

Submission to the Social Services Select Committee on the Vulnerable Children Bill

1. Introduction

1.1 This submission is on behalf of the Human Rights Foundation of Aotearoa New Zealand.

1.2 The Human Rights Foundation is a non-governmental organization, established in December 2001, to promote and defend human rights through research-based education and advocacy. We make submissions on new laws with human rights implications. We also monitor compliance and implementation of our international obligations in accordance with the requirements of the international conventions New Zealand has signed, have prepared parallel reports for relevant United Nations organizations to be considered alongside official reports and have coordinated stakeholder (NGO) reports as part of New Zealand's Universal Periodic Review by the United Nations Human Rights Council. Though the primary focus of the Foundation is on human rights in New Zealand, we recognise the universality of human rights and have an interest in the Pacific and beyond.

1.3 We request the opportunity to make an oral submission to the Committee.

1.4 We understand that our submission may be made publicly available if submissions are requested under the Official Information Act 1982.

2. Introduction and Executive Summary

2.1 The Foundation welcomes the Government's commitment to enacting legislation that protects and improves the well-being of vulnerable children. While strongly supporting some of the measures in the Vulnerable Children Bill (the Bill), the Foundation opposes or has strong reservations about other measures in the Bill.

2.2 As a preliminary observation, we observe that all children, by virtue of their age and dependence on adults for their care and development, are among the more vulnerable members of society. While enjoying the protection of all domestic laws and universal international human rights standards, children are also entitled

to the additional protection of specific domestic laws, such as sections 150A and 150 of the Crimes Act 1961¹ and the provisions of the United Nations Convention on the Rights of the Child (UNCROC).

- 2.3 We note that in an increasingly unequal society in which key segments and communities are struggling with economic and social pressures including inadequate housing, poorly paid and precarious work and unemployment, increasing numbers of children face significant risks to their well-being. We therefore consider the Government should commit fully to a comprehensive Action Plan for *all children* that specifically refers to their rights under UNCROC. Such an Action Plan would implement systemic and social measures that address the needs of children in deprived communities, as well as the specific harms addressed in the Bill. We record that virtually all research on the issue of child abuse highlights the link between economic and social deprivation and child abuse and harm.² Hence, addressing economic and social deprivation would go some way to reducing child abuse.
- 2.4 Having said that, we support new measures that specifically address New Zealand's high rates of child abuse and neglect – indeed they are urgently called for – but such measures must be based on reputable research, reliable evidence and not disproportionately override human rights of adults. We reiterate our concern that introducing such measures must not detract from the need to improve economic and social outcomes for all children.

3. New Zealand's international human rights obligations

- 3.1 We set out key provisions of the general international human rights instruments are particularly relevant to the provisions in the Bill.
- 3.2 The Universal Declaration of Human Rights, internationally broadly accepted as a legally binding set of rules, is a powerful statement of states' commitment to human rights standards.

Article 1 states: "All human beings are born free and equal in dignity and rights."

Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 3 states: "Everyone has the right to life, liberty and security of person."

¹ The duty to provide the necessities of life and protect from injury

² In "Death and Serious Injury from assault of children aged under 5 years in Aotearoa New Zealand: A Review of international literature and recent findings", Children's Commissioner, June 2009, the authors report that "socio-economic status has a differential effect whereby non-accidental injury and neglect deaths (0-4 years) occur at a higher rate in low-socio-economic groups and perpetrators are characterised by poverty, instability and unemployment.

Article 5 states; “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 7 states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 23 states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services..

“Motherhood and childhood are entitled to special care and assistance.”

These values have been further incorporated in the key international instruments ratified by New Zealand and discussed below.

3.2 Article 23 of the International Covenant on Civil and Political Rights (ICCPR) states;

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

3.3 Article 24(1) states: “Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

3.4 According to the United Nations Human Rights Committee (UNHRC), the implementation of Article 24(1) entails the adoption of special measures to protect children.³ The Committee notes at [3] that measures for the protection of children not specified in the ICCPR may also be of an economic, social or cultural nature.”

3.5 The Committee also recognises that the responsibility for guaranteeing children necessary protection lies with the family, society and the State, but is primarily incumbent on the family and particularly on the parents. However, where parents and the family seriously fail in their duties, or ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be removed if required (at [6]).

3.6 Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states:

³ United Nations Human Rights Committee, *CCPR General Comment No 17*, thirty-Fifth Session (1989) at [1].

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
 2. The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- 3.7 Article 10 states:
- “1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...
 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.”
- 3.4 Article 11 states: “The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”
- 3.5 Article 12 states: “The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standards of physical and mental health.”
- 3.5 As the UN Convention that focuses specifically on the rights of children, the United Nations Convention on the Rights of the Child (UNCROC) is of key relevance to the Bill.
- 3.6 Article 2(1) states: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”
- 3.7 Article 3 states:
1. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities

or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
 3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”
- 3.8 Article 5 states: “States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”
- 3.9 Article 6 states:
1. “States parties recognise that every child has the inherent right to life.
 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”
- 3.10 Article 9 states:
1. “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.”
- 3.11 Article 18 states:
1. “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”

3.12 Article 19 states:

1. “States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

3.13 Article 24 states: “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”

3.14 Article 27(1) states:

1. “States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”
3. States Parties, in accordance with national conditions and their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

3.15. Finally Article 3 of Te Tiriti o Waitangi is relevant: Article 3 gives to Maori equal rights and duties of citizenship. We note that this has not been honoured in Aotearoa: high numbers of Maori children are living in poverty, have parents on a benefit and have adverse outcomes including relatively high rates of child abuse and neglect.

4. Comment

- 4.1 In the paragraphs above, we have set out in some detail the international perspective on children's rights. The principles articulated in these international agreements have been negotiated by the world community with the benefit of a wide range of global expertise and, having been endorsed by New Zealand, are binding here. While some human rights of children are set out in New Zealand law, including in the New Zealand Bill of Rights Act 1990, the international context provides a comprehensive framework against which legislative initiatives in New Zealand are legally required to be measured.
- 4.2 Subject to our reservations in paragraph 2.3 above, we support in principle sections 6 – 13 of the Bill which call for the establishment and implementation of "The Vulnerable Children's Plan" (the Plan). We consider such a Plan to be urgent and overdue. In addition to the criteria set out in the Bill, the Plan must explicitly refer to and incorporate the rights of children as set out in the international instruments, particularly UNCROC. The Plan should be part of a comprehensive Children's Action Plan. Its preparation must include consultation with the Commissioner of Children with input from non-governmental organisations with expertise in domestic violence and children's issues.
- 4.2 The Bill does not specify at this stage who the responsible Minister is but leaves this to the Prime Minister to designate. The Bill should nominate the responsible Minister, presumably the Minister of Social Development, and set out a clear time-frame for preparation and approval of the Plan. Otherwise matters concerning children may continue to drift without urgency, as has tended to occur in the past. Section 8(4) needs to be amended so that the plan is published widely, not just in the Gazette but also in more accessible fora and other publications, including Internet sites and on social media.
- 4.3 We submit that section 11(2)(a)(ii) and (iii) be deleted. If the government is committed to the Plan, the Plan itself should influence the way a chief executive exercises a statutory power of decision. Failure to take account of the Plan should be a ground for judicial review.
- 4.4 We have considerable reservations about sections 14 – 20 of the Bill which require the selected agencies to develop child protection policies. Our reservations include the extra work imposed on, for example, school boards, to comply with this requirement. We consider that, if school boards are to be required to implement child protection policies, they need clear guidance, strong administrative support and adequate funding to enable them to do so, none of which is a requirement of the Bill.
- 4.5 Further, there needs to be some uniformity or consistency in such policies. For example, section 14 refers to the "reporting of child abuse and neglect." There is a lack of agreement and clear guidance on what is "neglect". By way of illustration we refer to the following story from the report "Preventing child neglect in New

Zealand” published by the Children’s Commissioner.⁴ One interviewee, noting the degree of variability in the neglect referred, commented,

I will not jump up and down if a child is not having lunch at school, because that’s the majority of our children. If I talk to a child and the child says ‘oh I haven’t had breakfast’ and I say ‘when did you last eat?’ ‘Oh two days ago’ then I will go and talk to the social workers.

This disturbing anecdote is one of several in the above-mentioned report. We suggest that the Plan is probably the more effective way of addressing what specific policies should be adopted and implemented by organisations such as school boards.

- 4.6 We support the principle behind section 21: that, in general, people engaged in work that involves regular or overnight contact with children, *where there are no other adult employees present at all times* [we recommend the wording in italics should be added] should be safety-checked. Because of the potential impact of this provision on aspiring employees and their right to employment, we consider that section 23(1)(b) should be amended to read, “takes place without a parent or guardian of the child.. *or other adult employee.*”
- 4.7 We note that this whole sub-part creates two classes of workers with different time-frames for safety checking each class: “children’s workers” and “core workers.” We consider this to be cumbersome particularly as the safety checks appear to be very bureaucratic. A comprehensive definition of “children’s worker” should suffice.
- 4.8 We consider however that the criteria set out in section 31 – “Requirements for safety checks” are unacceptably vague. Section 31(1)(c) refers to “a risk assessment carried out as prescribed by regulations made under section 32.” Given the centrality of this risk assessment to determining peoples’ employment prospects, key criteria should be spelled out in the Bill. If there is inadequate evidence to support such risk assessments, then they should not be implemented.
- 4.9 We strongly support the need for exemptions as set out in ss 34 – 35 of the Bill. For example, a person convicted of “manslaughter” or “attempt to murder” many years ago may have rehabilitated themselves and be able to work safely with children – and their conviction may not have anything to do with their capacity to work with children. That person has the right to be treated fairly, with dignity and without discrimination in accordance with the core international human rights standards. Their right to seek an exemption is important. We recommend that the criteria for revoking an exemption in section 36(2) should be tightened up by replacing the word “or” after subsection (a) with the word “and”.

⁴ Preventing child neglect in New Zealand”, Dr Janine Mardani, Office of the Children’s Commissioner, December 2010, at 75.

- 4.10 However, we oppose the routine application of safety checks to existing staff. Safety checks on existing staff should occur *only if* the employer has reasonable grounds for believing that the child worker in question is a risk to the safety of children. In such cases, safety checks must be carried out fairly and reasonably in accordance with the provisions of the Employment Relations Act 2000. We consider the provisions of section 28 to be unduly harsh and unnecessarily and unreasonably breach the employment rights of existing employees.
- 4.11 We also do not see the need for children's workers to be "safety checked" every 3 years. This appears unnecessarily intrusive to loyal and competent employees.
- 4.12 We support the implementation of child harm prevention orders and consider that, overall, the Bill adequately and carefully balances the competing human rights interests involved, being the rights of children to be safe from harm and the rights of adults to live and work where they choose. The principles in section 45 appropriately reflect these competing interests.
- 4.13 We note that under section 55 of the Bill, a court may make a child harm prevention order even where the "court finds, on the balance of probabilities, that the respondent has committed a qualifying offence". Because of the particularly low reporting and conviction rates for sexual offences and because of the serious harm they cause to child victims, we support the court having this power.
- 4.14 We question the need for section 53: court must obtain a second report by a health assessor nominated by the respondent. We consider that where a respondent does not wish to submit to a psychological report, he or she should have the right to decline and take the consequences.
- 4.15 Section 64 provides for annual reviews of child harm prevention orders by a review panel whose members must include "at least 4 members who have experience in the operation of the New Zealand Parole Board." This seems to apply to child harm prevention orders some of the procedures of the Parole Board. Without strong evidence substantiating the work of the Parole Board in assessing safety particularly concerning children, this process appears unnecessarily bureaucratic and expensive. We question a regime that automatically endorses the skills of Parole Board members to undertake risk assessments relating to harm to children. A better alternative may be that a person, subject to a child harm prevention order, should have the right to appeal the order to a court. Similarly, as with protection orders, a person subject to a child harm prevention order should have the right to apply to the relevant court for a variation or discharge of the order.
- 4.16 Section 75 of the Bill empowers a Judge or Court Registrar to issue a summons requiring any person to appear as a witness in a proceeding relating to a child harm prevention order. We are very concerned that child victims who have experienced the stress and/or trauma of giving evidence in a court trial may be required to relive this distressing experience, albeit in a hearing for a quite

different purpose. We recommend that this section be amended to exclude such child witnesses from being required to give evidence.

- 4.17 We question the fairness of the complicated procedure set out in section 77. In brief, this section appears to permit the Commissioner or Chief Executive to assess, before the trial, whether the defendant in question is likely to be the subject of proceedings for a child harm prevention order. In such a case, the Commissioner or Chief Executive has to provide a written notice to the defendant that includes, among other things, the statement that “in the event that the defendant is acquitted of the qualifying offence or offences, the Commissioner or chief executive, is likely to apply for a child harm prevention order against he defendant” and that any evidence presented during the trial may be considered by the court when determining the child harm prevention order. This section comes perilously close to breaching the important principle that all defendants are innocent until proven guilty. It may simply be fairer to warn all defendants in cases of qualifying offences that they face a risk, not easily assessable before trial, that evidence in their trial may be used in a subsequent application for a child harm protection order.
- 4.18 We comment, if only briefly, on the proposed amendments to the Children, Young Persons and their Families Act 1989 (CYPFA). We support the proposed section 103(1) except that the phrase “welfare and interests of the relevant child or young person” should be replaced with “welfare and *best interests*”. That is the expression used in UNCROC and section 4 of the Care of Children Act 2004.
- 4.19 We question the need for a section 106 which implements new sections 18A to 18D of CYPFA. In essence, these sections require a parent who has had children removed from them on a permanent basis or who has been convicted of the murder, manslaughter or infanticide of a child to demonstrate, to the satisfaction of the social worker, that he or she is unlikely to inflict harm on a child.”
- 4.20 We accept that research and statistical analysis highlights that previous notifications to CYFS is a risk factor for children. However, we are concerned that this reverse onus of proof provision puts a further burden and stress on disadvantaged parents at the time of birth of a baby. Even worse, such principles and processes impose a barrier in the way of these parents working effectively and collaboratively with CYFS. Parents who have inflicted harm in the past are, in some instances, capable of change, given the right conditions and adequate support. Developing a good relationship with a competent and supportive social worker is often a crucial factor in ensuring such change. The proposed amendment may impede this and lead to the upheaval and resulting trauma of newly born babies being removed from parents unnecessarily.
- 4.21 We are also concerned that the recent changes to the legal aid scheme may have reduced the availability of experienced and capable lawyers able and willing to advocate for parents in this category.

4.22 One of the authors of this submission is an experienced family lawyer, who has significant experience with CYFS files. Her experience, accumulated over many years, is that tinkering with the CYFA will do little to promote better outcomes for children. Those outcomes depend on a large number of factors including talented and well resourced social workers, the social worker's ability to form effective relationships with the parents in question, the capacities of the parents and extended family to care for the child and the support they are able to access. None of these matters are addressed adequately in this legislation.

5. Recommendations

5.1 The Bill should be enacted with the amendments noted above.

5.2 Alongside the enactment of the Bill the government should commit to implementing a rights-focussed Children's Action Plan that comprehensively encompasses the needs of all children, including those most at risk of harm, abuse and neglect.