](#). Royal Commission of Inquiry into Abuse in Care at 4.

²¹⁸ *Ibid* at 13.

²¹⁹ [Brief of Evidence of Lakiesha Cummings](#) (Wai 2915, #A142) at para 14.

times underestimated, and they are sometimes subject to a punitive rather than caring response.”²²⁰

Participants in a United Kingdom study involving workshops with young adults with experience of the care system described feeling like they were assumed to be untrustworthy and undeserving ‘problem children’ and that this stigma affected how professionals interacted with them.²²¹ This included police automatically viewing them troublemakers.²²² Fitzpatrick et al also describe the labelling of children in care as “mad or bad” as a persistent problem that can both contribute to criminal justice system involvement and be compounded by it.²²³

Harris et al.’s research in relation to young women transitioning into the adult justice system also discussed how these popular perceptions linking care experience with trouble are “compounded by gender stereotypes which shape perceptions of young women who offend as particularly transgressive or ‘deviant’” which in turn informs how professionals respond to them including whether they are seen as a risk or a young woman in need of support.²²⁴ Fitzpatrick et al also cite research in the United States which indicates that care experienced girls are treated more punitively in court although this may be “because of a misguided desire to protect them” by removing them from the community.²²⁵ Children’s rights academics Ton Liefwaard and Jessica Valentine explain how children in care can also face additional exclusion and discrimination in justice systems because they are “often from stigmatised groups of society” including children in residential care who are “more likely to have a disability or struggle with developmental issues or be from a minority group.”²²⁶

Not believing children

Tanisha Batten gave evidence to the Waitangi Tribunal that when she was abused she tried to report being abused to three different social workers all of whom did not believe her: “[m]y one was not listening to me, so I called an old one and she literally said “No, you’re not being abused”. All three refused to believe me.”²²⁷ As one of the participants in the Office of the Children’s Commissioners’ review of Oranga Tamariki complaints process told OCC staff:²²⁸

There appears to be a mismatch between responses to complaints made by adults and those made by or on behalf of children. Being really cynical this might reflect the wider view of the lack of regard children are held with in our society.

The Howard League for Penal Reform also points to a failure to believe children in care when they have been the victim of abuse resulting in both the child or young person not getting justice

²²⁰ Commission for Children and Young People, [Out of sight: systemic inquiry into children and young people who are absent or missing from residential care](#) at 30.

²²¹ Leaders Unlocked, [Young Adult Advisors on Criminal Justice: Hearing from young adults in the criminal justice system](#) at 21.

²²² Ibid at 22.

²²³ Fitzpatrick et al., [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#) at 28.

²²⁴ Harris et al., [Young Women’s Justice Project Falling Through the Gaps: Young women transitioning to the adult justice system](#) at 19.

²²⁵ Fitzpatrick et al., [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#) at 30.

²²⁶ Liefwaard, T. & Valentine, J. (2019). [Access to justice for children in alternative care: Submission to the UN Committee on the Rights of the Child for its Day of General Discussion on Children’s Rights and Children in Alternative Care](#). Leiden Law School, Leiden University at 4.

²²⁷ [Brief of Evidence of Tanisha Batten](#) (Wai 2915, #A143) at para 46 & 50.

²²⁸ Egan-Bitran, [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#) at 24.

for what happened to them, and even worse, getting caught up in the criminal justice system when they lash out in response.²²⁹

Children in care have reported that they are not listened to or believed, particularly where incidents have involved care workers who children claim have lied about what happened, assaulted them, incited the incident perhaps leading to the child biting or lashing out in self-defence, exacerbated an already fraught situation or called the police out unnecessarily (Howard League, 2017b).

Assumptions and prejudices in relation to care-experienced young women can also come into play when they come into contact with criminal justice agencies as victims. For example, the Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice describe the experiences of a care-experienced young woman whose abusive ex-partner called the police when she was drunk resulting in her arrest.²³⁰ The young woman explained:²³¹

There just seems to be a stigma that care-experienced people will more inclined to lie or exaggerate or say something has happened for attention... He'd just been absolutely awful that day so I just kind of snapped and had a bit of a breakdown... All of a sudden the police are storming in and they're restraining me... when I was in a situation that I was so obviously the victim... I don't want to go through that ever again.

This incident eroded the young woman's trust in the police meaning she would now be "too scared" to call them if she needed help in the future.²³²

Attitudes of children and young people in care or with care experience

In a recent Youth Court decision *New Zealand Police & Oranga Tamariki v SD*²³³ Judge Fitzgerald describes how a young person is treated can have an impact on their attitude to the system and those in authority in it:²³⁴

There is widespread concern and criticism of [SD] and her mother for closing their door to everyone, failing to engage in the process and generally appearing to be disrespectful to the law and those in "the system" by trying to shut everyone out.

... In this regard, respect is required both ways. In my experience, there is usually respect shown for the law, and "the system", if the law and the system is respectful itself in the way it is applied and administered by those responsible. This is not to suggest for one moment that there were not genuine reasons for the State to become involved out of concern for the well-being of [SD] and her siblings; most definitely that was necessary. But the way that happened throughout was often by simply replacing one form of abuse and neglect with another. It was rarely if ever respectful, nor did it show proper regard for [SD]'s well-being and best interests. It is little wonder to me that [GD] and [SD] do not want anything to do with anyone involved in a system that they feel has shown no respect for them.

²²⁹ Howard League for Penal Reform, [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 4.

²³⁰ Agenda Alliance for Women & Girls at Risk and Alliance for Youth Justice. (2022). [We've not given up": Young women surviving the criminal justice system](#) at 31.

²³¹ Ibid.

²³² Ibid.

²³³ [2021] NZYC 360.

²³⁴ [New Zealand Police & Oranga Tamariki v SD](#) [2021] NZYC 360 at [99]-[100].

The impact of negative attitudes about them and treatment of them by system actors also has an impact on how children and young people in care or with care experience view those in authority. Peek and Kallmier's report about the LevelUp project described this phenomenon explaining that clients of the service "were often reluctant to engage with government services as they were viewed through the lens of previous interactions which, in most cases, clients felt had been negative."²³⁵ A qualitative study exploring Tasmanian children and young people's perceptions and experiences of safety in the context of Tasmanian government institutions reported that:²³⁶

Children and young people who had experienced abuse or maltreatment reported a lack of trust in adults, particularly those working within the system (i.e. police, child protection, health). They gave multiple examples of ways in which these systems and people working within them had failed to protect them, failed to act in ways that fostered their sense of safety or failed to respond when they had safety concerns. This lack of trust led them to be ambivalent about adults outside of their institution and their ability, willingness and authority to act on a child's behalf and to adequately respond if a child raised a concern, made a complaint or disclosed their abuse.

Participants in this study also reported poor experiences of using organisational complaints mechanisms and that while they were aware of these mechanisms, they were unlikely to use them.²³⁷

A research report by Who Cares? Scotland quotes a care-experienced young person's response to a question about rights breaches which describes how being judged can affect children and young people including by shaping their attitude to those in authority which can in turn affect other aspects of their lives:²³⁸

Often survival strategies will kick in and your view of services and people in authority is skewed which influences all areas of life, increasing vulnerability for yourself & possibly others, increased risks to develop toxic relationships, unplanned pregnancies, poor housing, lack of social supports, poverty, lack of life skills, education impacted upon due to care exp, judgements and lack of aspirations for you, individuals internalising and creating emotional harms.

The Howard League for Penal Reform's guide to representing looked after children and young people also describes the need to address the 'trust deficit' many children and young people have in relation to those in authority:²³⁹

Children may not appreciate that solicitors, especially duty solicitors, are independent from the police. It is important to stress to the child the fact that you are not connected to the police in any way and that you are on their side. This may be a particularly important issue to counter for BAME children: David Lammy's Independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System (2017) identified a 'trust deficit' between BAME suspects and duty solicitors.

²³⁵ Peek & Kallmier, [LevelUP: An innovative legal project to help young people in Out Of Home Care](#) at 18.

²³⁶ Moore & McArthur, [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#) at 85.

²³⁷ Ibid at 99.

²³⁸ Who Cares? Scotland, [Navigating a World of Rights: Views from our Care Experienced membership](#) at 26.

²³⁹ Howard League for Penal Reform, [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 4.

Cultural barriers

The Independent Children’s Monitor noted that the ‘no-narking’ culture continues to be an issue in residential care reporting that: “rangatahi have spoken to Oranga Tamariki staff about not wanting to be “narks”, which may prevent them from making a grievance.”²⁴⁰ Counsel to Assist the Royal Commission of Inquiry into Abuse in Care put this to Oranga Tamariki witnesses at the State Institutional Response hearing in August 2023. Oranga Tamariki staff conceded that this culture persists and that the ‘no narking’ culture was probably a bigger problem for Oranga Tamariki than the procedure.²⁴¹ Staff from the Office of the Children’s Commissioner confirmed that they also saw the culture within residences as a barrier when giving evidence at the State Institutional Response hearing:²⁴²

I will use the statement that we had from our team: ‘We’ve consistently heard from mokopuna that making a formal complaint and process is a snitch form.’ And that often stops them from putting it in.

The Tasmanian study cited above also found similar barriers:²⁴³

A number of participants felt that it might be dangerous for them to raise concerns related to their maltreatment by adults or peers and identified this as a barrier to raising concerns, making complaints or seeking help. Young people in detention and residential care, for example, talked about cultures where ‘snitches’ were frowned upon or where their adult and peer harassers retaliated when their behaviours were raised

Structural / Systemic Barriers

Lack of power

As one of the participants in the Office of the Children’s Commissioners’ 2012 review of Oranga Tamariki complaints process told OCC staff:²⁴⁴

By their nature children in care are disempowered. In the children’s eyes the Ministry social workers are all powerful – so much so that they can do powerful things like separate children from their parents. As such it is unrealistic to expect those children to dare to raise issues about the practice of those who hold so much power. The risk of retribution is too great. The relevant point of this exercise is not what happened when a complaint was made – but the fact that hardly any complaints have actually been made. We as an organisation would not advise our young people to complain under the current process.

When staff from the Office of the Commissioner for Children spoke to children and young people in care & protection residences about the grievance process in 2019 they found that the “power

²⁴⁰ Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 85.

²⁴¹ Royal Commission of Inquiry into Abuse in Care. (n.d.). [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 813-814.

²⁴² Royal Commission of Inquiry into Abuse in Care. (n.d.). [State Institutional Response Hearing Transcript of Proceedings 25 August 2022](#) at 982.

²⁴³ Moore & McArthur, [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#) at 73.

²⁴⁴ Egan-Bitran, [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#) at 24.

difference between children and young people and staff was a recurring theme” quoting comments from participants that:²⁴⁵

‘They always think we are lying and take the staff’s side over us. Because they are adults.’ (Pākehā, Pacific and Māori girl)

‘When [staff] found out I put a grievance, they gave me shit about it.’ (Māori young woman)

‘[Grievances] should go to national office or somewhere where people will listen to us.’ (Pākehā, Māori and Pacific girl)

When the former Assistant Children’s Commissioner (Māori), Ms Phillip-Barbara, gave evidence at the Royal Commission of Inquiry into Abuse in Care’s Institutional Response hearing she told the Commission that the first issue to be addressed “is the power imbalance felt by mokopuna and their whānau, particularly in places of detention, but within State care”.²⁴⁶ She also told us that: “[m]okopuna have told us how frightening it is to complain when you are dependent for your wellbeing on the people you are complaining about”.²⁴⁷ The Independent Children’s Monitor’s report for the year from July 2020 to June 2021 also reported hearing from tamariki and rangatahi who said “they feel powerless to change their circumstances”.²⁴⁸

A 2018 evaluation report informing Oranga Tamariki about the feedback and complaints system also identified the power imbalance between vulnerable young people and social workers and how it could operate as a barrier. Stakeholders noted that it often takes courage for vulnerable young people in care to make a complaint, due to the sensitivity of issues involved and the perceived or real implications that a complaint might have for them. The report emphasised that children and their whānau must have confidence in social workers and Oranga Tamariki and advised that in order to achieve this “there has to be checks and balances; procedural fairness for both those making a complaint and those responding”.²⁴⁹

Again, similar issues have also been identified in overseas studies. For example, the Law Council of Australia quoted a submission from Western Australian Commissioner for Children and Young People who described the numerous barriers to speaking up faced by many children and young people in out-of-home care including:²⁵⁰

[F]ear of the consequences; being told not to speak up; not knowing how to or not having the words to articulate concerns; not having anyone to speak to or anyone who would listen; fear of not being believed; isolation and lack of privacy; a lack of confidence or feeling scared; shame; an imbalance of power.

Lightowler identified many of the same barriers for care and justice experienced children and young people in Scotland:²⁵¹

²⁴⁵ Office of the Children’s Commissioner, [A Hard Place to be Happy](#) at 23.

²⁴⁶ Royal Commission of Inquiry into Abuse in Care. (n.d.). [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 986.

²⁴⁷ Ibid.

²⁴⁸ Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 75.

²⁴⁹ Oranga Tamariki Evidence Centre, [Changing Feedback and Complaints: An evaluation report informing the Oranga Tamariki feedback and complaints system](#) at 11.

²⁵⁰ Law Council of Australia. (2018). [The Justice Project: Final Report Part 1 Children and Young People](#) at 48.

²⁵¹ Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 30.

There were also a range of barriers to their ability to challenge and to complain, which were often linked to the power dynamics experienced by children and young people in the justice system. There was a nervousness amongst children and young people with justice experience about complaining or doing anything which might increase attention on them. Professionals observed that children and young people were sometimes right to be concerned about complaining and challenging, and discussed the potential implications for those who do.

Awareness of rights

When staff from the Office of the Commissioner for Children spoke to children in residential care in 2019 they found that:²⁵²

Children and young people in Oranga Tamariki residences said they were confused about the difference between rules and rights. When asked about rights, several told us they didn't understand what rights were or they talked about rules instead.

The ICM also identified gaps in children and young people's knowledge of their rights in their first full report relating to the July 2020 to June 2021 year.²⁵³

Oranga Tamariki data shows that not all tamariki and rangatahi in care know their rights, including their right to be consulted on things that affect them and their right to complain if they are unhappy. This was also consistent with what we heard from tamariki and rangatahi.

Little appears to have changed with the ICM's report in relation to the year July 2021 to June 2022 also concluding that tamariki and rangatahi did not consistently know about their rights, with some knowing what their rights are and others feeling unsure.²⁵⁴ The ICM report also referred to developments over the last year including their work to strengthen the feedback and complaints system, updating the 'My Rights, My Voice' resource, and the introduction of a new Practice Framework.²⁵⁵

Oranga Tamariki have an obligation under NCS Regulation 66(e) to provide children and young people in care with information about their rights as set out in the statement of rights, how to make a complaint, and the support available to them including advocacy services.²⁵⁶ However, although the purpose of the *Statement of rights* is described as enabling children and young people in care to understand their rights to care and support under the regulations,²⁵⁷ it contains very few references to rights as this term is usually understood and many aspects could be more accurately described as summary of the social worker's role. For example:

If you are in care because you can't live at home at the moment, your support worker's job is to do the things that will be best for you.

If you are in care because you may have broken the law, your support worker's job is to think about what is best for you. They also need to think about other people's

²⁵² Office of the Children's Commissioner, [A Hard Place to be Happy](#) at 22.

²⁵³ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 11.

²⁵⁴ Independent Children's Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022](#) at 115.

²⁵⁵ *Ibid* at 11.

²⁵⁶ [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, r66.](#)

²⁵⁷ [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, Schedule 2.](#)

safety and about anyone who may have been hurt. If you broke the law, your support worker will work with you to help you put things right.

This lack of clarity over what children and young people's rights actually are can only operate to obscure children and young people's actual legal rights and creating a barrier to their identification and enforcement.

Research by the Office of the NSW Advocate for Children and Young People involving interviews and focus groups with children and young people with experience of the out of home care system found that the majority (84%) reported that they had either never been explained their legal rights, or were explained their legal rights too late in their care journey.²⁵⁸ Some of the young people explained the negative effects of not having access to this information and how different their situation might have been if they had known their rights and been able to self-advocate:²⁵⁹

If I had been told all my rights when I was in care...I think I would have been out of care within three months because I would have been able to advocate for myself with information in support of my arguments.

A lot of kids I've seen end up quite literally homeless on the street. I've seen people addicted to drugs and these are children who are supposed to be supported by the Department, who are ending up dependent on homelessness services like Link2Home because that funding isn't getting directly to them. They don't know their rights and they can't speak up for themselves."

The Howard League for Penal Reform also cites research suggesting that the common assumption that care experienced children know what their rights are is incorrect with even children with considerable criminal justice contact not knowing their basic rights and entitlements.²⁶⁰ Furthermore, participants in research by Who Cares? Scotland also explained that they thought that there was a difference between knowing what rights are and knowing what they actually mean in practice such as what a rights breach looks like and what to do when their rights are breached.²⁶¹ Participants added that some children may not know they are care-experienced which could have an impact on their ability to understand and therefore access their rights.²⁶²

Lightowler's research involving both young people and professionals also identified an ongoing need for both children and young people and professionals to know and understand children and young people's rights and the implications of those rights. She explained:²⁶³

This was an issue across the different care and justice settings, such as, police contact, children's hearings, courts, secure care and YOI. There were specific concerns expressed about those in a YOI not understanding their rights in custody and of the prison rules. There was also a need identified for professionals to be supported to fully understand children and young people's rights and entitlements in order to better support children and young people and raise issues and challenge

²⁵⁸ Office of the Advocate for Children and Young People, [The Voices of Children and Young People in Out-of-Home Care](#) at 23.

²⁵⁹ Ibid at 23.

²⁶⁰ Howard League for Penal Reform, [Representing looked-after children at the police station: a step-by-step guide for lawyers](#) at 6.

²⁶¹ Who Cares? Scotland, [Navigating a World of Rights: Views from our Care Experienced membership](#) at 15.

²⁶² Ibid.

²⁶³ Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 28-29.

decisions on their behalf. Some professionals also identified that they would benefit from improved understanding about the role of lawyers, and their place in realising children and young people's rights.

Lightowler also found that most children and young people did not know that they could challenge decision making or have a good understanding about how to do so.²⁶⁴ Liefard and Valentine also identify challenges around lack of information about rights explaining this affects all children but children in alternative care may be less likely to receive this information.²⁶⁵

The other side of understanding children and young people's rights is the need for professionals to also understand their responsibilities to them. For example, participants in Lightowler's research described how professionals did not always have a good understanding of their own responsibilities as a corporate parent,²⁶⁶ particularly prison officers whose training and professional culture did not always encourage such consideration.²⁶⁷

Not knowing it was wrong

Moore & McArthur's research exploring Tasmanian children and young people's perceptions and experiences of safety in the context of Tasmanian government institutions also identified not being aware that something was wrong could also operate as a barrier to disclosure, particularly for children in care who had previously experienced abuse:²⁶⁸

Others felt that children had less information about safety risks and were not always good at assessing whether they were safe or not. One young person reflected on his experiences of physical and emotional abuse in care and how, at the time, he did not realise that he was being harmed. He recalled that due to his own family background, that was also marked by physical and sexual abuse, he wasn't aware of what 'good parenting' was like and thought that all adults treated children in this way. He shared how it was only when he started to visit parenting websites where new parents would share their experiences and discuss what was "OK and what's not OK" (OOHC_, M16) he realised that some behaviours were inappropriate. He and other young people reflected that some children and young people were not always aware about risks and were not always effective at determining whether they were safe or not and that professionals and institutions are required to do so.

The Alliance for Youth Justice identify similar challenges in relation to young people with care experience who are victims of criminal exploitation but do not necessarily consider themselves as being exploited and instead seek to "emulate the attitude and lifestyle of those who have groomed or coerced them" making it harder for practitioners to recognise their vulnerability.²⁶⁹

²⁶⁴ Ibid at 30.

²⁶⁵ Liefard & Valentine, [Access to justice for children in alternative care: Submission to the UN Committee on the Rights of the Child for its Day of General Discussion on Children's Rights and Children in Alternative Care](#) at 4.

²⁶⁶ A 'corporate parent' is "an organisation or person who has special responsibilities to care experienced children and young people": Children and Young People's Commissioner Scotland. (n.d.). *What is a corporate parent?* <https://www.cypcs.org.uk/faq/what-is-a-corporate-parent/>

²⁶⁷ Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 28.

²⁶⁸ Moore & McArthur, [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#) at 68.

²⁶⁹ Alliance for Youth Justice, [Young people in transition in the criminal justice system: Evidence review](#) at 26-29.

Practical Barriers

Failure to meet need for support

As a young person with care-experience said at a youth hui in 2013: “[a]t 17 your average teen has emotional support from family. We do not. Financial support from family. We do not. Has a place to fall back on. We do not. We are alone. We’re alone.”²⁷⁰ Oranga Tamariki have an obligation under NCS Regulation 66(e) to provide children and young people in care with information about advocacy services.²⁷¹ However, the ICM report for the year 2020-2021 noted that the Oranga Tamariki Te Mātātaki survey found that only 46 percent of 1545 tamariki and rangatahi who were surveyed knew about VOYCE Whakarongo Mai, and less than a third of tamariki and rangatahi (29%) knew how to contact the service.²⁷²

Peek and Kallmier’s report about a tailored legal service for care-experienced youth in Australia describes the challenges faced by this group and their corresponding need for support:²⁷³

Young people in OOHC face complex challenges in accessing legal services and often lack the skills and legal literacy to identify legal issues. Even if a young person identifies they have a legal issue, having the knowledge and confidence to reach out is an immense barrier... Many young people expressed feeling voiceless and disempowered by the system that is legally responsible for them and required to ensure their meaningful participation in decision making about their care. A survey by peak body, the Create Foundation, found young people identified a need for individual advocates and youth lawyers to assist them with their transition to independence from OOHC.⁹

Baidawi and Ball describe the specific challenges experienced by dual systems youth even when they have a lawyer because their need for support to participate in legal proceedings is much wider than simply having access legal advice and representation:²⁷⁴

The overwhelming theme concerning criminal defence lawyers was the comparative lack of support available to children in residential care to engage with legal processes, relative to that available to children residing in family homes. Lawyers described an excessive independence expected on the behalf of children in residential care to be in contact with lawyers, collate information, provide instructions and context, make their way to legal appointments, and address other matters supporting more favourable court outcomes, such as counselling and acquiring support letters. Conversely, for children residing with family, parents were observed to commonly support children with these processes.

²⁷⁰ Robin, 20-years-old, Youth Hui speech, Auckland, July 2013 quoted in Ashton, The Rights of Children and Young People in State Care at 1083.

²⁷¹ [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, r66.](#)

²⁷² Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 75, note 71. It is also important to acknowledge that this was relatively soon after VOYCE Whakarongo Mai was established and knowledge is likely to have increased. Interestingly, the publicly available version of the Oranga Tamariki, *Te Matātaki Report* does not report on responses to these questions about Voyce Whakarongo Mai see: Oranga Tamariki Voices of Children and Young People Team. (2021). [Te Mātātaki 2021: Findings from the 2019/2020 survey of tamariki and rangatahi in care.](#) Oranga Tamariki—Ministry for Children at 21.

²⁷³ Peek & Kallmier, [LevelUP: An innovative legal project to help young people in Out Of Home Care.](#) Mid North Coast Community Legal Centre at 4.

²⁷⁴ Baidawi & Ball, [Multi-system factors impacting youth justice involvement of children in residential out-of-home care](#) at 6.

Moore & McArthur's study in Australia also identified children in care's lack of supportive relationships and how this could be contributed to by agency practices which disrupted or severed relationships with trusted adults:²⁷⁵

Many of the young people who lived in the out of home care system were often desperate for trusting and enduring relationships. As discussed above, they felt that all children in care need an ally who knew them, who was trustworthy and who was available and accessible. These allies were committed to the child's best interests and proactively took steps to ensure that they were safe. They advocated on young people's behalf and could help them find solutions when they needed help. However, young people reported that as they often moved from one agency to another and from one placement to the next, relationships with trusted adults were often disrupted or severed. Young people therefore valued relationships with allies that were enduring and were not limited to an individual placement or setting.

Fitzpatrick et al point to a similar lack of advocacy and support for looked after children attending court in the United Kingdom noting that this lack of support can "negatively impact decision making" and make it more likely that the young person will go into custody.²⁷⁶ Lightowler identified the need for both legal and non-legal support:²⁷⁷

Children and young people across all justice settings identified a need for someone to support them emotionally and practically to challenge decisions and help them make complaints where necessary. They sometimes needed an independent legal specialist to help keep them safe during such challenges, but they also needed people with time and skills to help them fill in forms, explain processes to them and to drive them to appointments/meetings.

Lightowler identified a broad range of issues where legal advice and support could be of benefit to children and young people in conflict with the law that are also relevant to children in care including around housing and transitional support, care entitlements and State responsibilities, support to ensure sibling and family contact, access to and support to understand residential care rules, access to information on their files and support to change any inaccurate information, and adequate provision of clothing, toiletries, food, and exercise.²⁷⁸

Practical challenges

Peek & Kallmier also outline the various practical challenges involved in working with this cohort including that clients:²⁷⁹

[W]ere often difficult to contact due to relocation, change of phone numbers and/or homelessness. Clients would be uncontactable for months then reengage with LevelUP for another emerging issue. ... In regional Australia, public transport is

²⁷⁵ Moore & McArthur, [Take notice, believe us and act! Exploring the safety of children and young people in government run organisations](#) at 80. The young people also reported that they felt that these relationships were not supported by the system which discouraged children and young people maintaining relationships once they have left a placement: see 81.

²⁷⁶ Fitzpatrick et al., [Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review](#) at 29.

²⁷⁷ Lightowler, [Improving legal support for children and young people in conflict with the law: A scoping study](#) at 30.

²⁷⁸ Ibid at 35-36. I have amended Lightowler's list to reflect the relevant terminology in Aotearoa New Zealand.

²⁷⁹ Peek & Kallmier, [LevelUP: An innovative legal project to help young people in Out Of Home Care](#). Mid North Coast Community Legal Centre at 18.

difficult to access and clients had limited funds for travel. Few clients held a driver's licence.

These challenges mean that professionals need to be prepared to be flexible with appointment locations and times or if a client does not attend an appointment, as well as taking proactive steps such as seeking alternative contact details and allowing enough time to take instructions and provide advice on multiple legal issues in case it is hard to contact the client after an initial meeting.²⁸⁰

Nowhere to go

Children do have standing under section 126 of the Oranga Tamariki Act to apply for the variation or discharge of various orders including under section 78 relating to the custody of a child or young person, under section 83(1)(c) requiring any person to receive counselling, custody order or interim custody order made under section 101, guardianship order made under section 110 or an interim guardianship order made under section 110AA, and any order made under section 121 granting access to, or conferring rights in respect of, any child or young person.²⁸¹ However, this does not translate to a general ability to challenge decisions made about their care. There are also practical limitations on their exercise of these rights in that a child or young person generally will not have standing to make the application themselves so would require a litigation friend to act on their behalf. A child or young person's Lawyer for the Child also has the ability to make an application to vary or discharge an order.²⁸² However, anecdotal evidence suggest that some may be reluctant to do this due to concerns that they will then become a party to proceedings.

Oranga Tamariki also have a complaints process but a series of reviews and reports in relation to various iterations of this system have repeatedly identified the same issues and barriers. In particular, that the complaints system is adult-centred and inaccessible to children and young people in care as discussed in the *Case Study: Oranga Tamariki complaints process - the last ten years of reviews*.

In addition to the internal complaints process, children and young people in care used to have the ability to make complaints to the Office of the Children's Commissioner. However, legislation passed in 2022 removed the Office of the Children's Commissioner's ability to consider complaints from children, including those in care, and designated the Ombudsman as the external complaints body. The legislation also removed the Office of the Children's Commissioner's monitoring functions, and formally established the Children's Monitor. These legislative changes were the subject of criticism from across the children's sector including in media comment,²⁸³ and a joint submission which raised concerns that the Bill:²⁸⁴

²⁸⁰ Ibid.

²⁸¹ Oranga Tamariki Act, ss [125](#) & [126](#).

²⁸² [Oranga Tamariki Act, s126\(c\)](#).

²⁸³ For example see Smale, A. (2022, February 19) Oranga Tamariki Oversight Bill under fire: 'They want a lapdog, not a watchdog'. *Stuff: Pou Tiaki*. <https://www.stuff.co.nz/pou-tiaki/300514964/oranga-tamariki-oversight-bill-under-fire-they-want-a-lapdog-not-a-watchdog>; Duff, M. (2022, August 29) How laws to 'strengthen' child protection led to division, distrust, and accusations of an autocracy. *Stuff*. <https://www.stuff.co.nz/national/300672123/how-laws-to-strengthen-child-protection-led-to-division-distrust-and-accusations-of-an-autocracy>

²⁸⁴ Children's Rights Alliance Aotearoa New Zealand, [Joint Children's Sector Submission to the Social Services and Community Select Committee: Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill](#) at 2. Many of the organisations supporting the joint submission also made their own submissions for example see: Save the Children New Zealand (SCNZ), [Save the Children Submission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill](#).

[W]eakens the Children’s Commissioner, undermines the independent oversight of Oranga Tamariki and fails to consider children and young people’s perspectives, including how they think their Commissioner should be appointed and function. ... The Bill risks deepening the prejudices, discrimination and inequities that already exist for children within the Oranga Tamariki system, and within Aotearoa New Zealand society more broadly. ...the oversight framework established by the Bill is unnecessarily complicated. It is not child-friendly and more focused on systems and monitoring than children’s experiences and outcomes.

Other submissions also raised concerns about the Office of the Children’s Commissioner losing the ability to receive and investigate complaints including the Human Rights Commission who argued:²⁸⁵

Child-centred expertise is crucial when it comes to ensuring that complaints mechanisms are accessible. Taitamariki, taiohi and whānau in the Oranga Tamariki system are often reluctant to raise concerns, and face a range of barriers when they try. This means that the avenues to making complaints of violations of rights must be accessible and known to those who need to make them. The Office of the Children’s Commissioner is widely known to taitamariki, taiohi and whānau. Moreover, the Office of the Children’s Commissioner has extensive expertise in working with care experienced and vulnerable taitamariki and taiohi. This should be drawn on in undertaking the investigations and complaints functions.

VOYCE Whakarongo Mai were particularly strident in their criticism of the legislation both in a submission on the Bill,²⁸⁶ and in their thematic report to the United Nations Committee on the Rights of the Child which summarised care experienced young people’s biggest concerns about the Bill including that:²⁸⁷

- *Tamariki and Rangatahi are not at the heart of this Bill – they’ve not been consulted in the Bill’s development, nor does the Bill include mechanisms for their involvement in the monitoring frameworks.*
- *Separation of advocacy from monitoring and complaints – Data and insights from monitoring and complaints should form the basis of good advocacy. Monitoring is pointless if no one is going to advocate for change and improvements.*
- *No independence of the Independent Children’s Monitor – the Bill proposes housing the monitor within a government department. Young people and Māori (who are overrepresented in Oranga Tamariki statistics) do not trust that another government department will be independent or impartial in their monitoring and they have won’t have the powers to stand up for them when needed.*

The United Nations Committee on the Rights of the Child Concluding Observations on New Zealand’s compliance with the Convention on the Rights of the Child also expressed concern

²⁸⁵ New Zealand Human Rights Commission - Te Kāhui Tika Tangata. (2022). [Te tāpaetanga o Te Kahui Tika Tangata ki te pire arotake i a Oranga Tamariki me Te Kahui Taitamariki. Submission of the Human Rights Commission on the Oversight of Oranga Tamariki System and Children and Young People’s Commission Bill](#) at 9.

²⁸⁶ VOYCE – Whakarongo Mai. (2022). [Submission on the ‘Oversight of Oranga Tamariki System and Children and Young People’s Commission Bill](#).

²⁸⁷ VOYCE – Whakarongo Mai, [Children in State Care. Thematic Report to the United Nations Committee on the Rights of the Child](#) at 6.

about the change to complaints oversight and recommended that when the Children and Young Person's Commission is established it "has the mandate to receive, investigate and process complaints from children or concerned individuals or organisations, and that its independence is guaranteed".²⁸⁸

The need for an independent and accessible body to whom children in care can make complaints has also been identified in other similar jurisdictions.²⁸⁹ Who Cares? Scotland explain: "[a]ccess to independent, formal complaints processes are vital in creating opportunity for rights abuses to be addressed before formal intervention of the court is required to protect rights".²⁹⁰

Another avenue for complaints is through the Optional Protocol to the UN Convention on the Rights of the Child on a Communications Procedure (OP3) acceded to by New Zealand in 2022.²⁹¹ However, as discussed in the Part 2 report, its utility is likely to be fairly limited in practice given that applicable domestic complaints avenues must have been exhausted, unreasonably prolonged or ineffective before the UN Committee on the Rights of the Child will accept a claim,²⁹² meaning that the process to bring a complaint to the UN Committee is likely to be lengthy and outside children's timescales, particularly for those in care. It is also questionable whether a child or young person in care would have the confidence to make a complaint to an international human rights institution, if they are even aware that this is a possibility.

Case Study: Oranga Tamariki complaints process - ten years of reviews

In 2012 the Office of the Children's Commissioner reviewed the Child, Youth and Family Complaints Resolution Policy and Procedure.²⁹³ The review found that the overwhelming response from the children and young people interviewed was that they did not know how to make a complaint if they were unhappy about something or weren't treated well.²⁹⁴ Only one of the youth participants had actually made a complaint and that young person was not happy with the outcome.²⁹⁵ They also reported that they were not told what they could do in that situation such as contacting the OCC's office or the Ombudsman. When participants were asked about barriers to making complaints, they identified a number of issues including not being given the information about how to make a complaint, that "they feel less powerful, could often be embarrassed and be scared of making a complaint" with the majority of participants speaking of being scared of the consequences of making a complaint.²⁹⁶

²⁸⁸ United Nations Committee on the Rights of the Child, [Concluding observations on the sixth periodic report of New Zealand](#) at 3.

²⁸⁹ Law Council of Australia, [The Justice Project: Final Report Part 1 Children and Young People](#) at 48; Who Cares? Scotland, [Navigating a World of Rights: Views from our Care Experienced membership](#) at 29-30; Inquiry Panel, [The Report of the Independent Inquiry Into Child Sexual Abuse](#) at 179-180.

²⁹⁰ Who Cares? Scotland, [Navigating a World of Rights: Views from our Care Experienced membership](#) at 29-30

²⁹¹ United Nations General Assembly. (2011). *Resolution adopted by the General Assembly on 19 December 2011: 66/138. Optional Protocol to the Convention on the Rights of the Child on a communications procedure.* https://treaties.un.org/doc/source/docs/A_RES_66_138-Eng.pdf

²⁹² See Article 7(e).

²⁹³ Egan-Bitran, [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure.](#)

²⁹⁴ Ibid at 19.

²⁹⁵ Ibid at 18.

²⁹⁶ Ibid at 21.

The following year, the Minister of Social Development commissioned a review of Child, Youth and Family Complaints System by Howard Broad.²⁹⁷ Broad endorsed many of the findings in Egan-Bitran's report for the Office of the Children's Commissioner as well as drawing from a paper on effective complaints handling produced by the Office of the Ombudsman.²⁹⁸ He found:²⁹⁹

Without a doubt the most troubling recurring theme encountered in this review was the absence of the voice of the child into the complaint system. Notwithstanding that both the Children's Commissioner and CYF have programmes that seek out feedback from children and young people; the record system discloses that there have only been two complaints by children in the post-2008 system outside of the Residence Grievance Procedure. The system primarily deals with complaints by adults about their experience of the CYF systems, processes and people (which may be as a parent, carer or advocate or in some cases about their experience of the system of some time ago as a child) and the complaints process does not achieve any effective platform for children to complain.

When the Expert Advisory Panel issued its report in 2015 it also made recommendations for "a stronger and more influential complaints process for all system participants".³⁰⁰ The following year another report in relation to the feedback and complaints system was commissioned as part of the *Investing in Children* programme, this time from KPMG.³⁰¹ The report noted that the Government had committed to giving implementing the recommendations of the Expert Panel including redesigning the feedback and complaints system as part of an effective child-centred operating model.³⁰² The authors' findings included that the "[s]ystem is not child-centred - the voice of the child is often missing".³⁰³

In 2016 Voyce Whakaronga Mai was established,³⁰⁴ and amendments were made to the Oranga Tamariki Act introducing new obligations to "establish, amend, or replace" one or more complaints mechanisms "to enable children and young persons, their parents, whānau, families, and caregivers" to complain and to receive responses that are "timely and fair" and "centred on the child or young person".³⁰⁵

The following year another three reports were commissioned by Oranga Tamariki, the first an evaluation report "to identify any difficulties posed by the CYF feedback and complaints system and to provide recommendations for a good practice feedback and complaints system".³⁰⁶ Once

²⁹⁷ Broad, [Review of Child, Youth and Family Complaints System: A Report to the Minister of Social Development](#).

²⁹⁸ Ibid at 66 citing Egan-Bitran, [A Review of the Child, Youth and Family Complaints Resolution Policy and Procedure](#); and Office of the Ombudsman (2012) [Occasional Paper: Effective Complaint Handling](#).

²⁹⁹ Ibid at 69.

³⁰⁰ The Modernising Child, Youth and Family Panel. (2015). [Expert Panel Final Report: Investing in New Zealand's Children and their Families](#). Ministry of Social Development at 134.

³⁰¹ Investing in Children Programme. (2016). [Child-centric Feedback, Insights and Complaints Mechanism For the Ministry of Vulnerable Children, Oranga Tamariki](#). Oranga Tamariki—Ministry for Children. This report was disclosed pursuant to my request under the Official Information Act. See <https://www.cypaccesstojusticenz.com/documents-1>

³⁰² Investing in Children Programme, [Child-centric Feedback, Insights and Complaints Mechanism For the Ministry of Vulnerable Children, Oranga Tamariki](#) at 1.

³⁰³ Ibid at 2.

³⁰⁴ VOYCE Whakaronga Mai. (n.d.). [About Voyce](https://voyce.org.nz/about-voyce/). <https://voyce.org.nz/about-voyce/>

³⁰⁵ [Children, Young Persons, and Their Families \(Oranga Tamariki\) Legislation Act 2017 \(2017 No 31\)](#), ss 6(2) & 13(5) amending the Oranga Tamariki Act to include section 7(2)(bad) and s7(2)(bb).

³⁰⁶ Oranga Tamariki Evidence Centre, [Changing Feedback and Complaints: An evaluation report informing the Oranga Tamariki feedback and complaints system](#).

again, the report identified the same failings including that the system is adult centred.³⁰⁷ Stakeholders interviewed by the researchers also identified challenges in relation to access to advocates.³⁰⁸

It was common to hear from the stakeholders interviewed that the Ministry could do better, both in ensuring improved awareness of children's advocacy rights and providing improved advocacy services....It was observed that advocate use for children and their families/whānau is inconsistent and largely unsupported.

The second was a rapid review of the research and literature regarding the components of an effective complaints system.³⁰⁹ The third report was undertaken by the Oranga Tamariki Voices of Children team and sought the views of children and young people in care on providing feedback and making complaints to Oranga Tamariki.³¹⁰ The key insights identified by the report writers included a number of concerns in relation to how the system was currently operating including that not all children and young people are aware that they can raise feedback and concerns with Oranga Tamariki and that Young people's previous experience of raising feedback and complaints raised issues with responsiveness from social workers and residence staff.³¹¹

The National Care Standards which came in in 2018 also introduced new obligations to provide information to children and young people "in a way that is appropriate to their age, development, language, and any disability".³¹² This information included information relating to how to provide feedback or make a complaint as well as the support available to them (including independent advocacy or other support services) if they require assistance to express their views. The National Standards also includes a *Statement of rights* but this statement does not refer to the obligations under r 66 in relation to feedback and complaints. It also provides for a process that is somewhat unrealistic in cases of abuse in care:³¹³

If you want to tell someone that something bad or wrong has happened that needs to be made right, you can. Tell your support worker, or another support worker if it is your normal support worker who has done something wrong. They will help you understand what to do, how to do it, and what will happen afterwards.

Oranga Tamariki staff began engaging with the Youth Advisory Group (YAG) in relation to possible changes to the feedback and complaints system in 2019.³¹⁴ The minutes of the advisory group meeting in April 2019 record that Oranga Tamariki staff gave a presentation in relation to a three year project to reform feedback and complaints system with staff acknowledging that the current process is not very accessible or youth friendly. The minutes also record initial feedback from the YAG on the complaints & feedback process including raising concerns about accessibility and saying that the complaints form is too long and is not child friendly. YAG also asked Oranga Tamariki staff what it will do to support children to feel

³⁰⁷ Ibid at 10: "Stakeholders noted that the CYF system is adult-centred. Complaints are predominantly made by adults, often focusing on the difficulties or frustrations that they face with CYF. Children rarely complain to CYF, and adult focused complaints can 'misdirect' responses away from children's needs or wishes."

³⁰⁸ Ibid at 12.

³⁰⁹ Oranga Tamariki Evidence Centre. (2018). [Feedback and complaints systems: A rapid review](#). Oranga Tamariki—Ministry for Children.

³¹⁰ Oranga Tamariki Voices of Children. (2018). [Children and young people's views on providing feedback and making complaints to Oranga Tamariki](#). Oranga Tamariki—Ministry for Children.

³¹¹ Ibid at 2.

³¹² [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, r 66](#).

³¹³ [Oranga Tamariki \(National Care Standards and Related Matters\) Regulations 2018, Schedule 2](#).

³¹⁴ [Youth Advisory Group Minutes 2 April 2019](#)

safe about making a complaint. The minutes noted that this issue had been raised previously. Minutes of the YAG meetings over the next year record ongoing discussions in relation to the issues with the feedback and complaints system but little progress.³¹⁵ The YAG projects overview for the period 2018-2020 also recorded the feedback given by the Youth Advisory Group to Oranga Tamariki in relation to how to make the feedback and complaints system more child-centred and noted that this work is a key project for the feedback and complaints team to progress in the 2021 financial year.³¹⁶

However, in 2020 Oranga Tamariki introduced a new complaints system, Compliments, Complaints, and Suggestions (CCS) and previous the Complaints Management System (CMS) was discontinued. It is difficult to understand why a new system was introduced that still wasn't child-centred given Oranga Tamariki's statutory obligations, all the reviews and research that had been done in the last few years and the very clear feedback received from the YAG.

The Oranga Tamariki Future Direction Plan released in September 2021 once again includes an action in relation to reviewing and amending the feedback and complaints system with this task to be completed in 0-6 months.³¹⁷ However, a year and a half after the release of the Future Direction Plan this work still appears to be in the design phase and concerns continue.³¹⁸

The Office of the Children's Commissioner told the Royal Commission of Inquiry into Abuse in Care that:³¹⁹

A functional mokopuna and whānau-centred complaints system has never existed and is urgently needed. The OCC has repeatedly highlighted its concerns with the current complaints system, including access to complaint mechanisms, remedy, and redress.

In cross-examination before the Royal Commission the Chief Executive of Oranga Tamariki also conceded that problems remain with the complaints system including that for grievances in residential care:³²⁰

So our current position it actually needs, in my words, an overhaul, which is why we have work already under way, which is called Manaaki Kōrero, working with VOYCE - Whakarongo Mai to completely re-design our feedback and complaints process internally.

Ihorangi Rewiti-Peters described the barriers children and young people in care experience in seeking to report their experiences of abuse or make a complaint:³²¹

From my own experiences of engaging with the New Zealand Police, there is no direct way that young people can report what has happened to us in care via the

³¹⁵ [Youth Advisory Group Minutes 24-25 June 2019](#); [Youth Advisory Group Minutes 20 & 21 Feb 2020](#); [Youth Advisory Group Minutes 28 April 2020](#); [Youth Advisory Group Projects Overview 2018-2020](#).

³¹⁶ [Youth Advisory Group Projects Overview 2018-2020](#).

³¹⁷ Oranga Tamariki— Ministry for Children. (2021). *Oranga Tamariki Future Direction Plan* at 1.4 <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/News/2021/MAB-report-action-plan-release/OT-Future-Direction-Action-Plan.pdf>

³¹⁸ Independent Children's Monitor, *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022* at 60.

³¹⁹ [Opening Statement for the Office of the Children's Commissioner | Manaakitia Ā Tātou Tamariki dated 14 August 2022](#) at 3.

³²⁰ Royal Commission of Inquiry into Abuse in Care. (n.d.). *State Institutional Response Hearing Transcript of Proceedings 24 August 2022* at 812.

³²¹ [Witness Statement of Ihorangi Ahi Bay Potiki Rewiti-Peters](#) 18 January 2022, Royal Commission of Inquiry into Abuse in Care at para. 60.

police, and it is a daunting and traumatic experience to re-tell our accounts of abuse. ...Young people in the care of Oranga Tamariki don't feel comfortable raising their concerns and sharing their experiences with Oranga Tamariki's 'Feedback and Complaints Line', because Oranga Tamariki staff are the people that the young people have a problem with. Young people in care are scared to raise their concerns because they are worried that it may affect their current placement, put them in a bad position, or that they may experience further abuse and/or neglect.

Ihorangi Reweti-Peters also discussed his experience of making complaints to Oranga Tamariki in the media including that he made his complaint over the abuse he suffered while in the Oranga Tamariki foster placements in February 2021 about but was still waiting for it to be resolved almost two years later in November 2022.³²² He described Oranga Tamariki's designated helpline often being left unanswered, despite the agency's promises that it would be fully monitored as well as his concerns over the delay in responding to his complaint which meant that he could not have the closure he needed saying "I feel hurt and let down, and that they don't really care."³²³

The most recent report from the Independent Children's Monitor made it clear that issues remain with Oranga Tamariki only receiving 16 complaints, one compliment and one suggestion from tamariki and rangatahi in care.³²⁴ The ICM acknowledged that Oranga Tamariki is working with VOYCE to improve its complaints system,³²⁵ as well as taking steps to improve the grievance process, noting that it would "continue to co-ordinate our monitoring activities with other oversight bodies and monitor the impact of these changes."³²⁶

Lack of Data

Concerns in relation to Oranga Tamariki's inability to provide key data have repeatedly been raised in a series of reports and inquiries over the last few years. The Office of the Children's Commissioner's second report in relation to uplifts of tamariki aged 0-3 months found that current data did not provide a full picture and that these data gaps limit understanding of what was happening and impeded transparency.³²⁷ The report concluded:³²⁸

The gaps identified in the aggregated database signal a missed opportunity for recognising trends and issues faced by both whānau and the state so that timely responses can be implemented.

In 2021 the Oranga Tamariki Ministerial Advisory Board found that across the organisation:³²⁹

³²² Miller, Corazon (2022, November 24) Teen waits nearly 2 years for OT to address abuse in care complaints. 1 News. <https://www.1news.co.nz/2022/11/24/teen-waits-nearly-2-years-for-ot-to-address-abuse-in-care-complaints/> A representative of Oranga Tamariki advised the journalist that a response to Peters' complaint should be ready in the next month.

³²³ Ibid.

³²⁴ Independent Children's Monitor, *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2021 – 30 June 2022* at 60.

³²⁵ Ibid.

³²⁶ Ibid at 61.

³²⁷ Office of the Children's Commissioner. (2020). *Te Kuku O Te Manawa: Moe ararā! Haumanutia ngā moemoeā a ngā tūpuna mō te oranga o ngā tamariki* at 55-56.

³²⁸ Ibid at 56.

³²⁹ Oranga Tamariki Ministerial Advisory Board. (2021). *Hipokingia ki te Kahu Aroha, Hipokingia ki te katoa: The initial report of the Oranga Tamariki Ministerial Advisory Board*. Oranga Tamariki—Ministry for Children at 47.

[T]he ability to make use of information was varied – either that the information was not timely, relevant, or fit for its required purpose, that it could not easily be accessed, or that it simply did not exist in the first place.

The Ministerial Advisory Board identified a number of benefits of improved data collection practices including better understanding of the diversity of needs and risks in the tamariki they are caring for as well as enabling better decision-making at both site and strategic levels.³³⁰

Recent OPCAT monitoring reports by the Office of the Children’s Commissioner also raise issues in relation to record keeping and data management at residences. For example, an inspection in October 2021 staff found a myriad of issues in relation to record keeping and the availability of key data: hard copy files were incomplete or could not be viewed because they were in a system that they did not have access to, there were no behaviour management plans or All About Me plans for mokopuna on file, recording in daily logs and secure files was inconsistent and poor, and the files did not have up to date documentation such as Retention Orders.³³¹

The Independent Children’s Monitor’s report on the year from the year July 2020 and 30 June 2021 found that Oranga Tamariki could only answer five percent of the questions for all children in their care using its administrative database.³³² The ICM concluded that:³³³

The data that agencies gave us clearly shows areas that need improving, although the gaps in available data prevent a comprehensive view of the quality of care. For example, Oranga Tamariki cannot report on tamariki and rangatahi access to health services, and whether they are informed of, and understand their rights; or whether caregivers are given appropriate training and information about the tamariki they care for.

The ICM’s next report, relating to the year July 2021 to June 2022 report commented on its findings in the previous report before noting that little had changed other than some measures which made it even more difficult to assess progress:³³⁴

While it has made some progress with self monitoring, Oranga Tamariki told us that, overall, its approach is still underdeveloped. It acknowledges its current state of data, tools and analysis is “fragmented”. ...We also note that there have been some changes to the measures that Oranga Tamariki have used compared to last year. This makes it difficult to compare progress. ...Until Oranga Tamariki makes more progress with their self-monitoring, it will remain difficult to measure and understand if it is making meaningful change in meeting its regulatory obligations to tamariki and rangatahi in its care. Being able to provide structured data for every child in their care, as opposed to relying heavily on case file samples, will enable them to understand what care looks like for all tamariki.

I also experienced challenges when seeking to access information about complaints to Oranga Tamariki for the purposes of this study. In particular, Oranga Tamariki responded to my request

³³⁰ Ibid at 47.

³³¹ Office of the Children’s Commissioner. (2021). [Te Oranga OPCAT Monitoring Report](#) at 15.

³³² Independent Children’s Monitor, [Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations, Reporting period 1 July 2020 – 30 June 2021](#) at 5.

³³³ Ibid at 10.

³³⁴ Ibid at 29.

for disaggregated information about complaints made by children and young people by saying that they don't ask for or collect this information.³³⁵

The purpose of our complaints system is to understand and seek to address a person's complaint. For this, reason we focus our questions on the nature of their complaint and what might resolve it for them. While a person may volunteer demographic information, such as age, gender, and ethnicity, we don't expect them to. We are, however, able to tag when it is a child in care making the complaint.

People who give us feedback have told us that asking a series of quite personal questions about them when they make a complaint can feel quite invasive. Often people who make complaints to us have had experiences with us that they view as quite negative, and they don't feel comfortable sharing any personal information with us that they don't have to.

While there may be some validity to the concern that questions about demographic characteristics could be viewed as intrusive, in many cases this information should be accessible on case files making it unnecessary to ask further questions. Moreover, regardless of the reason that the information is not recorded, not having access to it significantly limits our ability to understand how the complaints process is working, or not working, for different groups.

³³⁵ [Letter from Oranga Tamariki to Jennifer Braithwaite dated 7 May 2021](#) at 3.

Possible solutions

Introduction

In this section I discuss some possible solutions or ways of addressing some of the barriers to access experienced by children and young people in care or with care experience raised in the research and literature from Aotearoa New Zealand and overseas. This is not a complete analysis, nor an attempt to identify all possible ways to resolve these access to justice challenges and should be read together with working papers 11-17 which discuss possible ways of increasing access to justice for children and young people more generally.³³⁶

Legal services in Oranga Tamariki system

In Aotearoa New Zealand there is fairly limited guidance for lawyers representing children in child – a practice note from the Chief Family Court Judge which primarily focusses on procedural matters,³³⁷ and a single seven page best practice guidance note that relates to both private family law proceedings and proceedings under the Oranga Tamariki Act 1989.³³⁸

In contrast, Victoria Legal Aid produce a detailed guide for lawyers representing children in child protection proceedings which includes child participation principles adapted from the Basic requirements for the implementation of the right of the child to be heard identified by the United Nations Committee for the Rights of the Child.³³⁹ The VLA guide discusses the importance of considering the particular child's needs:³⁴⁰

[A] child's physical and mental health, cultural and religious identity, family and peer relationships, education, disability, housing situation, or sexuality will impact on a child's experience of the world around them and of the child protection system. In some cases they may indicate the child is at particular risk of disadvantage or marginalisation, has certain entitlements to services or resources, or may need special assistance to participate in proceedings.

All lawyers should consider how these factors impact a child they are acting for and identify the strategies, services and resources that may assist the child and promote their best interests. This means lawyers need to have a working knowledge of the child and family service system, and of policies, initiatives or legislative entitlements relevant to children involved with child protection.

The VLA guide also contains sections in relation to the needs of specific groups of children and young people and good practice in working with each group including Aboriginal and Torres Strait Islander children, children with a disability, education needs, cultural and religious diversity and LGBTIQ+ young people.³⁴¹ Victoria Legal Aid are also undertaking a project to develop new child protection professional development training and resources starting with consulting child

³³⁶ Working papers 11-17 discuss Strategic litigation; Legal service delivery, non-lawyer services, and integrated services; Data, evidence and measuring change; Technology; Training for professionals; Legal education and continuing professional development for lawyers and judges; and Law-related education for children and young people.

³³⁷ Principal Family Court Judge. (2020). [Family Court Practice Note. Lawyer for the Child: Selection, appointment and other matters](#). Principal Family Court Judge's Chambers.

³³⁸ Family Law Section. (2018). [Lawyer for the child best practice guidelines: Acting for children under the Care of Children Act 2004 and the Oranga Tamariki Act 1989](#). New Zealand Law Society.

³³⁹ Victoria Legal Aid. (2019). [Representing children in child protection proceedings: A guide for direct instructions and best interests lawyers](#).

³⁴⁰ Ibid at 29.

³⁴¹ Ibid at 29-35.

protection lawyers to find out what they consider to be the important skills and knowledge for this area of law, as well as what training and resources would support them best.³⁴² They will also review existing resources and speak to other key stakeholders including people with lived experience of the child protection system and other professionals.

In the United States there are a series of guidelines or standards produced by the National Association of Counsel for Children, the National Quality Improvement Center on the Representation of Children in the Child Welfare System, and the Family Justice Initiative.³⁴³ Each of these guidelines are significantly more substantial than the brief best practice guidance note available for lawyers in Aotearoa New Zealand.

The National Association of Counsel for Children sets out the ten primary duties of lawyers for children and young people in welfare and abuse proceedings each of which is discussed in a separate chapter:³⁴⁴

- Establish a lawyer-client relationship: Lawyers for children and youth should use the expressed interest model of legal representation;
- Support the lawyer-client relationship: Lawyers should maintain frequent contact and intentional communication, tailored to the child or young person;
- Offer legal advice: Lawyers have an ongoing, positive duty to advise clients of their rights, educate them about the legal process, inform them of their options, and support their decision-making;
- Ensure opportunity for full participation: Lawyers should ensure children and young people opportunity for meaningful participation in court hearings and legal processes;
- Provide competent legal representation: Lawyers should provide competent legal representation;
- Provide loyal and independent legal representation: Lawyers should guarantee loyalty and independence throughout their legal representation;
- Maintain confidentiality: Lawyers should follow the same confidentiality and privilege rules as they do for adult clients, in accordance with the law;
- Advance equity in legal representation: Lawyers should engage in “culturally humble representation” and actively challenge inequitable treatment;
- Provide “360°” Advocacy: Lawyers should seek to understand their clients as whole people, inside and outside the context of the legal proceedings, and provide holistic advocacy; and
- Preserve continuity of legal representation: Lawyers should provide uninterrupted legal representation where possible.

The National Association of Counsel for Children also publish *Child Welfare Law and Practice*, also known as “The Red Book,” a day-to-day guide for child welfare advocates which was originally developed as a study guide for attorneys preparing to take NACC's Child Welfare Law

³⁴² Victoria Legal Aid. (2023). *Help shape new training and resources for child protection lawyers*. <https://www.legalaid.vic.gov.au/help-shape-new-training-and-resources-child-protection-lawyers>

³⁴³ Family Justice Initiative. (2021). [*Improving the lives of children and families through high-quality lawyering*](#); Duquette, D.N., Orlebeke, B., Zinn, A., Pott, R., Skyles, A., & Zhou, X. (2022). [*Children's Justice: How to Improve Legal Representation of Children in America's Child Welfare System*](#). National Quality Improvement Center on the Representation of Children in the Child Welfare System; National Association of Counsel for Children. (2022). [*Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings*](#).

³⁴⁴ National Association of Counsel for Children, [*Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings*](#) at 4. The duties have been lightly amended to reflect terminology used in Aotearoa New Zealand e.g. changing ‘attorney’ to ‘lawyer’.

Specialist certification exam.³⁴⁵ The most recent edition published in 2022 includes chapters in relation to LGBTQ+ youth, racial justice, representing parents and children with disabilities, multidisciplinary advocacy, preventive legal representation, crossover youth, and child trafficking.

The National Quality Improvement Center on the Representation of Children in the Child Welfare System identify six core skills that form part of the “three dimensions of advocacy—listen, counsel and advocate”:³⁴⁶

1. Enter the child’s world: Engage with the child, learn their needs, guide them, and advocate for their needs while accommodating their stated interests as provided by law;
2. Assess child safety and protect the child but without over-reacting. “Remove the danger, not the child,” whenever that is consistent with child safety.
3. Actively evaluate needs: Facilitate an appropriate assessment of the needs of the child and his/her family.
4. Advance case planning: Facilitate development of an appropriate case plan.
5. Develop case theory: Develop an active and forward looking theory of the case whilst considering alternative and tentative theories of the case. The theory of the case provides direction to the advocacy.
6. Advocate effectively: Use advocacy methods that stress problem-solving and non-adversarial approaches as well as traditional adversarial modes when appropriate.

In 2017 the Family Justice Initiative identified what they described as the fundamental attributes of high-quality legal representation for parents and children that must be met by organizations and by the individual attorneys for children and parents to achieve improved outcomes³⁴⁷ including:

- Attribute 1: Caseload and Compensation – Caseloads should be reasonable and compensation rates for children’s and parents’ counsel should be on par with attorneys for the child welfare agency with pay structured in a way that incentivizes zealous representation.³⁴⁸
- Attribute 2: Interdisciplinary Practice Model – Lawyers work alongside other professionals, including social workers, peer parent/youth mentors, and investigators in order to address the root causes of system involvement.³⁴⁹
- Attribute 3: Diversity/Cultural Humility - Training and skill-building around bias, cultural humility and understanding how power may affect the lawyer-client relationship are crucial to high-quality representation.³⁵⁰
- Attribute 4: Timing of Appointment - Clients need to have a meaningful opportunity to consult with their lawyer at the earliest possible time.³⁵¹

³⁴⁵ Gupta-Kagan, J., Adams, L.T., Carter, M.D., Pisani-Jacques, K., & Sanjaraan, V.S. (2022). *Child Welfare Law and Practice: Representing Children, Parents, and Agencies in Child Neglect, Abuse, and Dependency Cases* (4th Edition). National Association of Counsel for Children. They have also published a guide for policymakers which sets out the rationale for lawyers for children: National Association of Counsel for Children. (2023). [Seen, Heard, and Represented: A Policymaker’s Guide to Counsel for Kids](#).

³⁴⁶ Duquette et al., [Children’s Justice: How to Improve Legal Representation of Children in America’s Child Welfare System](#) at 67-68.

³⁴⁷ Family Justice Initiative, [Improving the lives of children and families through high-quality lawyering](#) at 1 & 4.

³⁴⁸ Ibid at 4.

³⁴⁹ Ibid at 5.

³⁵⁰ Ibid at 6.

³⁵¹ Ibid at 6.

- Attribute 5: Support & Oversight – It is important that there are clear expectations, training, education and supervision of lawyers and interdisciplinary teams.³⁵²
- Attribute 6: Accountability/Use of Data - Developing and maintaining high-quality representation requires continuous evaluation of programs through data analysis.³⁵³

Each of these guidance documents share a number of commonalities but I do not advocate for simply adapting any for use in Aotearoa New Zealand. Rather, I share them as examples of a more comprehensive approach and the matters that could be covered in more detailed guidance for Lawyers for the Child. The actual content should be developed by experienced practitioners in partnership with children and young people with care experience and other key stakeholders perhaps through a similar project to that currently being undertaken by Victoria Legal Aid.³⁵⁴

Research and literature in the United States identifies a range of benefits of effective legal representation both in terms of individual case impact, and impacts on the child protection system as a whole. Individual case impacts include improved case outcomes, enhanced information being provided to the judge, children being heard and having meaningful input into the decisions about their lives, and improving children’s perceptions of the fairness of proceedings.³⁵⁵ System impacts include facilitating the recognition and protection of children and young people’s rights in the system and holding state actors accountable for their duties to children.³⁵⁶

Legal services in other contexts

In addition to legal services relating to Oranga Tamariki proceedings, as set out above, children and young people in care and with care experience frequently experience a wide range of justice problems both whilst in care, and when leaving care. Care-experienced young people participating in research by Who Cares? Scotland stressed the need for a wide range of support including both formal legal advice, independent non-legal advocacy, and having moral support available in the form of a supportive, trusted professional or adult.³⁵⁷ Young people also raised the need for education and training for young people, as well as for investment in specialist support organisations and professionals who can support young people to raise rights challenges.³⁵⁸

Education system

As noted above a common area of legal need is issues relating to the education system including disciplinary issues, bullying and discrimination, and special educational needs

³⁵² Ibid at 7.

³⁵³ Ibid at 8.

³⁵⁴ Victoria Legal Aid, *Help shape new training and resources for child protection lawyers*.

³⁵⁵ National Association of Counsel for Children, [Seen, Heard, and Represented: A Policymaker’s Guide to Counsel for Kids](#) at 8-13.

³⁵⁶ Ibid at 15-19. Another series of studies explores the perceptions of effective legal representation of young people in foster care, foster parents, and lawyers and guardians ad litem: Miller, J., Duron, J., Washington, E., & Donohue-Dioh, J. (2017). [Exploring the legal representation of individuals in foster care: What say youth and alumni?](#). *Children and Youth Services Review*, 78, 142-149; Miller, J., Donohue-Dioh, J., Duron, J., & Geiger, J.M. (2019). Examining legal representation for foster youth: Perspectives of foster parents. *Children and Youth Services Review*, 104, 104380; Miller, J., Donohue-Dioh, J., & Owens, L. (2020) Examining the legal representation of youth in foster care: Perspectives of attorneys and attorney guardians ad litem. *Children and Youth Services Review*, 115, 105059. See also Epps, K. & Green, A. (2021) [Youth in Foster Care Articulate What They Need from Legal Counsel; Will Attorneys Respond?](#) *Children’s Legal Rights Journal*, 41(1), Art. 5.

³⁵⁷ Who Cares? Scotland, [Navigating a World of Rights: Views from our Care Experienced membership](#) at 8.

³⁵⁸ Ibid.

provision. Both YouthLaw Aotearoa³⁵⁹ and the Students Rights Service operated by Community Law Wellington and Hutt Valley³⁶⁰ provide free legal services relating to education law however as charitable organisations serving the whole country, their capacity is limited.

Criminal justice system

Another common need is for legal services relating to criminal justice system involvement. In the United Kingdom, the Howard League for Penal Reform have developed a guide to representing children in care at the Police Station.³⁶¹ The introduction to the guide explains the reasons for it:³⁶²

Looked-after children are more likely than their peers to experience police contact and criminalisation. They are less likely to receive support at the police station from family or a trusted adult which can affect both their experience of custody and the criminal justice outcome.

The guide sets out both the legal framework including in relating to police detention, strip searching, the police decision to arrest or charge the young person, and the specific rights of children in care as well as practical guidance regarding matters such as effective communication, adolescent development and ensuring that the child or young person's needs are met. A similar guidance document tailored to the context in Aotearoa New Zealand may be worth exploring.

Transitioning from care

In New South Wales a pilot model delivering legal services to young people transitioning from care operated for a number of years. Although the pilot program has now come to an end, the evaluation of this service found several demonstrated impacts and identified valuable learnings in relation to the provision of legal services to young people leaving care.

The Level UP project provided specialised legal advice, education and support to young people transitioning from out of home care.³⁶³ Young people had regular 'Legal Health checks' using a template focussing on the legal needs commonly experienced by young people transitioning from out of home care which facilitates a discussion between the lawyer and the young person in relation to both current legal issues and those they may experience in the future e.g. employment issues. These checks are repeated every six months to identify any emerging needs and advice was provided accordingly. Young people also have access to dedicated lawyers, legal education, and warm referrals to other legal and non-legal services.³⁶⁴

An evaluation of Level UP found that legal support delivered through this model had demonstrated impacts including:³⁶⁵

- Obtaining housing and tenancy support;
- Understanding workplace rights;

³⁵⁹ YouthLaw Aotearoa. (n.d.). *Free Legal Help*. <https://youthlaw.co.nz/free-legal-help/>

³⁶⁰ Community Law Wellington and Hutt Valley. (n.d.). *Students Rights Service*. <https://www.wclc.org.nz/our-services/the-student-rights-service/>

³⁶¹ Howard League for Penal Reform. (2021). *Making Black lives matter in the criminal justice system: A guide for antiracist lawyers*. .

³⁶² Ibid at 2.

³⁶³ Peek & Kallmier, *LevelUP: An innovative legal project to help young people in Out Of Home Care* at 3. The LevelUP Project came to an end in December 2019 but its learnings are still useful when considering the provision of legal services to care-experienced children and young people.

³⁶⁴ Ibid.

³⁶⁵ Ibid at 20.

- Resolving debt and securing financial stability; and
- Understanding and navigating the family law and domestic violence systems.

The evaluators identified a number of features of the model that contributed to its success including:

- The relationship between the young person and the project solicitor which ensured that clients would contact the service again;³⁶⁶
- Community engagement and education played a key role in promoting the project, developing relationships, and increasing the legal knowledge of young people and their workers;³⁶⁷ and
- The involvement of an Aboriginal worker in the project team and Aboriginal oversight on the steering committee provided cultural support to Aboriginal and Torres Strait Islander young people and connected them with their community and culture.³⁶⁸

Another key insight was that there is no ‘one size fits all’ approach to legal services that works for all young people in this cohort – this means that services need to be dynamic, flexible and well connected to other services.³⁶⁹ The evaluators recommended that services seeking to work with care-experienced young people should consider the following factors:³⁷⁰

- Many clients have experienced trauma, abuse and sexual assault meaning services must use trauma informed practices and recognise that self-advocacy may not be realistic for many in this cohort.
- Clients were often reluctant to engage with government services due to previous negative interactions. This means that it is important that services are perceived as independent from the government.
- Clients felt empowered by the lawyer / client dynamic in which they could give instructions to their lawyer and where their communication with the lawyer was subject to legal professional privilege.
- Clients could often be difficult to contact due to homelessness, change of phone numbers, and relocation. This meant it was important to get multiple modes of contact and to be open to reengagement at a later point.
- LevelUP found frequent conflicts of interests e.g. between siblings, other children in foster homes, residences, or within personal relationships where both partners were care-experienced. As a result, it is important to have conflict of interest protocols and a referral list for those the service cannot assist.
- Flexibility with times and locations for meetings was also important for practical reasons such as public transport availability and limited access to funds. Other strategies included allowing time to get instructions and provide advice on multiple issues at the first meeting as further contact may be difficult.
- Many clients had limited resources or experience eating out meaning that providing food could provide an additional incentive to attend meetings.
- Demonstrating that you can resolve legal issues quickly can help to build trust in the service and that it will follow through for the client. Clients also appreciated clear, tangible advice on practical steps and timeframes.

³⁶⁶ Ibid at 7.

³⁶⁷ Ibid at 8.

³⁶⁸ Ibid at 9.

³⁶⁹ Ibid at 17.

³⁷⁰ Ibid at 17-19.

- Invest in building relationships with both young people and youth workers. Delivering legal education to youth workers led to increased referrals as they learned more about the legal issues young people could experience and how LevelUP could assist.
- LevelUP also found that marketing the service to others who worked with young people with care experience such as criminal lawyers could lead to additional referrals.

The evaluation also made a series of more specific recommendations for a free legal assistance programme and service tailored to young people leaving out of home care.³⁷¹

Non-lawyer services

VOYCE Whakarongo Mai are also funded to provide advocacy for children and young people in care but they do not have in-house legal expertise. *Working paper no. 12 Legal service delivery, non-lawyer services, and integrated services* sets out some different ways non-legal services can be supported to deliver law-related services and develop their legal knowledge. Two options that would be worth exploring in this context are legal secondary consultations and legal health checks. Legal secondary consultations are:³⁷²

[W]here a lawyer offers a non-legal professional (such as a doctor, nurse, youth worker, social worker or financial counsellor) legal information or advice on legal processes for their client through the non-legal professional as an intermediary or assists the professional in their role (such as what happens at court, and how to give evidence or structure reports for a court to provide the required considerations), or on their professional and ethical obligations, or guides the non-legal professional through tricky situations involving their client or their work for clients.

Legal health checks are a screening tool which can assist non-lawyers identify legal problems particularly when used in conjunction with other strategies such as training and building collaborative relationships.³⁷³

Complaints system

As set out above, there is work underway to improve the complaints system for children and young people in care through a joint project between Oranga Tamariki and VOYCE Whakarongo Mai.³⁷⁴ The project, Manaaki Kōrero, involves two workstreams:³⁷⁵

- *Immediate improvements to the residential grievance process. (led by Oranga Tamariki)*
- *Designing with tamariki, rangatahi and whānau the blueprint for a complaints, information, assistance, and advice service that meets their needs. (led by VOYCE – Whakarongo Mai)*

The changes to be made to the residential grievance process are:³⁷⁶

³⁷¹ Ibid at 21-23.

³⁷² Curran, L. (2017). Lawyer Secondary Consultations: improving access to justice: reaching clients otherwise excluded through professional support in a multi-disciplinary practice. *Journal of Social Inclusion*, 8(1), 46–77 at 48.

³⁷³ Victoria State Government, [Access to Justice Review \(Full report\)](#) at 188.

³⁷⁴ See

Case Study: Oranga Tamariki complaints process - ten years of reviews.

³⁷⁵ Oranga Tamariki – Ministry for Children. (2022). [Response to Te Mana Whakamaru Tamariki Motuhake – Independent Children’s Monitor, request for self-monitoring information on the National Care Standards 2021/22 Financial Year](#) at 48.

³⁷⁶ Ibid.

- improving the language and accessibility of tools/resources;
- developing multiple mechanisms to support tamariki and rangatahi to make a complaint (including making a complaint digitally);
- teaching how to make a complaint as a social skill;
- improving investigation standards and training for kaimahi; and
- increasing the profile of advocacy in residences.

While each of these is a positive change, they do not address all of the identified barriers to making complaints. For example, it is unclear whether young people will still need to ask a staff member for a complaints form or whether any steps will be taken to address the overall ‘no-narking’ culture within residences.³⁷⁷ It is also a positive sign that the new complaints system will be co-designed with tamariki, rangatahi and whānau. However, the previous ten years of complaints system reviews that have failed to result in substantive change gives rise to some concern that this project will be similarly ineffective.

In other jurisdictions there are some other guidance documents that could be a useful reference point. For example, in Australia CREATE Foundation, a representative body for children with out of home care experience,³⁷⁸ have developed a best practice guide to child-centred complaints containing “eight essential elements for a good complaints system”:³⁷⁹

1. *Use language that is easy to understand and jargon free*
2. *Train staff receiving complaints to respond appropriately and empower children young people to speak up*
3. *Provide support or access to an independent support person during complaints process*
4. *Prioritise complaints, follow up in a timely manner and inform young people when the complaint is finalised*
5. *Promote and display information on how the system works and who to speak with about any issues*
6. *Develop simple, user friendly and culturally inclusive complaints processes*
7. *Offer multiple options to make complaints and encourage feedback*
8. *Ensure safety and no ramifications for those who speak up*

The guidance document also includes best practice tips relating to each principle. A series of other guidance documents for child-centred complaints processes have also been developed in other jurisdictions.³⁸⁰

³⁷⁷ Oranga Tamariki staff conceded at the Royal Commission of Inquiry into Abuse in Care State Institutional Response hearing that this culture persists and that the ‘no narking’ culture was probably a bigger problem for Oranga Tamariki than the complaints procedure: Royal Commission of Inquiry into Abuse in Care. (n.d.). [State Institutional Response Hearing Transcript of Proceedings 24 August 2022](#) at 813-814.

³⁷⁸ CREATE Foundation. (n.d.). *Who we are*. <https://create.org.au/who-we-are/> [Accessed 27 March 2023]

³⁷⁹ CREATE Foundation. (2020). [Child-centred Complaints Handling: Best Practices Guide](#).

³⁸⁰ Children’s Commissioner for England. (2012). [Common Principles for a Child Friendly Complaints Process](#); Ombudsman for Children’s Office. (2018). [A Guide to Child-Centred Complaints Handling](#); Sedletzki, V. & Lúx, A. (2019). [National human rights institutions \(NHRIs\) Series: Tools to support child-friendly practices. Child-friendly complaint mechanisms](#). UNICEF; Commissioner for Children and Young People WA. (2021). [Child Friendly Complaints Guidelines](#).

Training

The research and literature also identifies the need for specific training in relation to the rights of children in care or with care experience. For example, Liefwaard and Valentine suggest that relevant actors in the alternative care and justice systems should receive training addressing cultural and social norms “towards children that feed into a lack of willingness to accept that children have rights that must be enforced”.³⁸¹ Who Cares? Scotland also argued that a wide range of professionals should get rights training “with particular focus on frontline staff, carers, and parents as the most involved in children’s lives” with training focussed on “the practical implications of upholding rights and ... tailored to individual job roles.”³⁸²

³⁸¹ Liefwaard & Valentine, [*Access to justice for children in alternative care: Submission to the UN Committee on the Rights of the Child for its Day of General Discussion on Children’s Rights and Children in Alternative Care*](#) at 6.

³⁸² Who Cares? Scotland, [*Navigating a World of Rights: Views from our Care Experienced membership*](#) at 7.

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