EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM 2013-092-001135
FAM-2020-092-000464
FAM-2020-092-000465
FAM-2020-092-000466
[2021] NZFC 3817

IN THE MATTER OF	**THE ORANGA TAMARIKI ACT 1989**
BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI—MINISTRY FOR CHILDREN Applicant
AND	[T S] [P H] Respondents
AND	[R S] born on [date deleted] 2005 [J S] born [date deleted] 2006 [K S] born on [date deleted] 2007 [A H] born on [date deleted] 2011 Children or Young Persons the application is about

FAM-2017-092-000220
FAM-2017-092-000221
FAM-2017-092-000222
[2021] NZFC 3829

AND BETWEEN	CHIEF EXECUTIVE OF ORANGA TAMARIKI—MINISTRY FOR CHILDREN Applicant

AND	[B P] [T T] [O M] [T P] Respondent
AND	[M T] born [date deleted] 2004 [R M] born on [date deleted] 2006 [N M] born on [date deleted] 2007 [D M] born on [date deleted] 2009 [A M] born on [date deleted] 2010 [W P] born on [date deleted] 2017 Child or Young Person the application is about

Hearing:	23 April 2021
Appearances:	E Faletau and C Mutadavic for the Chief Executive (re the [R S], [J S], [K S] and [A H] children) No appearance by or for the Respondents [T S] and [P H] A Cooke and J Davies as Lawyer for the Children [R S], [J S], [K S] and [A H], P Finau for the Chief Executive (for the [M T], [R M], [N M], [D M], [A M] and [WP] children) P Muller for the Respondent [B P] No appearance by or for the Respondents [T T] and [O M] Respondent [T P] in person J Davies as Lawyer for the Children [M T], [R M], [N M], [D M], [A M] and [W P]. S Jerebine to assist the Court
Judgment:	29 April 2021

RESERVED DECISION OF JUDGE S D OTENE
(Re-Hearing Applications)

TABLE OF CONTENTS

A. INTRODUCTION

[1] Inherent in the aspiration that a court "should be a place where all people can come to seek justice no matter what their means or ability and regardless of their ethnicity or culture, who they are or where they are from" is that justice is administered as the law requires.[1] It was not for the twelve children[2] who are the subject of these two separate proceedings concerning their care and protection.[3] Nor for children subject to six other separate care and protection proceedings in which similar errors have been identified.[4] They were not declared, as the law requires, to be in need of care or protection antecedent to the making of orders that permitted the intervention of the State in the organisation of their family. In consequence, the Chief Executive has at various times held the custody of 16 children and guardianship of 13 children on a jurisdictionally defective basis. For some that situation has endured for years.

[2] This judgment, therefore, first examines for the children subject to these two proceedings how this court might ensure the prospective jurisdictional soundness of the Chief Executive's custodial and guardianship rights and obligations. The value of the exercise might be questioned in light of the conclusion reached that, although the Chief Executive's custody and guardianship of the children was not granted in the way the law requires, it is presumed valid until declared otherwise by a higher court. Why then does jurisdiction matter? Why explore the means by which the Chief Executive's custody and guardianship of these children might from now be made jurisdictionally sound?

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[1] Heemi Taumaunu, Chief Judge of the District Court "…mai te pō ki te ao mārama…the transition from night to the enlightened world …Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture, 11 November 2020) at 2.
[2] Reference to child and children should be taken as incorporating young persons.
[3] Two of the children have attained the age of 18 years so are no longer the subject of proceedings.
[4] *The Chief Executive of Oranga Tamariki & [B] Children* FAM-2015-004-000785; *OT & [G-E] Children* FAM 2006-090-1744; *OT for [L] Children* FAM 2018-092-001218; *OT for [AK]* FAM 2019-092-000098; *MSD for [KA]* FAM 2015-092-000482*; OT for [C-F] Children* FAM 2012-004-002347.

[3] In answer to the first question, it may not have mattered if the practical outcome for these children would have been no different. But equally so it may have mattered. The application of the law may have given a different outcome that would have better served the children's welfare and interests. It may be that less restrictive options were available to render the same or better result for the children and their family but not identified because the law was misapplied.

[4] The second question is answered in the context of the judiciary's acknowledged calls for transformative change to the justice system, passed down through successive generations and driven by a sense of hurt and unfairness.[5] It is said those sensibilities are most deeply felt among Māori.[6] To know that there is fundamental defect without attention to remedy is to risk perpetuating those sensibilities. The disproportionate representation of tamariki Māori in the custody of the state stubbornly endures. The children subject to these proceedings whakapapa Māori. Their familial organisation into which there has been intervention is described by the High Court as a taonga, preservation of which is contemplated by Te Tiriti o Waitangi.[7] These contemporary social conditions within which the court operates demand attention to how jurisdiction might be set right.

[5] Furthermore, the legitimacy of the enlightened world toward which the Chief District Court Judge has announced this court will move in response to calls for change, rests upon the principled application of the law by its judges. The Oranga Tamariki Act 1989 (the Act), when read carefully and understood and its principles applied, is first and of itself a means by which to respond to the calls for transformative change. The legal architecture, available for three decades and more potent for amendments effected in 2019, is solution focused and accommodates multiple world views even without the overlay of best practice and judicial protocols.

[6] A collateral consequence of attentiveness to jurisdiction is the focus it draws to impediments to the court's application and administration of the Act that may have led to error.

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[5] Heemi Taumaunu "mai te pō ki te ao mārama", above n 1, at 7.
[6] Heemi Taumaunu "mai te pō ki te ao mārama", above n 1, at 7.
[7] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184. It is noted however that some conceptualise Māori custom as an expression of tino rangatiratanga retained to Māori by article 2 rather than an incident of the concept of taonga provided for in the same article. See for example Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 9.

These circumstances did not become apparent by any standardised process of the court; they were latent until happened upon in the course of routine care and protection court lists. Their opportunistic identification raises question of whether there are other children similarly affected but as yet unknown; and because the defects are fundamental and repeated, it raises the question of whether there are features not just discrete to each proceeding, but systemic, that are shaping outcomes. Relevant too is the generally private conduct of Family Court proceedings and hence the diminished public scrutiny of the processes of the court.[8] That makes more crucial the vigilance of the court to its proper process and to remedy when it falls short.

[7] Therefore, the second aspect that this judgement examines, in the broader interests of justice, is systemic function, as is relevantly revealed by these proceedings. To do that properly requires a comprehensive appreciation of the court's protective jurisdiction and the legislative framework. This decision is therefore structured as follows:

(a) Section B summarises the conclusions reached in this judgement.

(b) Section C details the proceedings.

(c) Section D describes the nature of the protective jurisdiction.

(d) Section E describes the care and protection legislative framework.

(e) Section F discusses the systemic issues that arise.

(f) Section G applies the principles articulated to the proceedings at hand.

[8] Counsel for the Chief Executive, for the children and for represented parties are all thanked for their thoughtful submissions.

[9] Given the complex legal issues arising in these proceedings Ms Jerebine was appointed to assist the court by way of providing independent advice. Her advice has been augmented by contribution from Ms Irwin-Easthope and Mr Rishworth, QC. Their brief was expansive

[8] Oranga Tamariki Act 1989, ss 166-169. Also, Family Court Act 1980, s 11A. Accredited news media reporters are entitled to attend proceedings but rarely do so.

and answered with precision and depth that cannot be entirely reflected in this judgment but which has been invaluable. Ka nui te mihi ki a koutou katoa.

B. SUMMARY

[10] This judgement concludes as follows:

(a) The Act authorises the intervention of the State into otherwise private family relationships in the interests of children in need of care or protection. For that, it is public law most vital.

(b) The Family Court's function in application and administration of the Act is two-fold: jurisdictional, to ensure the State intervenes only in the circumstances permitted; supervisory, to ensure that once the State intervenes its actions are adequate to the child's care or protection need. It is a manifestation of the constitutional dynamic whereby the judicial arm of government acts as a check on the executive arm of government.

(c) The jurisdictional gateway to intervention is unchanged by the statutory amendments that have removed the declaratory mechanism, being the point at which there was error by omission in these proceedings. It remains that, unless, as a declaration signalled, a judge is satisfied by the evidence that a care or protection ground is established and that there is no lesser means of meeting the care or protection need, no jurisdiction lies.

(d) These proceedings demonstrate that even with the overt declaratory mechanism, jurisdiction can be overlooked. To the extent that a declaration acted as a statutory prompt to turn minds to the essential elements of jurisdiction, its contemporary absence will require greater vigilance to ensure the basis for intervention is properly established and articulated.

(e) That said, the doctrine of relative invalidity applies so that orders made absent the jurisdictional precondition of a declaration are presumptively valid unless and until declared to be invalid by a higher court. So too for proceedings

commenced after 1 July 2019, orders made absent the antecedent judicial satisfaction of the existence of a care or protection ground and that the intended orders are the least restrictive intervention, would be presumptively valid.

(f) The quintessential protectiveness of the legislation disposes higher courts to a more forgiving attitude to non-compliance with statutory requirements. It emphasises the need for rigour to the proper exercise of the jurisdiction at first instance and to the identification and amelioration of any systemic features that inhibit that exercise.

(g) The examination of the subject and ancillary proceedings indicates that not only has the jurisdictional function of the court faltered, but the supervisory function has lapsed. The nature, magnitude and repetition of default, is congruent with discourse in the public domain about the problematic function of the court and the proposition that systemic failings are undermining the expeditious function of the court, and by that the integrity of the care and protection system. But ultimately, responsibility for the proper exercise of the jurisdictional and supervisory function rests with the presiding Judge whilst, given the constitutional order of Aotearoa New Zealand, responsibility for the expeditious function of the court rests with the Heads of Bench, and the Executive.

C. THE PROCEEDINGS

[11] The progress through court of the two proceedings is detailed in the tables annexed A and B.[9] There are a greater number of administrative actions than those detailed, but only those material actions are referenced.

[12] As indicated, the irregularities in these subject proceedings have occurred in others and there are common features of process. One of the ancillary proceedings was the subject of a judicial conference in the same care and protection list on 2 July 2020 in which the proceedings for the*[S] Children* were considered.[10] A similarly detailed procedural analysis was therefore

[9] Because this minute relates to unrelated proceedings, identifying details of the subject children and parties are anonymised.

[10] Those proceedings have since concluded by discharge of the orders in question though. Whilst I considered that the orders were jurisdictionally deficient, I considered that I nevertheless had jurisdiction to order the discharge:

undertaken and is annexed C. Narratives of material aspects of the balance of the proceedings are annexed D.

[13] This decision is not to resolve the irregularities in other proceedings, but a précis is given for two reasons. First, because in one of those proceedings the irregularity has been addressed by reliance upon s 440 of the Act (that proceedings not be questioned for want of form) and, in another, upon r 204 of the Family Court Rules 2002 (which enables correction of clerical mistakes and slips). They are therefore two matters for attention for potential application to these proceedings. Second, for the assistance it may provide for improved application and administration of the Act.

[14] For convenience, all proceedings are summarised in the below table and are followed by expanded summaries of the two subject proceedings:

Proceeding	Reference	Irregularity
Subject proceedings		
1	[S] Children	Custody and guardianship orders made absent preceding declaration. Declaration made two years later, treating its prior absence as error of form.
2	[T], [M] & [P] Children	Custody and guardianship orders made absent preceding declaration.
Other proceedings		
3	[B] Children	Custody and guardianship orders not made but sealed, issued and continued on three subsequent reviews
4	[L] Child	Custody and restraining orders made absent preceding declaration. Declaration made one year later relying upon the slip rule.

MVCOT for [B] Children FAM 2015-004-785, 22 December 2020.

5	[G-E] Child	Custody and guardianship orders made absent preceding declaration.
6	[AK] Child	Custody order made absent preceding declaration. Declaration made four months later, treating its prior absence as error of form.
7	[KA] Child	Custody order not made but continued on six reviews.
8	[HC-F] Child	Custody order made absent preceding declaration.

Proceeding 1:[S] Children (Appendix A)

[15] The proceedings concerned four children of [TS] and [PH]: [RS] born [date deleted] 2005; [JS] born [date deleted] 2006; [KS] born [date deleted] and [AH] born [date deleted] 2011.

[16] The Chief Executive applied under the Act, without notice, on 11 January 2018 for an interim custody order[11] and, on notice, for a declaration that the children were in need of care and protection.[12] The interim custody order was granted.

[17] A family group conference agreed on 12 March 2018 that the children were in need of care and protection and to the making of a declaration and s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive.

[18] Thereafter followed four judicial adjournments until 17 December 2018, when a judge in chambers discharged the interim custody order, made s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive and directed a review of the plan in six months. A declaration was not made prior to the custody and additional guardianship orders.

[19] Reports and revised plans were filed by the social worker in June 2019. They were considered by a judge (not being the judge who made the custody and guardianship orders) at a judicial conference on 21 November 2019. It appears that the plan for only [RS] was received as compliant, the custody order continued and a review of the plan in six months was directed.

[20] When the matter was before me on 8 May 2020 I was unable to determine with certainty when plans for each child had last been furnished to the court and what consideration, if any, had been given to them and queried when a declaration had been made. In response to that query Dr Cooke, lawyer for the children, filed a memorandum outlining the chronology, confirming that a declaration had not been made and submitting that the s 101 custody and s 110 additional guardianship orders were *ultra vires*.

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[11] Section 78.
[12] Section 68.

[21] Upon considering Dr Cooke's memorandum in chambers on 26 June 2020 the judge who made the custody and guardianship orders:

(a) Recorded that a declaration should clearly have been made on 17 December 2018 when the interim custody order was discharged, and s 101 custody and s 110 additional guardianship orders were made.

(b) Noted the 12 March 2018 family group conference record of agreement to the making of a declaration and the sound evidential basis for that decision.

(c) Made a declaration that all four children are in need of care and protection on the grounds in s 14(1)(a) and (b). In doing so reliance was placed on s 440. It is not apparent from the judgment that the requirement in s 73 that the court not make a declaration unless satisfied of the impracticability or inappropriateness of providing for the child's care or protection by other means, was met.

Proceeding 2: [T] , [M] and [P] Children (Appendix B)

[22] The proceedings when commenced concerned eight children of [BP] (mother):

(a) [FT] born [date deleted] 2001; [ST] born [date deleted] 2002; and [MT] born [date deleted] 2004. Their father is [TT]. [FT] and [ST] have ceased to be the subject of the proceedings upon each attaining the age of 18 years.

(a) [RM] born [date deleted] 2006; [NM] born [date deleted] 2007; [DM] born [date deleted] 2009; and [AM] born [date deleted] 2010. Their father is [OM].

(b) [WP] born [date deleted] 2017. His father is [name deleted].

[23] The Chief Executive applied without notice under the Act on 8 March 2017 for an interim custody order[13] and on notice for a declaration that the children were in need of care and protection.[14] The interim custody order was granted.

[13] Section 78.
[14] Section 68.

[24] A family group conference agreed on 4 May 2017 that the children were in need of care and protection, and to the making of a declaration, s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive.

[25] Thereafter followed two judicial adjournments, until 14 November 2017 when a judge in chambers discharged the interim custody order, made s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive and directed a review of the plan in six months. A declaration was not made prior to the custody and additional guardianship orders. It is not apparent from the judgment that the requirement in s 73 that the court not make a declaration unless satisfied of the impracticability or inappropriateness of providing for the child's care or protection by other means was met.

[26] Thereafter two administrative and three judicial adjournments followed, until at a judicial conference on 14 March 2019 a judge (not being the judge who made the custody and guardianship orders) received revised plans of 17 January 2019 as compliant, continued the s 101 custody in respect of [ST] and [MT] (it is unclear from the court record if the order was continued in respect of the other children) and directed a review of the plans in six months.

[27] The next judicial conference to consider the revised plan was scheduled for 19 February 2020 but judicially adjourned to 2 July 2020 when the matter came before me at which time I queried whether a declaration had been made and, if not, whether the s 101 custody order might be *ultra vires*.

[28] The issues of systemic function to which these proceedings draw focus is addressed at section F, but two features immediately apparent from the summaries above and appended are acute failures of timeliness and that actions were undertaken by multiple administrative and judicial officers. The table next provides an overview:

	Proceeding 1 [S] children	Proceeding 2 [T], [M] & [P] Children	Proceeding 3 [B] Children
Time by which disposition of declaration application exceeded 60 days prescribed by s 200	10 months	6 months	20 days

Time by which first review of interim custody order exceeded judicial direction of 14 days*	3 months	2 months	2 months 1 week
Longest lapse between judicial consideration of care and protection plans (the statutory review period being 6 months)	11 months	1 y 4 months	1 year 2 months
Number of administrative officers undertaking case intervention** ϕ √	5 case officers	3 case officers	8 case officers
Number of judicial officers undertaking case intervention √	7 judges	8 judges	9 judges

** The Family Court observes the Court of Appeal dicta to set a hearing to review an interim custody order optimally within five working days but in any case, within 14 days by means of a standard direction given in almost every decision granting an interim custody order without notice to call the application at a judicial conference within 14 days. A variant of that direction was made in each of these proceedings.*

The Family Court has also made recent efforts to provide Pickwick hearings at short notice upon applications made without notice for interim custody orders, but it is not known if there is more ready compliance with the direction to hold a judicial conference within 14 days where such orders are made.

*** There were a greater number of administrative officers who took actions in the proceedings but only who attended to a material events are accounted for.*

ϕ The Family Court in South Auckland operates a task-based/team administration model prevails as opposed to the end-to-end/dedicated case officer administration model that prevails in some other registries.

√The files in these proceedings are voluminous, complex and hence time consuming to assimilate. Even leaving aside matters of substantive justice, the administrative inefficiency of files being handled by multiple officers can be easily appreciated.

D. THE PROTECTIVE JURISDICTION[15]

[29] The Family Court exercises the care and protection jurisdiction pursuant to Parts 2 and 3 of the Act. It is significant work by import and by volume.[16] Although the jurisdiction is statutory and originates in the Family Court,[17] its description is usefully informed by regard first for the notion of the "protective jurisdiction" that is often ascribed to the Family Court, and secondly for the Act's genesis and evolution.

[30] The protective jurisdiction was described by Judge Inglis, QC writing extra-judicially as follows:[18]

> It is specifically structured to protect the welfare and interest of those members of the community whose ability to protect their own welfare and interests is either limited or non-existent. This protective jurisdiction extends to minors, whose legal capacity is limited by their age, and to those adults whose mental or physical disabilities have wholly or partially deprived them of the capacity to look after their own personal care and welfare or their property interests.
>
> …The jurisdiction is of a special character, and its distinctive focus, either expressly or by necessary implication, is directed as the paramount consideration to the protection and promotion of the welfare and best interest of the child or person concerned; but where the disability is of a kind which exposes the person concerned or others to an unacceptable degree of personal risk, the interests of public and personal safety naturally also have to be considered as an important element. It is essentially an inquisitorial and non-adversarial jurisdiction, pervaded by the principles established during the long history of its development.

[31] The principles underlying the protective jurisdiction have foundation in the Sovereign's prerogative of antiquity to protect the naturally vulnerable - the *parens patriae*[19] jurisdiction. In New Zealand the *parens patriae* jurisdiction was inherited by the High Court and is still exercised to the extent that it has not been expressly modified or qualified by statue.[20] Those statutory modifications and qualifications have, however, been extensive, and in most instances the Family Court now has exclusive originating jurisdiction.[21]

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[15] This section of the judgment is reproduced in large part from the minute in these proceedings dated 24 July 2020 and the judgement in *Chief Executive of Oranga Tamariki v BH* [2021] NZFC 210.
[16] As at March 2021 there were 3,210 active applications in the Family Court pursuant to the provisions of the Oranga Tamariki Act 1989.
[17] Oranga Tamariki Act 1989, s 2.
[18] BD Inglis, *New Zealand Family Law in the 21st Century* (Brookers, Wellington, 2007), at 227.
[19] 'Parent of the nation.'
[20] See Senior Courts Act 2016, ss 12 and 14, and the statutory predecessors.
[21] The principal statutes, in addition to the Oranga Tamariki Act 1989, are the Protection of Personal and Property Rights Act 1988, the Mental Health (Compulsory Assessment and Treatment) Act 1993, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and the Care of Children Act 2004.

[32] Whilst the jurisdiction of the Family Court is solely statutory[22] and without inherent jurisdiction, it has the implied power to do what is necessary to exercise the functions, powers and duties conferred on it by statute and the duty to prevent abuse of its processes.[23] Judge Inglis, QC posits that the Family Court can adopt *parens patriae* principles even if not conferred by statute and provided they are not inconsistent with the statutory objective, in exercise of its implied power to devise remedies for circumstances not expressly covered by the legislation.[24] More particularly of the care and protection jurisdiction, His Honour said:[25]

> The Court's jurisdiction…is essentially "parental and administrative" and inquisitorial, dedicated to the welfare and interests of the child whose care and protection is in issue, so following the practice of the *parens patriae* jurisdiction.

And further:[26]

> In instances where statutes, such as [the Oranga Tamariki Act] 1989, impinge on the *parens patriae* jurisdiction as such, the question will arise whether the legislature did not specifically recognise it either because of a belief that it was no longer needed or because it was taken for granted that if any occasion arose on which it could be invoked it would remain potent as a backstop. Given the nature and width of the care and protection jurisdiction, the second explanation is the safer one. One would expect that if the legislature had intended the *parens patriae* jurisdiction not be available it would have said so in express terms. At all events the Court's "parental and administrative" role stems directly from *parens patriae* principles.

[33] That brief exposition provides context by which to consider the framework of the Act and the role of the Family Court.

E. THE CARE AND PROTECTION LEGISLATIVE FRAMEWORK

The Legislative genesis and evolution

[34] The 1989 enactment of the Children, Young Persons, and Their Families Act (as the legislation was then titled) represented a fundamental change in the conception of child welfare. It situated welfare firmly within the context of the child's family, whānau, hapū, iwi and family group ("the kinship group") rather than independent of it.[27] That reformulation

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[22] Family Court Act 1980, s 11.
[23] See *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.
[24] Inglis, above n 18, at 233-234.
[25] Inglis, above n 18, at 237.
[26] Inglis, above n 18, at 238.
[27] Supported by a weight of parliamentary, judicial, and scholarly comment and analysis. See for instance

drew deeply upon *Pūao-te-Ata-Tū*, the 1986 report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare.[28] The committee was tasked to "advise the Minister of Social Welfare on the most appropriate means to achieve the goal of an approach which would meet the needs of Māori in policy, planning and service delivery in the Department of Social Welfare."[29] Unsurprisingly the committee's recommendations were fundamentally oriented to the place of Māori children and their relationship with whānau, hapū and iwi structures.

[35] It must not be lost that the legislation is for the benefit of all children and their families. But because it was driven by powerful concern for the Māori condition it imported precepts into the child protection framework that in significant and, for the time, radical ways were consistent with a Te Ao Māori world view.

[36] This radical dynamic was manifest in the statutory entitlement of family and whānau to participation in decision making via the mechanism of the family group conference. So too it manifested in a number of the statutory principles by which those exercising powers under the Act are guided. The principles of general application in the former s 5 most obviously giving expression to a child's welfare being vitally tied to the kinship group are those speaking to the kinship group participation in decision making;[30] the maintenance and strengthening of the child's connection to the kinship group;[31] and that consideration must be given when making decisions to the stability of whānau, hapū and iwi.[32] They are enhanced by the principles specific to care and protection in the former s 13 which recognise that: primary responsibility for children rests with the kinship group, and therefore support and assistance to and protection of that group is a component of child welfare;[33] the child should be removed from the kinship group only if there is a "serious risk of harm" and returned when practicable to be "protected

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comments of Dr Michael Cullen, Minister of Social Welfare, on the second reading of the Children, Young Persons and Their Families Bill at (27 April 1989) 497 NZPD 10246; comments by Elias J in *CMO v Director-General of Social Welfare* (1996) 15 FRNZ 40 (HC) at 45; comments by Joseph Williams, "Lex Aotearoa", above n 7.

[28] Ministerial Advisory Committee to the Department of Social Welfare *Puao te-Ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988). Though it should be noted that the Bill introduced to the House in its first iteration as the Children and Young Persons Bill in 1986 was roundly criticised for, amongst other things, failure to adopt the recommendations of *Puao te-Ata-tu* with the result that it was significantly revised before reintroduction to the House for its second reading in 1989.

[29] *Puao te-Ata-tu*, above n 28, at 5.

[30] Children, Young Persons, and Their Families Act 1989, s 5(a).

[31] Section 5(b).

[32] Section 5(c)(ii).

[33] Sections 13(2)(b), 13(2)(b)(i) and 13(2)(c) and (d).

from harm" within it;[34] until return, connection is to be maintained and strengthened;[35] and if return is not possible, cultural identity should be maintained and priority should be afforded to placement with a caregiver of the child's hapū first, then iwi, then a person of the same, tribal, racial, ethnic or cultural background.[36]

[37] That said, all principles in ss 5 and 13 were subject to the child's "welfare and interests", mandated by s 6 as the first and paramount consideration.

[38] The care and protection system has been subjected to ongoing scrutiny, much of it critical, in multiple reviews.[37] A concerted reform programme, informed in large measure by two discussion papers and the work of an expert advisory panel, led to numerous amendments to the Act in the period 2016 to 2019.[38]

[39] Significant for present purposes are comprehensive amendments to the statutory objectives and principles that took effect from 1 July 2019.[39] The s 4 objectives have been replaced with a statement of purposes and the s 5 general principles and s 13 care and protection principles are similarly replaced in their entirety.

[40] Certain of the new principles might be taken to diminish the notion of a child's well-being resting with the child's kinship group. For instance, reference to ensuring children have a "safe, stable and loving family home from the earliest opportunity",[40] describing placement with whānau, hapū or iwi as a "preference"[41] rather than to be accorded "priority" where practicable,[42] and specific incorporation of the child's rights under the United Nations

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[34] Sections 13(2)(e) and (2)(f)(i).
[35] Section 13(2)(f)(ii)
[36] Sections 13(2)(f)(iii) and 13(2)(g)(i).
[37] Between 1989 and 2015 there were 14 reviews of the predecessors of Oranga Tamariki. See, for example, MJA Brown "Care and Protection is about Adult Behaviour: The Ministerial Review of the Department of Child, Youth and Family Services" (December 2000); the Kirkland Report (1992); the "First Principles Baseline Review of the Department of Child, Youth and Family Services" (2003); Office of the Chief Social Worker "Workload and Case Work Review: Qualitative Review of Social Worker Caseload, Casework and Workload Management" (2014).
[38] *The Green Paper for Vulnerable Children* (Ministry of Social Development, July 2011), *The White Paper for Vulnerable Children* (Ministry of Social Development, October 2012) and Modernising Child, Youth and Family Expert Panel, *Modernising Child, Youth and Family: Interim Report* (Ministry of Social Development, July 2015), and Modernising Child, Youth and Family Expert Panel, *Expert Panel Final Report: Investing in New Zealand's Children and Their Families* (Ministry of Social Development, December 2015).
[39] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.
[40] Oranga Tamariki Act 1989, ss 4(1)(d), (4)(1)(e)(i) and 5(1)(b)(iii).
[41] Section 13(2)(i)(ii)(A).
[42] Former s 13(2)(g)(i).

Convention on the Rights of the Child ("the Convention on the Rights of the Child").[43] However, they can be set alongside other amendments to principles that might be taken as equally, if not more forcefully, enhancing the policy underlying the legislation at its inception and the intent to address the needs of Māori. Instructive (and non-exhaustively) are the following:

(a) The introduction by statutory definition of tikanga Māori and its concepts of mana tamaiti (tamariki), whakapapa and whanaungatanga and their incorporation in the statutory purposes and principles.[44]

(b) Promotion of the wellbeing of children and their kinship group by practical commitment to the principles of the Te Tiriti o Waitangi (Treaty of Waitangi)[45] and to that end imposition of duties on the Chief Executive specifically in relation to tamariki Māori, iwi and Māori organisations.[46]

(c) Guidance to adopt in decision-making a holistic approach encompassing (non-exclusively) matters of development, educational and health needs, whakapapa, cultural identity, gender identity, sexual orientation, disability and age.[47]

(d) The preservation and strengthening of sibling relationships expressed as a purpose and a principle to guide decision making.[48]

[41] On balance I maintain an observation previously made that:[49]

> Despite the wholesale change an unsophisticated analysis suggests that but for two exceptions the existing objects and principles are carried over to the amended, albeit not always corresponding, provisions. The exceptions for which no equivalents are overtly apparent are the s 5(c)(ii) principle that consideration must always be given to how a decision affecting a child will affect the stability of the family, whānau, hapū or iwi group and the principles in s 13(2)(f)(ii)(A) and 13((2)(g)(ii) emphasising placement of a child in same locality in which he or she was residing. Even so it can be easily appreciated that those matters can be recognised as incidents of the broader principles.

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[43] Section 5(1)(b)(i).
[44] Sections 4(1)(a)(i) and (g), 5(1)(b)(iv), and 13(2)(b)(ii) and (i)(iii)(C).
[45] Section 4(1)(f).
[46] Section 7AA.
[47] Section 5(1)(b)(iv).
[48] Sections 4(1)(h)(ii), and 13(2)(i)(iii)(D) and (j)(ii)(A).
[49] Sharyn Otene "He Hurihanga Tuarua?" (2019) 9 NZFLJ 139 at 141.

> … engaging an overarching evaluation, my view is that the balance of the principles continue to weigh with heft in favour of the well-being being of children being entwined with the well-being of their whānau and best assured when responsibility for their care rests primarily with their family, whānau hapū or iwi.

[42] As before, these provisions are all subject to a first and paramount principle that is framed now in the new s 4A as the "well-being and best interests" of the child rather than the former "welfare and best interests." "Well-being" is defined in s 2 as including the welfare of the child or young person, suggesting that it is intended to mean more than "welfare". Similarly, the wording "best interests" suggests more than "interests." An expansion of the standard by which to measure matters of administration and application of the Act aligns with the approach found within the other amendments as to the holistic approach to be taken to decision making under the Act, and the incorporation of tikanga Māori.

[43] Finally, before moving to consider the legislative mechanisms by which the care and protection needs of children may be met, it is useful to be reminded of the gravitas of the legislation. It authorises the intervention of the State into otherwise private family relationships. It casts responsibility upon, and grants rights to, agents of the State in relation to the most vulnerable members of society. The gravity of the responsibility and the caution with which it should be exercised was articulated thus by Anderson J:[50]

> State intervention is not justified by the prospect of improving a child's care but by inadequate care which, having regard to the diversity of our New Zealand culture and its broad range of parenting approaches and abilities, is clearly unacceptable. The principle imports a consideration of minimum community standards of parental competence such that the State should not intervene unless the parental care has been proven to be unacceptably incompetent.

The Legislative Scheme

[44] The Act is lengthy, detailed, complex and abundant with cross-reference. The graphic representation next is to provide a degree of simplification and is limited to care and protection matters that are the subject of court proceedings.[51] Even so, it powerfully demonstrates the weight and prescription of statutory obligations.

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[50] *E v Department of Social Welfare* (1989) 5 FRNZ 332 (HC) at 334.

[51] Observing that the Act provides an equally detailed framework for the care and protection of children other than by way of proceedings in the Family Court.


Application for an interim custody order
(Section 78)
•Typically applied for without notice by a social worker where there is perceived potential for injury, hardship or risk to a child's safety requiring summary ability to remove the child from his or her parents or caregivers pending determination of an application for a care and protection order.
•In practice an application on notice for a care and protection order is usually made contemporaneously.
•An application can be made absent pending proceedings in circumstances of urgency or in the public interest in the case of child offending, but any order made is time-limited in duration.
Application for a care or protection order/declaration
(Section 68)
•Prior to 1 July 2019 the application was for a declaration that a child is in need of care and protection rather than for a care or protection order. Applications commenced prior to that date are determined according to legislation as it then read (Schedule 1AA, Part 3).
•Usually the first substantive and central step in care and protection proceedings and typically accompanies the application for an interim custody order.
•Must rely on one of the specified grounds in s 14.
•Cannot be made before a family group conference is held (s 72).
Appointment of lawyer to represent child
(Section 159)
•The Registrar must appoint a lawyer to represent a child who is the subject of care and protection proceedings (unless the child is already represented).
•Notable are the specific duties imposed on lawyers (and the court) to explain the proceedings, including rights of appeal, to children and to assist their participation in proceedings (ss 10 and 11).
Family Group Conference
(Sections 28-30)
•Convened by a Care and Protection Co-ordinator.
•Wide rights of whānau and professional attendance.
•Two primary functions: to consider whether or not a child is in need of care or protection and if so to make decisions, recommendations, and formulate plans for the child's care and protection. Agreements may require implementation by appropriate court orders but in some circumstances, albeit rare ones, the agreement may bring an end to proceedings.
•The outcome, whether an agreed plan or non-agreement, is reported to the court.


Determination of pre-1 July 2019 application for declaration
•The court may make a declaration that a child is in need of care and protection if satisfied that one or more of the grounds in s 14 is established, subject to the next two provisos.
•A family group conference must have been held (s 72).
•The court must be satisfied that it is not practicable or appropriate to provide care or protection for the child by other means, including by implementaion of a plan formulated by a family group conference (s 73).
•Upon making a declaration the court may then in disposition undertake action ranging from discharge to the making of various orders (s 83).
Determination of post 1 July 2019 application for care or protection order
•The making of a declaration that a child is in need of care and protection orders is no longer prequisite to the making of a care or protection order. In removing the declaratory "step" the determination that a child is in need of care and protection occurs within the consideration of the making of dispositive orders.
•The provisos to the making of a declaration apply to the making of a care and protection order - a family group conference must have been held and the court must be satisfied that it is not possible to provide care or protection by other means.
Social worker's report and plan (Section 128-138 - plan and sections 186-194 - reports)
•The court must obtain a plan from a social worker or any other person directed to prepare it before making a services order (s 86), support order (s 91), a custody order other than an interim custody order (s 101), a sole guardianship order (s 110) or a special guardianship order (s 113A). It must also obtain a report from a social worker before making such custody, sole guardianship or special guardianship orders and in any case may obtain a report before making any of the other orders available to the court.
•Despite the now unified legislative process, the practical progress of proceedings through court has thus far been little different to the process involving the declaratory step, in part because of the need to adjorn for plans and reports.
Review of plan
(Section 134)
•In any case in which a plan must be obtained before an order is made, the court must set a date for review of the plan - within six months when the child is under the age of seven years and within one year for other children.
• A report of the results of the review and a revised plan must be furnished to the court.
•The court must consider the report and revised plan and may then undertake a range of prescribed actions. If the order is continued the court must again set a date for review of the plan and so on for as long as the order subsists.

The Role of the Family Court

[45] The task of the Family Court when considered within that overarching framework distils to two aspects:

(a) Determining whether children are in need of care and protection.

(b) Reviewing care and protection plans and adjusting care and protection orders at prescribed intervals.[52]

[46] Whilst these tasks, for their frequency, might be seen as routine, they are not. Their importance cannot be overstated:

(a) A determination that a child is in need of care and protection is the touchstone of the jurisdictional gateway to the formulation of plans and the imposition of orders to address the care or protection need. It is the foundation for the State's intervention.

(b) The review scheme is in place to prevent "a child who has entered the system [becoming] lost in it and forgotten."[53] The court's role is "not only to monitor the child's progress but also to act positively to promote the child's welfare where such action is required."[54] The role is therefore supervisory in nature, a characteristic underscored by the court's powers of examination and to require revision of any plans and reports considered inadequate.[55]

[47] The subject proceedings reveal deficiencies of both aspects. Expanded attention is given to each followed by consideration of the status of orders with jurisdictional defects and how jurisdictionally sound orders might be made. But it is first useful to emphasise another feature that shapes the legislation, its focus upon timeliness.

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[52] Noting that care and protection orders might also be varied or discharged upon application made pursuant to s 125 independently of the plan review process.
[53] *Re Children (no 2)*, FC Levin, CYPF 031/020/90, 21 March 1990 at 4.
[54] *Re R* FC Palmerston North, CYPF 031/11-4/95, 28 May 1997 at 5. Cited with approval by Judge Mather in *Re P Children* [2004] NZFLR 97 at [63].
[55] Section 137.

[48] Timeliness is a principle of child well-being and reflected in the prescription of timeframes for various processes in the Act.[56] Parliamentary prescription of timeframes underlies the importance of the protective jurisdiction. It is a rare overt Parliamentary emphasis of expected priority in judicial response. So too the importance of timeliness is reflected in direction from senior courts as to timeframes to be observed and procedural steps to be followed in certain aspects of care and protection proceedings.

[49] Compliance with timeframes in the subject proceedings was lacking in multiple ways. Timeframes in review processes are considered more fully at [79] to [90], but it is instructive generally to consider timeframes for disposition of the initiating applications for declarations (and now care or protection orders) and, as recommended by the Court of Appeal, for review of interim custody orders made without notice.

Declarations/Care and Protection Orders

[50] When an application is made for a declaration (now an application for a care and protection order) s 200 requires that:

> … the court shall, so far as it is practicable, give priority to the proceedings in order to ensure that, unless there are special reasons why a longer period is required, the hearing of the application commences not later than 60 days after the application is filed in the court.

[51] The language in the provision should not be glossed over. The priority required is commencement of hearings no more than 60 days from filing the application. The only exceptions are if some unspecified practicality or special reasons (presumably identified and articulated by a judge) present. The purposes and principles of the Act suggest those exceptions should be rare. They in fact appear commonplace.

Review of interim custody orders

[52] The Court of Appeal in *DE v Chief Executive of Social Development* outlined comprehensive procedural steps that should be followed when an interim custody order is made without notice.[57] Some, on any measure, are simply unattainable. Others are beyond the ambit

[56] Section 5(1)(b)(v) and 13(2)(b)(f).
[57] *DE v Chief Executive of Social Development* [2008] NZFLR 85 (CA).

of the legitimate influence of the court[58] or in light of subsequent statutory enactment no longer permissible.[59] However, given the nature of the legislation it is difficult to resist many of the directives including that if an order is made without notice a review hearing date should be set preferably within five working days but in any case within 14 days and that such date should be notified to the parents or caregivers when served with the order.[60]

The Jurisdictional Role

[53] Analysis of the jurisdiction upon which the court may intervene in the interests of a child's care or protection is required to answer these two questions raised by the proceedings and addressed in following sections:

(a) What is the status of s 101 custody and s 110 additional guardianship orders?

(b) If the orders are jurisdictionally defective for the manner in which they are made, what options are available to the court to remedy the defects?

[54] Whilst these proceedings engage the court's function relative to jurisdiction prior to the amendments that to effect on 1 July 2019, the systemic issues they point to call for an analysis comparative to the court's function after those amendments.

(a) Foundation for intervention: pre 1 July 2019[61]

[55] Prior to 1 July 2019, ss 67 and 68 were the central statutory provisions in respect of "proceedings" under the Act. Section 68 empowered the making of an application for a declaration that a child is in need of care or protection.[62] Section 67 provided the court, upon

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[58] For instance at [103], that the Court should ensure that the parents or caregivers have a person available at Child Youth and Family (as it then was) including, if necessary, after hours to contact for information about the order and about access arrangements.
[59] For instance at [102], that the court consider appointing counsel to assist the court to, inter alia, advise parents or caregivers in a preliminary manner on the seeking of legal advice and possible options with regard to the order. The role of the lawyer to assist the court was defined in 2014 by the insertion of s 9C into the Family Court Act 1980. That definition precludes appointment of counsel for the purpose envisaged by the Court of Appeal.
[60] At [99].
[61] References in this section to provisions of Act are, unless otherwise specified, as those provision read prior to 1 July 2019.
[62] Eligible applicants being the Chief Executive, a constable or other person with the court's leave. Subject to specified exceptions, the application could not be made unless a family group conference had been held per s 70.

such application, with a discretion to make the declaration where "satisfied on any of the grounds specified in section 14(1) that a child or young person is in need of care or protection."

[56] Abundant and repeated senior court authority explains the central importance of a declaration, establishes that the making of a declaration is the exercise of a discretion and directs how that discretion must be exercised. Review of the statutory scheme and the authorities is helpful to understand the jurisdictional defects in these proceedings.

[57] Section 67 relevantly reads:

> **67 Grounds for declaration that child or young person is in need of care or protection**
>
> (1) A court may, on application, where it is satisfied on any of the grounds specified in section 14(1) that a child or young person is in need of care or protection, make a declaration that the child or young person is in need of care or protection.

[58] Plainly the discretion to make a declaration was not available to be exercised unless a court first assessed the evidence as establishing one of the grounds of need in s 14(1). The court was also constrained from making a declaration unless:

(a) A family group conference had been held in relation to the matter that forms the ground upon which the application is made: s 72(1).[63]

(b) Satisfied that the child's needs cannot be met by other means: s 73(1).

[59] The declaration therefore operated to aggregate and overtly signal the presence of three elements: a family group conference held; a care and protection ground established; satisfaction that a declaration is the least restrictive intervention. Only if the discretion is exercised to make a declaration is the gate opened to enable the making of various orders (including custody and guardianship orders) specified in s 83. Whether any of those orders are made is again discretionary.

[60] The mandatory prerequisite of a declaration is again plain from the language of s 83. So too that the making of an order is discretionary:[64]

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[63] Subject to the exceptions in s 70(2).
[64] And reiterated in the relevant sections authorising the making of each order.

83 Orders of court on making of declaration

(1) Where the court makes a declaration under section 67 relating to a child or young person, it may do 1 or more of the following things: ….

[61] The nature of a declaration was described by the Court of Appeal in *TWA v HC & Anor* as follows:[65]

> It is a **jurisdictional precondition** to an order under s 101 that the Family Court has issued a declaration under s 67 of the CYPFA that the child is in need of care or protection. Such orders are **only made** in respect of children who are in need of care and protection because they are vulnerable to abuse or neglect. …
>
> (emphasis added)

[62] A determination that a child is in need of care or protection is a finding of fact as the High Court explains in *SLB v Ministry for Children, Oranga Tamariki*:[66]

> The Courts held that s 14 justified intervention in a family's autonomy only where the child's care had fallen or was likely to fall below the normal standards acceptable in the community. …The harm or likelihood of harm specified in s 14 had to be proved on the balance of probabilities, and be of a sufficient degree to justify or warrant the Court' intervention by the making of a declaration. However, once seized of the application, the Court was able to make a declaration on the basis of any of the grounds set out in s 14(1) that was supported by the evidence.

[63] The preceding comment also emphasises the discretionary nature of a declaration: that not only must harm, or likely harm be proved, it must be to a degree that moves the court to intervene.

[64] Consideration of the evidentiary threshold relative to the requirement that the court be "satisfied" of a state of affairs was given by the High Court in *T v DWS.*[67] Of the appropriate standard of proof to establish the grounds for the placement of child or young person in secure care Gault J held:

> Section 376(1) empowers the Court to approve continued detention if "the Court is satisfied that it is necessary, on either or both grounds specified in s 368 of the Act."
>
> In *Angland v Payne* [1944] NZLR 610 the Court of Appeal dealt with a requirement in s 6(2) Mental Defectives Amendment Act 1935 for the Court to be "satisfied", and Smith J said (p 626):

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[65] *TWA v HC & Anor* [2016] NZCA 459 at [14].
[66] *SLB v Ministry for Children, Oranga Tamariki* [2020] NZHC 1129 at [45].
[67] *T v DWS* 6 FRNZ 100 at 109.

> "…The Judge must be "satisfied". This implies, I think, the weighing of the opposing contentions and the reaching by the Judge of a clear conclusion that a substantial ground exists. The Judge must pass beyond the state of saying that there "seems" to be a substantial ground. He must be "satisfied" that there is a substantial ground."

I consider that aptly states the degree of persuasion required to establish the grounds in s 368.

[65] And the process by which the discretion to make a declaration is to be exercised was described by the High Court in *L v Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* as follows:[68]

> [16] Once the s 14 grounds are met, the Court has a discretion whether to make the declaration sought. In exercising the discretion, the Court will have regard to s 6 of the OTA which provides that the welfare and interest of the child shall be the "first and paramount consideration, having regard to the principles set out in section 5 and 13. …
>
> [17] Once a s 67 declaration is made, it opens the door for other orders to be made in respect of the child. These include an order that the Chief Executive, or any other person, provide services and assistance to a parent or guardian or other person having the care of the child, a support order for that child, and a custody order. …

[66] The dicta in the first paragraph conveys the robust dynamic balancing process that must be engaged by a judge when exercising a discretion in which welfare and interests must be held paramount. Whilst the comment is specific to the exercise of a discretion to make a declaration, it is equally applicable to the discretion to make one of the orders specified in s 83 or indeed any other discretion exercised under the Act. I have previously described the process in these terms:[69]

> [In] stating various principles which ought to be taken into account, the Act is identifying constituent elements of child well-being. Well-being is a function of the balancing of those principles reasoned by the decision maker to the subjective circumstances of the child and the child's kinship group. Inevitably the advancement of some principles will diminish the realisation of others and the balance will require adjustment through time and changing circumstances, but it is by that process of accounting and weighting that an outcome most in the child's wellbeing and best interest is constructed.

[67] If that process is not engaged or is defective in some manner, an outcome in the child's welfare and interests may still result. But, if so, that is by happenstance not by application of the law. It is therefore an engaged, evaluative process that affords a child a decision for him or her that has assimilated the principles that Parliament has identified as bearing on child welfare.

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[68] *L v Chief Executive, Ministry for Vulnerable Children Oranga Tamariki* [2018] NZHC 2232 at [16].
[69] *Chief Executive of Oranga Tamariki v BH*, above n 15, at [33].

[68] Furthermore, it is articulation of the process or, in other words, the giving of a reasoned decision, that affords the child (and the child's family and whānau) knowledge of how and why the outcome that affects them was reached. The requirement to provide reasons for the decision can be readily understood as incidents of the judicial obligations in s 10 to explain the nature of proceedings to a child (and parents, guardians and carers) and in s 11 to encourage and assist a child's participation in proceedings (obligations which have been amplified by amendments to both provisions that took effect on 1 July 2019).[70]

[69] But in any case, the likely fallibility of a decision made without adequately giving reasons is demonstrated by the Court of Appeal's decision in *Turnbull v Chief Executive of the Department of Corrections.*[71] The court allowed an appeal of the decision of a District Court Judge to make an extended supervision order. The appellant consented to the order at first instance and the Judge issued his decision in the form a brief minute addressing the grounds for the making of the order but without addressing the statutory test. Dunningham J writing for the Court made the following comment which arguably is equally applicable to the task of a Family Court Judge upon making a declaration that a child is in need of care or protection:[72]

> It is important that a decision imposing an ESO addresses the statutory criteria for making such an order, and that there is a clear explanation to the offender of the reasons for imposing an ESO. While a Judge's decision can be relatively brief when an application is unopposed, the statutory criteria must still be addressed. In the present case we do not have the benefit of the Judge's reasoning on this issue and we accept it is arguable that the statutory criteria are not met…[T]he appeal should be allowed and the decision set aside.

[70] That leads to another acknowledgment: consent does not establish jurisdiction.[73] Similarly, the court cannot simply endorse the recommendations of the family group conference but has the responsibility to make its own determination.[74] This emphasises again the robust process that must be engaged.

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[70] Notably s 11(2)(e) requiring any written decision to set out the child's views and, if those views were not followed, the reasons for not doing so; and s 11(2)(f) requiring any decision, the reasons for it, and how it will affect a child to be explained to the child.

[71] *Turnbull v Chief Executive of the Department of Corrections* [2020] NZCA 409. See also *DE v Chief Executive of the Ministry of Social Development* [2008] NZFLR 85 at [99] (CA) and *CLM v Chief Executive of the Ministry of Social Development* [2011] NZFLR 11 at [46] to [48] (HC).

[72] At [11].

[73] Section 202 empowers the court to make any order that it is empowered to make (and for proceedings commenced prior to 1 July 2019, a declaration) by the consent of all parties to the proceedings. That said a court is only empowered to make the orders in s 83 (and previously a declaration) if satisfied that a care and protection ground is established.

[74] *Re Children CYPF 031/020/90,* (1990) 6 FRNZ 55.

[71] Finally, the need for temporal proximity between the events relied on to establish jurisdiction and the hearing must be borne in mind. For instance:

(a) A decision that a child is in need of care and protection should be based on all relevant evidence of events that occur up to the time to the hearing.[75]

(b) Consistent with the above is the requirement that in the case of a care and protection need on either of the grounds in s 14(1)(a) or (b),[76] the court in deciding whether to make a declaration must take into account any evidence before the court that the harm will not continue or be repeated: s 73(2).

(c) If there is a significant change in circumstances between the holding of the family group conference and the hearing, compliance with s 72(1) fails and a declaration cannot be made. Furthermore, to satisfy s 72(1) the conference must address the specific matters that are said to provide the basis for a declaration.[77]

(b) Foundation for intervention: from 1 July 2019[78]

[72] With s 67 appealed the typically first substantial and central step in proceedings is now the application under s 68 for care or protection order.[79]

[73] Consequential amendments to other provisions nevertheless maintain the same three elements previously aggregated by a declaration to establish the current jurisdiction to take the permitted actions in response to a care or protection need: a family group conference held,[80] a care and protection ground established and satisfaction that the intended action is the least restrictive intervention.[81] Only if those three elements are present is the gate opened to enable the making of the various orders specified in s 83. As before, whether any of the orders in s 83 are made is discretionary. The jurisdictional gateway is identical.

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[75] *Director-General of Social Welfare v B* HC Auckland M313/94, 30 June 1995.
[76] Now s 14(1)(a), which encompasses the grounds formerly in s 14(1)((a), (b), (c), (f), (g) and (h).
[77] *H v Chief Executive Officer of the Dept of Child Youth & Family Services* [2007] NZFLR 802.
[78] References in this section to provisions of the Act are, unless otherwise specified, as those provisions read now.
[79] As with an application for a declaration, and subject to specified exceptions, the application for a care and protection order cannot be made unless a family group conference had been, per s 70.
[80] Section 72(1) subject to the exceptions in s 70(2).
[81] Section 73(1).

[74] The requirement to be satisfied of a care or protection need arises now from s 83 (and is reiterated in the relevant sections authorising the making of each order) rather than s 67 but, as before, a care and protection need exists only if one of the grounds in s 14 is established. That mandate and the existence of a discretion to make the orders is again plain from the language of s 83 which now reads: [82]

> **83 Orders of court on making of declaration**
>
> (1) Where the court, on application made under s 68, is satisfied that a child or young person is in need care or protection, the court may do 1 or more of the following things: ….

[75] All that being so, it follows that the robust, dynamic balancing process that the judge must engage, the requirement to provide reasons for the decision, the responsibility to make a determination rather than endorse a family group conference agreement and the temporal connection between relevant events and the decision remain as they were before 1 July 2019.

(c) Summary

[76] Because the declaration was a jurisdictional precondition, its contemporary obsolescence due to the repeal of s 67 might at first blush suggest a now different jurisdictional imperative. That is not so. The multiple statutory protections and restrictions to be tested and met upon the court's exercise of the discretion under the former s 67 to make a declaration must still be met and tested upon the court's exercise of the discretion under s 83 to make a care or protection order.

[77] The removal of the declaratory step will have consequences for how an erroneous assessment that a child is in need of care or protection, and to a degree warranting intervention, might be remedied given that a decision to make a declaration was appealable.[83] The appeal would now lie against the making of the care and protection order.

[78] In conclusion, the effect of the repeal of s 67 is not jurisdictional. Rather it operates to now situate jurisdiction within the dispositive stage instead of a declaratory stage. Caution

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[82] And in the language of the relevant sections authorising the making of each order.

[83] A decision to make a declaration being an appealable decision: *L v Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* [2017] NZCA 517 at [3] (CA) and *L v Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* [2018] NZHC 2232 (HC).

may be needed to ensure that the full extent of jurisdiction is not overlooked now that the declaratory signpost is removed.

The Supervisory Role: Plans and Reviews of Plans

[79] The importance of plans and their review is captured by the authors of Child Law in the following comment:[84]

> The 1989 Act attempts to ensure a court will have all the information required to fulfil its inquisitorial role. … The court is required to obtain a detailed plan before making an intrusive order. Plans are to be reviewed by this court which will thus receive the necessary feedback to enable the court to maintain oversight of the wellbeing and best interests of the child or young person. The requirement of planning and court-based reviews bring an important new level of public accountability into the law in this area.

So too by Judge Smith in *Chief Executive of Child Youth and Family Services v JH*:[85]

> The provisions of the Act relating to furnishing plans, reports and revised reports are designed to provide judicial oversight to ensure proper implementation of the Court's Orders and they are to ensure the best possible care arrangements that can be achieved for children having regard to the evidence, reports and principles of the Act. This judicial function is more than to monitor a child's progress, but also to positively promote a child's welfare. The review process provides protection of the child, parents and interested parties.

[80] These comments draw focus to the protective process that the review scheme enables and demands on each discrete occasion a child's circumstances are monitored. But there is another aspect: it engenders confidence that shortcomings for children will be detected because there is a structure in place designed to do so, and that structure is credible for the imprimatur of Parliament that it carries. It engenders confidence that failings are not left to arbitrary or opportunistic identification. It is an aspect that higher courts have considered relevant when considering consequences for breaches of obligations to vulnerable people.[86] In this sense the review scheme is not just a mechanical prescription of steps to be taken to monitor a child's progress, it goes to perceptions about the overall integrity of the child protection system.

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[84] *Brookers Family Law – Child Law* (online loose-leaf ed, Brookers) at NT12.1.01.
[85] *Chief Executive of Child Youth and Family Services v JH* FC Dunedin FAM 2002-012-777, 8 February 2005, at [2].
[86] See *Sestan v Director of Area Mental Health Services, Waitemata District Health Board* [2007] 1 NZLR 767 (CA).

(a) The Statutory Review Scheme Detailed[87]

[81] There are five orders in respect of which plans and reports must be obtained. Timeframes for various aspects of the process are set and role of the court and other participants are prescribed. The relevant orders are: services orders (s 86); support orders (s 91); custody orders (s 101);[88] sole guardianship orders (s 110); special guardianship orders (s 113A).

[82] If the court proposes to make any of the specified orders it must, before doing so, obtain a plan,[89] the content of which is prescribed.[90] The plan must be prepared by the applicant for the order or any other person that the court directs.[91] Typically, the responsibility to prepare the plan will fall to the Chief Executive (and therefore the social worker as his or her delegate) as the applicant for the care or protection order. The timeframes attaching to the aspect of the process are as follows:

(a) Any adjournment for the purposes of obtaining the plan shall not exceed 28 days unless the court in any special case otherwise determines.[92]

(b) The plan must be filed with the court not later than 10 working days[93] before the date set for the hearing to determine whether the order should be made.[94] Corollary to this, the person responsible for preparing the plan must make all reasonable endeavours to ensure that the plan is filed with the court at least 10 working days before the date set for the hearing:[95]

(c) The registrar shall give a copy of the plan furnished to the court to entitled persons, which copy shall, wherever possible, be supplied not later than 5 working days before the sitting of the court.[96]

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[87] Given that the subject proceedings span the period before and since the 1 July 2019 amendments, the scheme is considered as prescribed by the current legislation with reference to the legislation prior to the amendments as necessary.
[88] But not an interim custody order pursuant to s 101 by virtue of the application of s 102.
[89] Section 128(a). That plan must be prepared in accordance with s 130.
[90] Section 130.
[91] Section 129(1).
[92] Section 131(1).
[93] Prior to 1 July 2019 there was no such time prescription.
[94] Section 128(3A).
[95] Section s 131(2). Prior to 1 July 2019, the period was two working days before the hearing.
[96] Section 132(2). Prior to 1 July 2019, the period was one working day.

[83] Upon the making of any of the specified orders the court must fix a date by which review of the child's care plan is to be carried out,[97] being not later than six months from the date of the order if the child is under the age of seven years and not later than 12 months for older children.[98] The court may direct who is to carry out the review but in default responsibility is deemed to the person who prepared the first plan (again, typically the Oranga Tamariki social worker).[99] The review process then operates as follows:

(a) The social worker must, no later than the day fixed by the court, conduct the review and furnish to the court a report on the review and a revised plan for the child.[100]

(b) The registrar must, whenever possible, give a copy of the report and plan to all entitled persons no later than five working days before the court sitting.[101]

(c) The court must consider the report, and then has discretion to make a range of orders and directions.[102] Subject to defined exceptions, any order that is in force continues in force until the court has completed its consideration of the report and determined what (if any) decision it should make with respect to that order.[103]

(d) After considering the report and taking such action as it thinks fit, the court shall if any of the orders are to continue in force fix a date by which a review of the revised plan that accompanied the report is to be carried out, and so the review process continues.[104]

[84] Whilst there is no express statutory timeframe within which the consideration must be conducted, guidance must be taken from the statutory principles as to timeliness and participation.

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[97] Section 134(1).
[98] Section 134(2).
[99] Section 134(4).
[100] Section 135(1).
[101] Sections 132 and 136.
[102] Section 137.
[103] Section 137(5).
[104] Section 138(2).

[85] Other obligations arise as a consequence of the review scheme, despite not being expressly within its structure. For instance, lawyer for the child must discharge duties to explain the proceedings to the child[105] and as to the child's participation[106] and meet with the child to ascertain and communicate any views of the child about to the plan.[107] Counsel for parents or other participating parties have obligations of representation.

[86] It is easily understood from this description how default in one part of the process leads to default in others and that because responsibilities are held by various persons and interdependent, there are multiple points of vulnerability. Delay is the obvious and frequent consequence and goes not only to matters of efficiency. Crucially, delay denies children the benefit of the wide-ranging protective actions available to the court upon considering the review of a plan. In that sense, delay defeats the Parliamentary intention for the scheme.[108]

(b) Sanctions for non-compliance[109]

[87] What may the court do if plans (initial or revised) and reports are not furnished to the court in accordance with the prescribed timeframes?

[88] The Act does not impose or provide for the imposition of sanctions upon a defaulting plan provider. Conceivably, it is possible to dismiss proceedings for failure to meet a statutory timeframe, but it is difficult to imagine any scenario where a court would be moved to do so when a child's care or protection need remained unmet - the protective imperative makes allowance for non-compliance. Hence, failures to furnish plans and reports in accordance with statutory timeframes are in most circumstances likely to be "acceptable" even when that failure is repeated and lengthy.[110]

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[105] Section 10.
[106] Section 11.
[107] Section 9B, Family Court Act 1980. The obligation to meet with the child may only be excused by a Judge if, because of exceptional circumstances, a meeting would be inappropriate.
[108] Those actions include: the ability to vary and discharge orders or make new orders; direction to convene a family group conference; requiring a person to appear before the court to be examined; requiring a further report or revised plan to be furnished if the presented report or plan is considered to be inadequate: see Section 137(1).
[109] As is evident from the procedural analysis of the subject proceeding and those for the *V Children* many delays through the review process are attributable to the court. Those matters will be considered more fully in Section F. This part focuses on the other prominent delay in the process, the furnishing of reports and plans by social worker.
[110] See *Police v V* [2006] NZFLR 1057, a decision of the High Court which, although it concerned the youth justice provisions of the Act, summarises the relevant considerations and assists with review of non-compliance with timeframes on review of plans. Pertinently the court held that is no longer regarded as helpful to categorise statutory obligations as mandatory or directory. Rather it preferred the approach in a line of authority whereby the nature, causes and consequences of non-compliance are examined to determine where it should lie on a spectrum

[89] A plan provider is not a party to proceedings susceptible to an award of costs in the usual way. Though costs are available in some circumstances against a non-party,[111] any award would be fact specific and likely extremely rare. If it is taken that a social worker has a duty to the court to the provide the plan, default may give rise to contempt however that possibility is similarly fact specific and likely rare.

[90] In practice the means with which the court is left to manage default is for the most part by administrative oversight thorough the registry and the convening of judicial conferences to encourage compliance.

(c) Summary

[91] The review scheme is an intricate weave of responsibilities. It is easily warped, and its protective strength weakened at any point when there is a default.

[92] Responses available to the court to ensure compliance are muted and in essence of encouragement rather than of sanction or coercion. The good function of the scheme is therefore almost entirely dependent upon the diligent discharge of responsibilities by those entrusted with them.

[93] Self-evidently, individuals and institutions cast with those responsibilities must be adequately resourced to meet the onerous obligations and expectations placed upon them by Parliament. Where there is failing to do so the court is inhibited from the performance of its supervisory role (and similarly performance of its jurisdictional role). To be other than transparent about that risks perpetuating a confidence of the type expressed by higher courts that makes other irregularities tolerable, but which would be misplaced.

Status of orders made absent an antecedent declaration

[94] By way of preliminary clarification, the context for the discussion in this and the next section is not the situation in which a declaration was intended to be made or in fact made but, for whatever reason, not recorded nor issued; it is the situation in which the declaration has not

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of possible responses by the court. That approach was all the more appropriate because the Act is silent as to the consequences of non-compliance with the time limit.

[111] For example, if the non-party has materially contributed to the costs of proceedings.

been made at all. Secondly, "remedy" is used as reference to the means by which contemporary orders might be made with the jurisdictional foundation required by the law. It is not used in the sense of repairing a jurisdictional defect in existing orders, nor to pronounce on the validity of those orders.

[95] The circumstance of orders made without the jurisdictional precondition of a declaration falls within *ultra vires* principles described by the Court of Appeal in *Air New Zealand Limited v Wellington International Airport Limited* as conduct "outside the legitimate scope of what the statutory or common law (for example, prerogative) power merits".[112] Similarly, in *Kemp v Commissioner of Inland Review* the High Court held "Courts should not be prepared to uphold an *ultra vires* decision where that decision has been made pursuant to legislation which carefully limits the express power to make such a decision".[113]

[96] That said, the doctrine of relative invalidity applies. The Court of Appeal has said of the doctrine:[114]

> …[T]here is no method of establishing the invalidity of a decision or order save by the determination of a Court of competent jurisdiction. It may be valid. It may be invalid. The averred defect or error may be patent or obvious or it may be latent or concealed. But until declared invalid by a Court of competent jurisdiction it is to be treated as valid. In this area logic corresponds with the requirement of society. The orderly conduct of affairs would be impossible on any other footing.

And also:[115]

> Unless a judgement of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides. If it were not so, the principle of legality would be undermined.

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[112] *Air New Zealand Limited v Wellington International Airport Limited* [2009] NZCA 259 at [155].
[113] *Kemp v Commissioner of Inland Review* (1999) 19 NZTC 15,110 (HC).
[114] *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 at 324. See also *Love v Porirua City Council* [1984] 2 NZLR 308.
[115] *R v Smith* [2003] 3 NZLR 617 at [46]. To say that because orders are made without jurisdiction they are void or invalid reflects the notion of absolute invalidity which treats an order or decision made on serious legal error as null. There is ample authority for New Zealand having moved away from the theory of absolute invalidity: see *Ortmann v Unites States of America* [2020] NZSC 120 (CA); *Argos Froyannes Ltd v Chief Executive of Immigration NZ* [2020] NZHC 3089 (HC).

[97] Further, the doctrine operates so that failure to comply with even a mandatory requirement will not necessarily invalidate a decision or order,[116] but subject to exception if there are express statutory consequences of requirements not being met.[117]

[98] Applying the doctrine to care and protection proceedings, orders made without the mandatory jurisdictional precondition of a declaration are assumed to be legal, or in other words "presumptively valid", unless and until declared to be invalid by a higher court. It follows that actions undertaken by the Chief Executive, the court and others in reliance upon those orders will stand unless also held invalid by a higher court.

[99] Whether orders might be declared invalid and, if so, the nature of the invalidity is not a matter for this court, but in contemplating how a higher court might apply scrutiny there is strong analogy with mental health legislation. The Court of Appeal in *Sestan v Director of Area Mental Health Services, Waitemata District Health Board* [118] said of that legislation:

> The [Mental Health Act] is aimed at defining and protecting the rights of people who may be mentally disordered. Courts will not countenance breaches of the Act's provisions and obligations lightly. It should not be overlooked that, within the statutory framework, ongoing protective mechanisms exist. These checks and balances operated both during the periods of assessment and treatment and after a compulsory treatment order has been made by a Judge.
>
> Because of the nature of the jurisdiction, it is almost inevitable that there will at times be some variance or deviation form strict statutory requirements. It is important to view any non-compliance in the round rather than from a blinkered focus on isolated provisions which ignore the statutory context.
>
> We do not accept that wherever it is demonstrated that there is any degree of non-compliance with a specific provision the only consequence will be the total invalidity of all subsequent actions. The Court must assess what happened, why it happened and how it happened, remembering that the protection of a vulnerable person, and potentially the community is at the heart of the legislative framework.

[100] Nevertheless, the Court of Appeal has more recently said:[119]

> *Sestan* and *J v Attorney-General* stand for the proposition that minor breaches of the Mental Health and Intellectual Disability Acts do not necessarily invalidate subsequent steps and decision under those statutes. That proposition, however cannot be invoked in

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[116] *Hill v Wellington Transport District Licensing Authority*, above n 114, at 319.
[117] *Coromandel Marine Farmers (Inc) v Waikato Regional Council* HC Auckland CIV-2006-419-877, 7 March 2008 at [90] and [112].
[118] Above n 86 at [88] and [89].
[119] *Care Co-Ordinator v R* [2020] NZCA 574 (CA) at [74].

> circumstances where a failure to comply with the relevant legislation is so fundamental that it deprives courts of jurisdiction to take any further steps under the legislation.

[101] These observations highlight that the very nature of a protective jurisdiction and the vulnerable interests to which is it responsible tend to greater tolerance for non-compliance.

Remediating jurisdiction

[102] Whilst there may be remedial options available by action taken in the High Court, for instance on judicial review or appeal, this section focuses upon remedies that may be available to this court for the obvious reason that that is all that can be done. In light of remedies applied by other judges of this court, consideration is given to the application of s 440 of the Act and rule 204 of the Family Court Rules. The other potential options that occur to be considered are fresh applications, restarting the process and rehearing.

Section 440, Oranga Tamariki Act 1989: want of form

[103] Section 440 provides:

> **440 Proceedings not to be questioned for want of form**
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> No charging document, summons, conviction, order, sentence, bond, warrant, or other document under this Act, and no application, proceedings, or process under this Act, shall be quashed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission or want of form unless the court is satisfied that there has been a miscarriage of justice.

[104] Section 440 might on the face of it have had more ready application to preclude any challenge to the s 101 custody and s 110 guardianship orders for having been made without a preceding declaration. That is not the way in which the provision was applied in the proceedings for the *[S] Children* and in one of the ancillary proceedings. Rather it was relied upon to make the declaration. In that sense it appears that it is being utilised to repair a "process" under the Act that should have but did not occur – that being the making of a declaration before the said orders.[120] The required assessment is therefore whether the failure to make a declaration was defect, irregularity, omission, or want of form.

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[120] The absence of a declaration is not an error of form relating to a document. Rather, the document is wholly absent. The analogy is to a warrant that has never been issued, rather than a warrant defective for the way in which an offence is described, as was the circumstance in *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 in which s 204 operated to protect the warrant.

[105] Section 440 is in identical terms to s 204 of the Summary Proceedings Act 1957. The Supreme Court reviewed cases on s 204 in *Dotcom v Attorney General* and from that it can be taken for authority that s 204 can only cure matters of form.[121] Whilst it allows that s 204 can extend to even relatively serious defects of form, they cannot be so serious that the document or process is a nullity.

[106] The Supreme Court's characterisation of s 204 (and by extension the character of s 440), even allowing for serious defects of form, does not sit with the failure to make a declaration because a declaration is so fundamental to the statutory scheme. It simply cannot be conceived of as a matter of form. I therefore find that s 440 cannot apply to correct the absence of a declaration.

[107] In any case it is unclear how the making of a declaration by invoking s 440 could apply to remedy the jurisdictional defect in the s 101 custody and s 110 guardianship orders. It remains that they were made without the mandatory antecedent declaration. Analogy can be drawn with the circumstance in *CLM v Chief Executive of Ministry of Social Development* in which an interim custody order made by the Family Court on an application that fell short of the jurisdictional requirements was held to be procedurally defective or improper.[122] The order was discharged, and a second interim custody order made by the Family Court without the error that vitiated the first decision. Harrison J held that the second order "did not, and could not, cure the original procedural defect".[123]

Rule 204, Family Court Rules 2002: the slip rule

[108] Rule 204 of the Family Court Rules 2002 provides:

> **204 Clerical mistakes and slips**
>
> (1) This rule applies to a judgment—
>
> (a) that contains a clerical mistake or an error arising from an accidental slip or omission, whether or not the mistake, error, slip, or omission was made by an officer of the court; or
>
> (b) that is drawn up in a way that does not express what was actually decided and intended.

[121] *Dotcom v Attorney General* [2014] NZSC 199 at [121] - [124].
[122] Above n 71. That being that notice of the application was not given to the mother of the child as to enable her to exercise an entitlement to be heard.
[123] At [57].

(2) The judgment may be corrected by the court or, if the judgment was made by a Registrar, by the Registrar

(3) The correction may be made by the court or a Registrar, as the case requires, on his or her or its own initiative or on an interlocutory application for the purpose.

[109] In the context of the subject proceedings r 204 requires assessment of two aspects:

(a) Is the absence of a declaration a clerical mistake or error in the judgment making s 101 custody and s 110 guardianship orders the result of an accidental slip or omission? Or

(b) Was there a decision and intent to make a declaration, but the judgment not drawn accordingly?

[110] The application of the slip rule was considered and denied by the High Court in analogous circumstances in *L v The Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki.*[124] The Chief Executive had applied for a declaration that a child was in need of care or protection and the court granted the Chief Executive interim custody of the child "pending determination of the application for a declaration."[125] Upon subsequently making a declaration, the Family Court judge did not mention the interim custody order. Instead, at the request of the Chief Executive after delivery of the judgment, the judge gave a direction applying the slip rule to amend the judgment to continue the interim custody order pending the making of dispositive orders. Palmer J held that the direction was not lawfully made under the slip rule because:[126]

> …the amendment purportedly made...[did] not correct a clerical mistake or slip in expression in the judgment. It made a substantive change to the content of the legal orders made. The slip rule cannot be used to vary an order in such a fundamental way or to improve the judgment.[127]

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[124] *L v The Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* [2017] NZHC 3008. The High Court was considering the slip rule under r 52 of the Oranga Tamariki Rules 1989 which provides that "clerical mistakes in judgments or orders, or errors arising in judgments or orders from any accidental slip or omission, may at any time be corrected by the court or a Judge or a Registrar." Rule 52 does not apply to proceedings under the Act to which the Family Court Rules 2002 apply: r 2(2)(aa)(i), Oranga Tamariki Rules 1989 and r 5(2), Family Court Rules 2002.

[125] Section 78.

[126] At [26].

[127] *R v Cripps, ex p Muldoon* [1983] 3 All ER 72(CA), relied on in, for example *Allan Scott Wines & Estates Holding Ltd v Lloyd* (2006) 18 PRNZ 1999 (HC).

[111] Adopting the analysis applied to s 440 to conclude that because a declaration is fundamental to the statutory scheme the failure to make it cannot be conceived as a matter of form, nor can the failure to make it be conceived of as a clerical mistake or error. To use the slip rule to make a declaration would, as Palmer J described, make a substantive change to the content of the legal orders made, or in these circumstances omitted.

[112] As to the second aspect of the slip rule, it might be tempting to treat as implicit in making the orders that a judge decided and intended to make a declaration simply because the making of a declaration is so fundamental and hence is the usual practice (because it must be) before the relevant orders are made. In other words, it cannot be contemplated that a judge would have made orders without first making a declaration. The Chief Executive's submission to that effect in *L v The Chief Executive of the Ministry for Vulnerable Children, Oranga Tamariki* did not find favour with the court. Conceivably the rule might provide relief if a judge indicated in a hearing that he or she was, by reference to evidence, satisfied that a care or protection ground was established to a degree warranting the exercise of the discretion to make a declaration, but did not do so when formally issuing orders. But in that scenario, there is an objective indicator of the subjective judicial intent. There is no such indicator in a decision simpliciter to make the orders in question and particularly if the orders are made in chambers without providing accompanying reasons. There should be caution not to construct a subjective judicial intent without adequate foundation.

Fresh application

[113] Should the Chief Executive retain a belief that the children are in need of care or protection and be concerned to hold the children's custody and guardianship on a jurisdictionally sound basis, he could make a fresh application for a care and protection order as empowered by s 68. Such an application would require that another family group conference be held but might be preferred as enabling matters for the children to be determined by application of the current statutory provisions rather than those applicable at the time the declaration application was made. That would not on the face of it deal with the existing presumptively valid but jurisdictionally deficient orders. Conceivably they could, upon an application properly brought, be discharged contemporaneously with the making of a new order.

Restarting the process

[114] If an application for a declaration is extant, the court is obliged to hear it and determine it.[128] In those circumstances the court could, in effect, restart the process by directing a family group conference pursuant to s 72(3) on the extant application for a declaration. Once a family group conference is held and, if satisfied of all other statutory requirements, the court could then make a declaration and then a s 101 custody order and section 110 guardianship order, and those orders would have the proper jurisdictional foundation. The existing orders could be discharged, again on the appropriate applications being brought.

Rehearing

[115] Finally, the sound jurisdictional foundation might be established by means of a rehearing. A rehearing in effect restarts the process at a particular point afresh. It does not constitute the court revisiting its own decision when a matter is at an end. Hence it does not offend the principle of *functus officio* which prevents the court revisiting its own decisions when a matter is concluded.

[116] Section 204 provides as follows for rehearings:

> **204 Rehearings**
>
> (1) Where a declaration or an order has been made or refused on an application under Part 3 or Part 3A, the court may, on the application of the applicant or any other person who was a party to the proceedings or the barrister or solicitor representing the child or young person to whom the proceedings relate, grant a rehearing of the application on such conditions as it thinks fit.
>
> (2) Notice of any such rehearing shall be given to such persons and in such manner as the court directs.
>
> (3) An application for a rehearing under this section shall not operate as a stay of proceedings unless the court so orders.
>
> (4) If the court grants an application for a rehearing, the declaration or order shall continue to have effect unless the court orders otherwise.

[117] Clearly an eligible party could apply for a rehearing of the declaration made subsequent to the s 101 custody and s 110 guardianship orders, and for rehearing of an application for those orders (whether or not the declaration has been subsequently made). If the orders are made but the declaration not, the remedial course is effectively a combination of what is described above

[128] Section 11(1)(ga), Family Court Act 1980.

as a "restart" of the process to determine the extant declaration application and the rehearing process in respect of the orders made. In either scenario the following considerations arise:

(a) To determine the application for a declaration a family group conference must have been held with sufficient temporal proximity to the determination. If not, a conference will need to be convened. That could be directed by the court if necessary.[129]

(b) If satisfied of the statutory criteria, the declaration can be made, followed by the s 101 custody and s 110 additional guardianship orders with the proper jurisdictional foundation.

(c) The existing presumptively valid but jurisdictionally defective orders might be discharged contemporaneously with the making of new orders upon application properly brought or on the applicant's motion under s 204 for a rehearing and the court making an order to that effect. It is plainly envisaged by the terms of s 204(4) that the court on rehearing may order that declarations or orders shall have no further effect.

[118] Counsel for the *[T], [M] and [P] Children* submits, as I summarise, that s 204 provides the court with the discretion to grant a rehearing but it is r 59 of the Family Court Rules 2002 (which in turn imports the application of rr 209 to 213) that empowers the making of the application for rehearing. The submission therefore continues that the requirements of the rules as to the filing of the application within 28 days of the judgement[130] and the miscarriage of justice threshold that must be reached to order a rehearing frame the court's ability to order rehearing under s 204. I reject that submission for the following reasons:

(a) The plain wording of s 204(3) contemplates that the application is made under the provision in the primary legislation.

(b) The rules are expressly excluded in affect or application to the extent of inconsistency with s 204.[131]

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[129] Section 72(3).
[130] Rule 209(3).
[131] Rule 209(2)(a).

[119] The most apparent inconsistency is that, under the rules, an application may be brought, and the rehearing granted, only if there has been a miscarriage of justice. There is no such constraint in s 204 upon the making of the application. The only precondition to the making of an application is that a declaration or order has been made. It is logical then that the court has wide discretion under s 204 as to whether a rehearing is granted, or not. Section 204 cannot be constructed as counsel contends without significant "rewriting".

F. SYSTEMIC ISSUES

[120] The appropriateness of inquiring into interests beyond those directly adjudicated upon was described, albeit in the context of publication of proceedings, by Sir Owen Woodhouse P in *Broadcasting Corporation of New Zealand v Attorney-General* thus:[132]

> The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. **Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purpose.**
>
> (Emphasis added)

[121] More recently, and specific to the Family Court, systemic function was considered a subject for legitimate judicial comment by Heath J in *Brown v Sinclair and Ors*:[133]

> [9] It is sad that this case has reached the point where I am required to determine nine applications for judicial review of decisions made in the Family Court as a result of difficulties of the type I have identified. … in the end, the problem was systemic in nature. All of the problems coalesced. …the combination of events had disastrous consequences.
>
> [10] While this is the worst example I have seen of problems of this type, others exist on a smaller scale. From my experience, the time may have come for those responsible for providing adequate resources for the Family Court to undertake the many and difficult functions cast upon it to take stock of the present position and to reflect on whether it is

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[132] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA), at 122-123.
[133] *Brown v Sinclair and Ors* [2016] NZHC 3196, 22 December 2016. Heath J took the relatively unusual step of forwarding his judgment to the Chief District Court Judge and the Principal Family Court Judge so that they could consider the issues raised.

> practicable for that Court to do everything that Parliament has entrusted to it with its present resources – both judicial and administrative.
>
> [11] As a Judge, I am conscious that it is not my place to offer views on how Parliament should appropriate funding to meet important social objectives. Striking that balance is a political decision. My concern is to highlight some systemic problems that have come to light, so that those responsible for allocation of resources can consider whether (and, if so, how) improvements can be made. A civil justice system that facilitates the prompt resolution of disputes, with each side having (as near as practicable) equality of arms, should be an important part of New Zealand's social fabric.

[122] The following discussion traverses matters of the court's operation in a fine grained way that is relatively unusual for a judgment. That is inevitable in order to examine the systemic issues that may have impacted the application and administration of the Act. More fundamentally, I return to Inglis J's proposition that the court may adopt *parens patriae* principles provided they are not inconsistent with the Act. Identification and amelioration of systemic features and practices of the court that defeat the purposes of the Act and inhibit the court's jurisdictional and supervisory role, though not a task for the court prescribed by the statute must surely be consistent with those principles.

[123] This section is structured to first consider how the Family Court is constituted and the means by which it exercises its powers and duties. That is necessary because, like Heath J, I am mindful of the constitutional boundaries to be observed and similarly indicate that the observations in this section are to highlight problematic features in the proceedings that point to some underlying systemic issues – they are not intended to cross into the domain of the other branches of government. Role precision is therefore important. Secondly, to consider what is meant by systemic issues and why problematic features of these proceedings might be conceived of in this way.[134] Thirdly, to consider possible responses and, fourthly, to offer some conclusions.

The Constitution of the Family Court

[124] Day-to-day reference to a "court" can typically be intended as or taken to be reference to all or any of the judge, the registry, the administrative and security services and personnel who provide those services, and the physical facilities including the courtroom and its environs.

[134] And principally by reference to the two subject proceedings and for the *[B] Children* because their procedural progress has been analysed in most detail.

This expansive concept of a court is not the entity to which the care and protection jurisdiction is endowed.

[125] Rather, the endowment is to the Family Court. The Family Court is a division of the District Court.[135] The District Court consists of the Chief District Court Judge, the Principal Family Court Judge, the Principal Youth Court Judge and the other District Court Judges.[136] The Family Court jurisdiction must be must be exercised by a Family Court Judge,[137] and a Family Court Judge must be a District Court Judge.[138] That said, there are within the Act various powers and duties (primarily procedural rather than arbitral in nature) imposed upon Registrars[139] and to that extent a Registrar does exercise jurisdiction in care and protection proceedings. However, the point to be taken from this circular description is that reference to the court's jurisdiction is to the jurisdiction exercised by the presiding Family Court Judge.

[126] In order to exercise the jurisdiction, the Family Court (and hence the presiding Family Court Judge) is dependent upon the provision of all those aspects of the expansive concept of the court. Put another way, the Family Court requires infrastructure and resources to exercise its powers and duties under the Act. Responsibility for provision of that infrastructure and resource rests with the Executive and is provided through the Ministry of Justice.

[127] This of course reflects a fundamental tenet of our constitutional arrangement whereby, in simplified description, the executive branch of government is responsible for the provision of support to the judicial branch so that the judiciary can interpret and apply the laws made by the legislative branch. That simplification does not reflect that there is in fact a degree of overlap between the responsibility of the executive and judicial branches for administrative functions. For instance, the Principal Family Court Judge, in consultation with the Chief District Court Judge, is responsible for ensuring the orderly and expeditious discharge of the business of the court,[140] for determining the stationing of Family Court Judges and for approving regular sessions of the Family Court.[141] The Memorandum of Understanding

[135] Family Court Act 1980, s 4.
[136] District Court Act 2016, s 7(1).
[137] Family Court Act 1980, s 11(1)(ga) and (2).
[138] Family Court Act 1980, s 5(3).
[139] And within the Family Court Rules 2002 that are applicable to care and protection proceedings.
[140] Family Court Act 1980, s 6(7).
[141] Family Court Act 1980, s 9.

between the former Chief Justice and the former Secretary for Justice[142] recognises those statutory responsibilities and records corollary Heads of Bench responsibilities for, inter alia, scheduling and rostering, control of courtrooms and precincts, the direction and supervision of registry staff in relation to the business of the court and the control and supervision of the use of information technology for the business of the court. However, as Miller J writing extra-judicially points out, the Memorandum does not secure to Heads of Bench the resources to meet those responsibilities nor does it establish a governance mechanism.[143]

What are systemic issues?

[128] Like the calls for transformative change which have been acknowledged by the judiciary and which have a primary focus on the criminal justice system, there is discourse within the public domain specific to the function of the family justice system and within that the care and protection system.

[129] The following factors (non-exhaustively) could be taken from that discourse as indicative of systemic issues impeding the function of the court (and the care and protection system more broadly):

(a) Delay.[144]

(b) Inefficient case progression.[145]

(c) The under performance of the court particularly with respect to tamariki Māori.[146]

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[142] New Zealand Judiciary and Ministry of Justice, *Principles observed by Judiciary and Ministry of Justice in the Administration of the Courts* (Memorandum of Understanding, 29 November 2018).
[143] Forrie Miller, "*Reform of courts administration in New Zealand*" [2019] NZLJ 264 at 265.
[144] Ministry of Justice, *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* at pages 14, 17, 19 and 20. Whilst this was a finding of the 2018/2019 review into the Care of Children Act 2004 (and the Family Court), this finding appears relevant across the Family Court.
[145] Jan-Marie Doogue, then-Chief District Court Judge "Pressures spell redeployment of judicial workforce" (25 May 2018) *New Zealand Bar Association* https://www.nzbar.org.nz/news/pressures-spell-redeployment-judicial-workforce-chief-district-court-judge-janmarie-doogue.
[146] See *Te Korowai Ture ā-Whānau*, above n 136.

(d) Substantial and persistent inequity for Māori in the care and protection system.[147]

(e) The failure of the care and protection system for those most vulnerable.[148]

[130] Former Chief District Court Judge Doogue referred in the following terms to some of these factors in 2018 upon her redeployment to the Family Court of resources that fell within her remit:[149]

> In the Family Court, disposal time frames are routinely not meeting legislative or practice-note expectation...the unrelenting pressure is now creating unacceptable delay.
>
> …
>
> As the second biggest division of the District Court, the Family Court is under enormous strain, It deals with the most basic rights to care, shelter and protection for our most vulnerable New Zealanders, be they mentally unwell, elderly, domestic violence victims, abused and neglected children or those families being torn apart by intractable contact and custody disputes.

[131] The problematic features of these specific proceedings are consistent with that high-level framing of systemic issues. For instance:

(a) Delay: routine failure to meet legislative timeframes; failure to meet judicial direction for urgent hearing.

(b) Inefficient case progression: actions undertaken by multiple administrative and judicial officers; action undertaken on future scheduled date rather than upon readiness; limitations of the electronic case management system.

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[147] As at 31 December 2020 there were 5,600 children in the custody of the state of which 68% were identified as Māori (inclusive of 11% identified as Māori and Pacific). Derived from "Care and protection – statistics" (22 February 2021) Oranga Tamariki <https://orangatamariki.govt.nz/about-us/reports-and-releases/quarterly-report/care-and-protection-statistics/>. An annual average of 265 babies under three months of age have been taken into custody over the past six years and an annual average of 171 pēpi Māori have been taken into custody in the same period (64 percent, despite making up only 28 percent of births): See Office of the Children's Commission, *Te Kuku O Te Manawa - Ka puta te riri, ka momori te ngākau, ka heke ngā roimata mo tōku pēpi* (June 2020), at p 92.

[148] The Interim Report of the Expert Panel established by the Minister of Social Development in April 2015 found that the current system is failing to provide the safe, stable and loving care that children need, and is not supporting them to fulfil their potential as adults (Modernising Child, Youth and Family, Expert Panel, Interim Report, 31 July 2015 at 7.1 (p.79) and Investing in New Zealand's Children and Their Families, Expert Panel Final Report, December 2015 at 2).

[149] Above, n 145.

(c) Performance relative to tamariki Māori: all children of the subject proceedings whakapapa Māori.

(d) Performance relative to vulnerable persons: judicial supervision of care or protection plans delayed for periods of up to 12 months beyond the statutory requirement.

[132] These features, but for the electronic case management system the court operates, are apparent from the appended summaries. In respect of that management system, the full detail is not necessary for this judgment, but it is sufficient to explain that it tracks proceedings as they progress through the court. It has not contained the functionality to identify when revised plans are not furnished as required. That monitoring task has instead fallen to administrative officers and is fallible for all manner of variables.[150] The system vulnerability was recently illustrated in the matter of *Oranga Tamariki for [N] Child*. The child in that proceeding is subject to a s 101 custody order in favour of the Chief Executive.[151] A revised plan dated 18 January 2019 was furnished to the court. A judge considered the plan in chambers four months later on 26 May 2019, continued the custody order and directed a review in 12 months, hence by 26 May 2020. No review took place as directed. Instead, a further seven months elapsed until on 21 December 2020 counsel for the Chief Executive made inquiry of the court as to the status of the proceedings. It transpired that because the case officer had left the Ministry the outstanding review had not been identified. The period between judicial consideration of plans for this child was one year and 10 months.[152]

[150] For example, human error, data inaccuracies, pressures of case load and changing personnel.
[151] *Oranga Tamariki for [N] Child* FAM 2018-055-000113.
[152] The Ministry of Justice generates an "exception report" designed to prospectively identify proceedings in respect of which review of plan are outstanding. It is not apparent that it will identify reviews that are outstanding prior to the inception of the report. The number of such proceedings is unknown and short of a manual file audit there does not appear to be any ready way of identifying them.

Responses to systemic impediments

[133] The primary focus of this section is upon administrative and operational actions that the court might take to ameliorate the some of the problematic features identified in these proceedings. However, if as public discourse would have those features, or some of them, are a product of systemic function, and bearing in mind the disproportionate representation of Māori in the care and protection system, a duty of care upon the Crown to tamariki Māori and whānau Māori grounded in tikanga and guarantees in Te Tiriti might be considered.

[134] Counsel assisting develops this positing a general duty upon the Crown in the care and protection context to, for instance, adequately resource and manage the court so that the statutory protections are met by observance of timeframes and allocation of hearing time commensurate to robust testing of evidence tendered to establish jurisdiction to move children to the State's custody or other intervention. The conceptual frame encompasses propositions that Te Tiriti requires minimum standards for Māori "users" of the court and adequate monitoring and audit of court performance vis a vis Māori. If there is a duty of this nature its adequate discharge would readily lend to systemic improvements.

[135] Recognition of such a duty, if asserted, would be novel and a matter for senior courts or the Waitangi Tribunal. But the common law evolves, and in this context, there might be resonance with duties to Māori presently being asserted in climate change litigation. It is certainly curious that comparative to other spheres in which Te Tiriti speaks, there has been a paucity of jurisprudence of depth and import as to its relevance and the relevance of tikanga Māori in care and protection matters. Given the fundamental orientation of the Act, that scarcity is not adequately explained by the absence of specific legislative reference to Te Tiriti and tikanga Māori prior to 2019. It is even less explicable in the period since 1997 when a full court of the High Court in *Barton-Prescott v Director-General of Social Welfare* affirmed the interpretive force of the Te Tiriti in all legislation affecting children.[153]

[136] Turning to this court, actions that would lend to addressing the problematic features revealed by these proceedings appear obvious. For example: assignment of cases to specific

[153] Above n 7, at 184. See also *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. Although *Barton* was an appeal from a Family Court decision on an adoption application, clearly it applies to children subject to the OTA.

judges or a judicial docket; similar assignment of cases to specific registry officers; referral of documentation necessary to progress proceedings to chambers upon (or at least proximate to) receipt rather than awaiting a future scheduled (and sometimes long distant) chambers date; more frequent allocation of hearing time.

[137] However, the simple statement of those actions diminishes the complexity of their implementation. As a simple example, the assignment of each care and protection proceeding to a specific judge with expectation that each judge will preside over each court event will be constrained at the Manukau District Court by courtroom capacity and the frequent rostering of those judges to other jurisdictions (of work type) and locations within metropolitan Auckland. Judicial case management will have implication for discharge of the court's business in those other jurisdictions and locations.[154]

[138] It is also prudent to anticipate unintended adverse consequences of any solutions adopted. Taking another example from the Manukau Family Court, scheduling has recently been adjusted so that there is hearing time designated daily to care and protection matters. That has enabled judges, upon completing considerations of reviews of plan in court, to allocate the date at which the next review will be considered in court and fix a timetable according to that date for the filing of the revised plan.

[139] There is by this potential significant benefit in that children should no longer become "lost" to the system because a default in filing a report and revised plan will be immediately evident to the judge at the next review hearing. Perhaps too the prospect of appearance before a judge, as opposed to monitoring compliance administratively, might better incentivise compliance with timeframes. But there are compromises. For instance:

(a) Resource has not been increased so inherent in a re-balance of priority is that the courtroom, judicial and administrative resource allocated daily to care and protection matters is not available for other work.

(b) It is a "blunt" response in the sense that it has been adopted so that dates can be given up to 12 months in advance of the hearing because it is known that on each

[154] At Manukau District Court nine of the resident judges hold Family Court warrants and the building has only two dedicated Family courtrooms. There are ten criminal courts and tribunal hearing rooms. They are sometimes available for Family Court matters but not on a routinely dedicated basis.

> day at Manukau Family Court there will be a care or protection court, even if the specific court room to be assigned and judge who will preside are not known. It is not a response nuanced to requirements of the work volume because the matrix of systems necessary to manage the courtroom allocation and judicial deployment for 12 months in advance are not in place. The consequence is that if the care and protection work might be serviced by a lesser allocation of time, the daily application of resource is inefficient.

Conclusion

[140] Whether and how the court responds to the systemic matters revealed by examination of these proceedings engages broader issues that present as the court attempts to respond generally to the calls for transformative change referred to the introduction.

[141] Daily care and protection courts do not operate at the other five courts in the Auckland metropolitan area (including the Family Courts at Papakura and Pukekohe which are administered from the Manukau Family Court). There might be discomfort that the same level of resource and hence protection is not available to children the subject of proceedings in other Family Courts of Aotearoa. That concern engages with fundamental concepts about equality of access to justice and the undermining of the rule of law by way of "post code" justice. It is reflected in the Chief District Court Judge's recent question of whether specialist courts that deal with discrete issues, placed unevenly throughout the country, representing a small percentage of the criminal caseload of the District Court, should continue to be supported or whether a more integrated approach should be taken.[155]

[142] The integrated approach to which the Chief Judge refers looks to the best practice arising from solution focused courts. It has strong resonance for the Family Court for its legitimate claim to be the first solution-focused court. The Family Court was established as a specialist division of the District Court, accommodating of less adversarial process[156] and incorporating therapeutic intervention.[157] Other best practice lessons to be taken from the specialist courts

[155] The Chief Judge's answer is ultimately both: "…mai te pō ki te ao mārama", above n 1, at 23.
[156] For example, the duty upon legal advisors to promote reconciliation and conciliation, formerly in s 8, Family Proceedings Act 1980; the availability of mediation conferences; the appointment of lawyers to represent children.
[157] For example, the ability to commission psychological and cultural reports.

are already inherent to the Family Court, for example involved and active judging, toned down formalities and a focus upon "drivers" of difficulties.

[143] All that said, the examination of the subject proceedings shows that even for the Family Court, with the weight of a solution focused kaupapa, and applying and administering legislation firmly tethered to Te Ao Māori, proper outcomes will be undermined and repeatedly so by inadequate process and systems. Perhaps the guidance to be had from that examination is that if statutory prescription is not to be devalued to Parliamentary rhetoric and best practice not devalued to impotent judicial protocol, it is the prosaic matters of case management, file integrity, data analysis, courtroom allocation, rostering and scheduling practices, judicial and registry interface, utilisation of technology and the like that are crucial. Ultimately those are matters of the discharge of the court's business and the exercise of the statutory responsibilities of the Principal Family Court Judge[158] and Chief District Court Judge[159] and their management of the court's relationship with the Executive.

[144] These observations are not to dissuade any response in solution to systemic impediments to the administration and application of the Act. Rather it is to acknowledge that the nature of a system is that any action in respect of one constituent part is affected by and affects other constituent parts such that the implementation of what might seem an obvious solution is complex.

G. DECISION

Proceeding 1:[S] Children

[145] The Chief Executive applies pursuant to s 204 and r 59 for a rehearing of the application for a declaration that the children are in need of care or protection.[160] To refresh, the declaration

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[158] Section 6(7), Family Court Act 1980.
[159] Section 24(4) and (4), District Court Act 2016.
[160] The rehearing application dated 18 February 2021 was in error, seeking to rehear the decision of the judge dated 14 December 2018. I invited the Chief Executive to file an amended application. He duly did so, filing an application on 1 April 2021 dated "On Notice (Amended) Application for Rehearing as to Making of Orders" and in the body referring to a rehearing sought of the making of s 101 custody and s 110(2)(b) additional guardianship orders made on 17 December 2018. Again, that did not rectify the error in the application. At the hearing the Chief Executive sought leave to amend the application to seek rehearing of the decision by the judge on 26 June 2020 to make a declaration that the children are in need of care or protection. I indicated at hearing that I was prepared to make that amendment availing myself of s 440. On reflection it is a matter more properly provided for by r 78 which enables a court of its own motion or on an interlocutory application at any stage of the proceedings to amend a defect or error in a document in the proceedings. The application has been served on the

was made by a judge in chambers on 26 June 2020 subsequent to s 101 custody and s 110 guardianship orders made on 17 December 2018.

[146] I have determined that the discretion to order a rehearing pursuant to s 204 should be exercised. I therefore do not need to deal with the application pursuant to r 59. I hold material to my determination to grant a rehearing the process by which the declaration was made, the currency of evidence upon which the assessment that the children were in need of care and protection was made and the children's participation in the proceedings. Those matters in combination satisfy me that the proceeding miscarried.

Process

[147] The absence of the declaration became apparent at a judicial conference before me on 8 May 2020 when I queried whether it had been made. I directed the Chief Executive to file revised plans and reports and Dr Cooke, the children's lawyer, to file a report and adjourned the matter to a further judicial conference before me on 19 June 2020. At that second conference there was no confirmation that the plan and report furnished by the Chief Executive for the court's consideration had been supplied to entitled persons and Dr Cooke wished to undertake further inquiries. The matter was therefore adjourned to a further conference before me on 6 July 2020.

[148] In the interim, Dr Cooke filed a memorandum dated 25 June 2020 in light of my earlier question of whether a declaration had been made. He outlined the proceedings chronology, confirmed his understanding that a declaration was not made and submitted that the s 101 custody and s 110 guardianship orders were therefore *ultra vires*. Dr Cooke did not invite any further intervention from the court at that stage, likely because a judicial conference was already scheduled for 6 July 2020.

[149] The next day, 26 June 2020, the registry of its own motion referred Dr Cooke's memorandum to the judge who had earlier made the orders. The judge made the declaration in

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parents though they are not taking an active role in the proceedings. Previous minutes issued make clear to parties and the counsel that it is the matter of the declaration that is in issue and that the court would be considering whether to order a rehearing of the application for a declaration. Furthermore, there was unlikely to be any prejudice to either parent if the rehearing is granted. The children's lawyer takes no opposition to the amendment and I am satisfied that it is an error in the application going to form not substance. Accordingly, of my own motion I amend the application as sought by the Chief Executive.

chambers. None of the Chief Executive, parents, nor counsel were aware that the judge would be determining the application for declaration and hence did not have the opportunity to be heard on it on it and were not heard on it. Ms Faletau, counsel for the Chief Executive, and Dr Cooke both take the view that natural justice requirements were not met by that process. I concur.

Currency of evidence

[150] As discussed, an assessment that a child is in need of care and protection must be made on the basis of contemporary evidence and, if there is a significant change in circumstances between the holding of the family group conference and the hearing, compliance with s 72(1) fails and a declaration cannot be made. In making the declaration the judge addressed those matters in these terms:

> I note the family group conference record of 12 March 2018 where the declaration was agreed upon, and the attendance of whanau at the FGC (namely both parents, two Aunties and the maternal grandmother), together with the sound evidential basis for such a decision.

[151] Presumably the judge had to hand the many files in the proceedings and various reports from the children's respective social workers which provided information about occurrences since the March 2018 family group conference. The most recent report for [RS] was dated 11 June 2020, for [JS] dated 16 April 2020 and for [KS] and [AH] dated 29 May 2020. The difficulty however is in discerning whether and how that information was taken into account.

[152] Furthermore, the two year and three month gap between the family group conference and the making of the declaration is also a significant period of time that raises a question of compliance with s 72(1). The possibility arises that the declaration was made on the basis of an earlier state of affairs.

Child Participation

[153] It is questionable whether there was due provision for the children's participation in the proceedings when the declaration was made. Their relatively recent views as to their general circumstances were before the court in the social workers reports as at [151]. But when

proceedings are on foot the Act[161] places duties upon judges and the lawyer appointed to represent the child and not the social workers, to encourage and assist the child's participation in proceedings,[162] to give the child reasonable opportunities to express views on matters affecting them[163] and to provide support to express views if the child has difficulty doing so.[164] Similarly, the child's lawyer has a statutory responsibility to ensure any views expressed by the child on matters affecting the child or and relevant to the proceedings are communicated to the court.[165] A judge is obligated to take into account any view a child expresses.[166]

[154] These obligations are not absolute. They are, for instance, moderated by the child's age and level of maturity. Nor are the obligations prescriptive to the extent of specifying each occasion on which the opportunity to express views should be given or how the encouragement and assistance to participate should occur. But it is posited that what is required to adequately discharge the duty is proportionate to the importance of the decision the court is called to make. The more important the decision, the greater the onus to effect the children's participation. Dr Cooke makes the point, which I accept, that the children's views are unlikely to weigh heavily in the factual determination of whether a care and protection ground is established. But if the ground is established and the proceeding is at the point a judge is exercising the discretion to make a declaration, or not, and bearing in mind how fundamental that decision is to the scheme of the Act and for the consequential actions in relation to the children and their family it empowers, I consider that:

(a) Children should have an opportunity to express their views proximate to the decision.

(b) That the opportunity should be available via their lawyer and not solely the social worker, given that the social worker is effectively the agent of the applicant Chief Executive.

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[161] Statutory references are as to the Act as it read before 1 July 2019: schedule 1AA, Part 3.
[162] Section 11(2)(a).
[163] Section 11(2)(b).
[164] Section 11(2)(c).
[165] Family Court Act 1980, s 9B (1)(b).
[166] Section 11(2)(d) of the Act. The duties reflect the principle in s 5(d) by which courts exercising any power conferred by the Act must be guided, namely that consideration should be given to the wishes of the child so far as they can be reasonably ascertained and given such weight as is appropriated having regard to the age, maturity and culture of the child.

(c) If the children's views cannot be ascertained or, in the judgment of their lawyer, it is inappropriate to do so, that should be communicated to the judge so that the judge might assess whether and how the obligation to give support to the child to express views is engaged.

[155] When the judge made the declaration in June 2020 the only means by which the children's' views were available via their lawyer were by his memoranda dated 22 March 2018 and 26 June 2019. Those views were significantly dated having preceded the judicial determination by two years and three months and by one year respectively. That is not to say that Dr Cooke had not obtained the children's views at other points throughout the proceedings nor that he would not have obtained them had he known that the judge was imminently to determine the application for a declaration. But the judge's intent was not known and because the determination was made in chambers there was no opportunity for Dr Cooke to make oral representation of any current views the children may have expressed to him.

Orders and Directions

[156] Pursuant to s 204 I order a rehearing of the Chief Executive's application dated 11 January 2018 for a declaration that the children are in need of care and protection.

[157] I record the Chief Executive's intention to convene a family group conference anticipating that it will be held upon receipt in May 2021 of a psychological report that the court has commissioned from Dr Calvert.[167] In any case I direct pursuant to s 72(3) that a care and protection co-ordinator convene a family group conference in relation to the matter that forms the s 14(1)(a) and (b) grounds pleaded in the application.

[158] I further direct:

(a) The allocation of a two-hour hearing before me on 22 June 2021 at 10:00am to determine the application for a declaration.

[167] Pursuant to s 178.

(b) The Chief Executive is to file an affidavit from the responsible social worker or social workers by way of update and in support of the application by 1 June 2021.

(c) The children's parents are given leave to file a notice of intention to appear in respect of the application and affidavit evidence in support of the notice and by way of response to the evidence of the social worker or social workers directed above by 15 June 2021. Given all the circumstances I have elected to extend the time for the parents to file notice pursuant to r 132(2)(a)(ii).

(d) Dr Cooke is to file a memorandum as to the children's views by 18 June 2021.

[159] Finally, for completeness, I record that Dr Cooke did not pursue an earlier submission that this court state a case to the High Court in respect of the jurisdiction issues that arise.

Proceeding 2: [T], [M] and [P] Children

[160] In distinction to the matter for the *[S] children*, the Chief Executive's application for these children has not yet been determined. A family group conference was held on 14 April 2021 for the purpose, inter alia, of ensuring that when the application is determined by the court a sufficiently proximate conference had taken place. There was no agreement at the conference that the children are in need of care or protection. All the children are living with their mother and her partner who is the father of the youngest child. Those two parents have indicated their intention to oppose the making of a declaration. The Chief Executive is considering whether the application is to be pursued and at the hearing I made directions to progress that application or anticipating that the Chief Executive might apply to discontinue. I need deal therefore only with the Chief Executive's application for rehearing.

[161] The Chief Executive applies pursuant to s 204 and r 59 for a rehearing of the application for a s 101 custody order in his favour.[168] To refresh, the order was made by a judge in chambers on 14 November 2017.

[168] The rehearing application on 22 February 2021 was in error seeking a rehearing of the application for a declaration. I invited the Chief Executive to file an amended application. He duly did so, seeking a rehearing of the making of s 101 custody and s 110(2)(b) additional guardianship orders made on 14 November 2017. That application was in error because no guardianship order was made. At hearing I took the Chief Executive's oral application to amend it by deletion to the reference to the guardianship order indicating, as with the *[S] children,*

[162] The children's mother and the father of the youngest children both consent to the application for rehearing.[169] The children's lawyer having made the submission about the applicability of r 59 which I have rejected abides by the court's decision.

[163] I am satisfied that there is compelling reason to exercise the discretion to order a rehearing pursuant to s 204, being that for all the reasons described the custody order was made without the jurisdictional precondition of a declaration that the children are in need of care and protection. I therefore do not need to deal with the application pursuant to r 59.

Orders and Directions

[164] Pursuant to s 204 I order a rehearing of the Chief Executive's application, by way of recommended disposition orders, for a section 101 custody order in his favour.

Judge SD Otene
Family Court Judge

Date of authentication: 29/04/2021
In an electronic form, authenticated electronically.

that I was prepared to make that amendment availing myself of s 440. As described, the amendment is more properly provided for by r 78 and I so amend the application by that rule as sought by the Chief Executive.

[169] At the hearing I granted, pursuant to r 126(2)(a), the Chief Executive's oral application to dispense with service of the application for rehearing on the father of the oldest child and the father of the next four children. I was satisfied hearing from the children's mother who was present at the hearing that the father of the oldest child lives in Australia at an unknown location, and that the father of the next four children, although not served with the application for rehearing, knew that it was being considered at court. Furthermore, there was unlikely to be any prejudice to either father if the rehearing is granted.

APPENDIX A

FAM 2013-092-001135 – [S] Children		
Date	**Event**	**Outcome**
11 January 2018	Applications by Chief Executive: • Without notice - interim custody order[170] • On notice - declaration[171]	Judge 1: • Grants interim custody order to the Chief Executive. • Directs, inter alia, that the application be called at a judicial conference within 14 days (hence by 25 January 2018). **Judicial conference is allocated for 21 March 2018*
12 March 2018	Family Group Conference	Conference participants agree that: • The children are in need of care and protection. • Declarations should be made that the children are in need of care and protection. • Custody[172] and additional guardianship[173] orders should be made in favour of the Chief Executive.
21 March 2018	Judicial Conference	Judge 2 • Adjourns to administrative review in 21 days (hence by 11 April 2018) for the lawyer for the child to file a report then refer to chambers. **Administrative review allocated for 9 May 2018*
16 July 2018	Administrative review	Case officer 1 refers lawyer for the child report received 22 March 2018 to chambers to consider the making of a declaration and custody and guardianship orders
17 July 2018	Chambers decision	Judge 3 • Declines to make a declaration and custody and guardianship orders given 4-month lapse since previous judicial consideration and report by the lawyer for the child. • Directs allocation of judicial conference as a matter of urgency and updated report from the lawyer for the child.

[170] Oranga Tamariki Act 1989, s 78(1).
[171] Pleading the grounds in s 14(1)(a) and (b).
[172] Pursuant to s 101.
[173] Pursuant to s 110(2)(b).

		**The conference was allocated for 6 September 2018 but vacated on 5 September 2018 and reallocated to 26 September 2018*
24 September 2018	Chambers decision	Judge 4 at request of counsel for Chief Executive and the lawyer for the child in the absence of the Chief Executive having filed a plan[174] and report:[175] • Vacates judicial conference scheduled for 26 September 2018. • Directs the allocation of a further judicial conference as soon as possible. **The conference was allocated for 6 December 2018*
6 December 2018	Judicial Conference	Judge 5 adjourns proceedings to be considered by her in chambers in 7 days noting that the plans and reports[176] for three of the children had been filed the day before and for the other child that it had not been served.[177]
17 December 2018	Chambers Decision	Judge 5: • Discharges the interim custody order. • Makes s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive. • Directs for a review in six months (hence 17 June 2019).
20 June 2019	Administrative review	Case officer 2 allocates administrative review on 14 August 2019 to monitor filing of: • The revised plan[178] and report[179] and proof of service of same in respect of [RS] not then received. • Proof of service of the revised plan and report for [JS], [KS] & [AH] received 17 June 2019. • The lawyer for the child report.
14 August 2019	Administrative review	Case officer 3: • The lawyer for the child had not reported. • Judicial conference allocated for 21 November 2019.

[174] Pursuant to s 128.
[175] Pursuant to s 186.
[176] The Judge's minute refers to "reviews" that had been filed. That must have been intended as reference to a s 128 plan and a s 186 report, being the documents on the court file.
[177] The Judge being unable to proceed with the matter given default in compliance with s 132(2) that required every copy of a plan be supplied by the Registrar to entitled people no later than one working day prior to the sitting of the court. Following the amendments that took effect on 1 July 2019 the requisite time period is now five working days.
[178] Pursuant to ss 135(2) and 128.
[179] Pursuant to s 135(1).

21 November 2019	Judicial conference	Judge 4: • For [RS]: notes revised plan of 21 June 2019 as compliant; continues custody and guardianship orders; directs review of plan in six months (hence 21 May 2020). Given that child's whereabouts were unknown a case management review in four weeks was directed for counsel for the Chief Executive and the lawyer for the child to file an updating memorandum. • For [JS]: plan and report noted though it is unclear what direction was made. • For [KS] & [AH]: noted that the lawyer for the child will file a report and a case management review directed in four weeks hence (16 November 2019) to monitor. Case officer 4 allocates administrative review for 16 December 2019 (as to child's whereabouts) and 22 May 2020 to monitor filing of revised plans and reports.
16 December 2019	Administrative review	Case officer 5: • Notes the lawyer for the child report received for [JS], [KS] and [AH]. • Directs as invited by the lawyer for the child report from Chief Executive regarding [KS]. • Directs the lawyer for the child report regarding [RS] within seven days. • Adjourns to judicial conference to be allocated. **On 8 February 2020 notice issued for judicial conference on 7 May 2020*
13 February 2020	Judicial conference	Judge 6 considering matters for [JS] only, concurrently with Youth Justice proceedings in the "crossover court": • Notes that the care and protection plan is overdue for review and that revised plan and report dated 9 December 2019 on the court file was for consideration at a judicial conference on 7 May 2020. • Vacates 7 May 2020 judicial conference and adjourns to 12 March 2020 (for [JS] only).
5 March 2020	Judicial conference	Judge 5 considering matters for [JS] only, with Youth Justice proceedings in the "crossover court." It is unclear from the file how the matter came to be considered on this date rather than 12 March 2020 which was earlier directed by Judge 6:

		• Adjourns to crossover court on 26 March 2020.
12 March 2020	Judicial conference	Judge 5 considering matters for [JS] only, with Youth Justice proceedings in the "crossover court." • Adjourns to crossover court on 26 March 2020 for consideration of updated revised plan.
8 May 2020	Judicial conference	Judge 7 considering matters for [RS], [KS] and [AH]: • Notes, given state of file presentation, the inability to determine with certainty when plans for each child was last furnished to court and what consideration, if any, has been given to them. • Directs the filing of revised plans and reports from the Chief Executive and report from the lawyer for the child and adjourns to judicial conference before Judge 7 on 19 June 2020.
28 May 2020	Judicial conference	Judge 5 (incorrectly identified in the minute as another judge) considering matters for [JS] only, it being unclear from the files how the matter was allocated to this date nor whether the judicial conference in the crossover court on 26 March 2020 proceeded: • Adjourns to crossover court on 11 June 2020 for Oranga Tamariki and Police to advise steps taken to locate [JS].
11 June 2020	Judicial conference	Judge 7 considering matters for [JS] only, with Youth Justice proceedings in the "crossover court:" • Notes [JS] is missing. • Adjourns to crossover court on 25 June 2020.
19 June 2020	Judicial conference	Judge 7 considering matters for [RS], [KS] & [AH]: • Notes receipt of revised plan and report for [RS] dated 11 June 2020 and for [KS] & [AH] dated 29 May 2020 but inability to proceed absent confirmation that plans have been supplied to entitled person and further the lawyer for the child inquiry was to be made. • Adjourns to judicial conference before Judge 7 on 6 July 2020.
25 June 2020	Judicial conference	Judge 5 considering matters for [JS] only: • Notes [JS] is missing. • Adjourns to crossover court on 2 July 2020 for monitoring.

26 June 2020	Chambers decision	Judge 5: • Notes the lawyer for the child memorandum dated 25 June 2020 in response to inquiry by Judge 7 at judicial conference on 11 June 2020 as to whether declaration had been made outlining proceedings chronology, notes the absence of a declaration having been made and submissions that there was not jurisdiction for orders placing the children in custody of the Chief Executive hence the orders are ultra vires. • Notes that a declaration should have clearly been made by Judge 5 on 17 December 2018 when interim custody order was discharged and custody and additional guardianship orders in favour of the Chief Executive were made. • Notes the Family Group Conference record of 12 March 2018 where declaration was agreed upon, the attendance of whānau at the FGC and sound evidential basis for such a decision. • Makes a declaration in respect of all four children on the grounds in s 14(1)(a) and (b) relying on s 440.
2 July 2020	Judicial conference	Judge 5 considering matters for [JS] only: • Notes [JS] is missing. • Adjourns to administrative review in four weeks (30 July 2020) for monitoring.
6 July 2020	Judicial conference	Judge 7 considering matters for [RS], [KS] & [AH]: • Not having available the decision of Judge 5 on 26 June 2020 as to the making of a declaration adjourns to make directions upon further consideration in chambers.

APPENDIX B

FAM 2017-092-220 – MSD for [T] Children FAM 2017-092-222 MSD for [M] Children FAM 2017-092-221 MSD for [P]		
Date	**Event**	**Outcome**
8 March 2017	Applications by Chief Executive: • Without notice - interim custody order[180] • On notice - declaration[181]	Judge 1: • Grants interim custody order to the Chief Executive. • Directs, inter alia, that the application is to be called at a judicial conference within 14 days (hence by 22 March 2017). **Judicial conference allocated for 18 May 2017*
4 May 2017	Family Group Conference	Conference participants agree that: • The children are in need of care and protection on the grounds in s 14(1)(a) and (b). • Custody[182] orders should be made in favour of the Chief Executive.
18 May 2017	Judicial conference	Judge 2: • Notes that the mother is seeking legal representation. • Adjourns to a judicial conference on 27 July 2017.
27 July 2017	Judicial conference	Judge 3: • Notes that the Chief Executive seeks, and the lawyer for the child supports, the making of a declaration and a custody order and directs for a review in 6 months. • Adjourns for service of proceedings on two fathers. • Directs that after service and the expiry of time for response the files are to be referred to a judge in chambers to deal with on the papers.

[180] Pursuant to s 78(1) of the Oranga Tamariki Act 1989.
[181] Pleading the grounds in s 14(1)(a), (b) and (f).
[182] Pursuant to s 101.

		**Service on the fathers is dispensed with on 1 November 2017*
14 November 2017	Chambers decision	Judge 4: • Discharges the s 78 interim custody order. • Grants a s 101 custody order be made in favour of the Chief Executive. • Directs for a review in 6 months (hence by 7 May 2018).
8 May 2018	Administrative review	Case officer 1: • Notes that revised plans and reports are not filed. • Adjourns to administrative review on 20 June 2018.
9 October 2018	Administrative review	Case officer 2: • Notes that administrative review occurred on 16 August 2018 instead of 20 June 2018 and was adjourned to the present administrative review for the filing of a revised plan and reports (though the record of the 16 August 2018 administrative review cannot be located on the file). • Notes revised plans and reports have not been filed. • Refers to chambers for direction.
10 October 2018	Chambers decision	Judge 5 directs for a judicial conference on 28 November 2018.
28 November 2018	Judicial Conference	Judge 6: • Records that updated plans are required given changes that have occurred for the children. • Adjourns to judicial conference on 17 January 2019.
17 January 2019	Judicial Conference	Judge 5: • Notes that the revised plan and report were only filed on that day hence consideration could not proceed.[183]

[183] Given the s 132(2) requirement that every copy of a plan be supplied by the Registrar to entitled people no later than one working day prior to the sitting of the court.

		• Adjourned to judicial conference 14 March 2019.
14 March 2019	Judicial Conference	Judge 5: • Notes that the plan of 17 January 2019 is compliant. • The s 101 custody order is continued in regard to [ST] and [MT]. It is unclear from the record whether the order was continued for the other children. • Directs for a review in 6 months (hence by 14 September 2019).
21 October 2019	Administrative review	Case officer 3: • Was advised by the lawyer for the child that revised plans are not available. • Adjourns to judicial conference on 19 February 2020.
19 February 2020	Chambers decision	Judge 7: • Adjourned at request of counsel for Oranga Tamariki who were seeking time for a meeting to be held regarding the possible discharge of orders.
2 July 2020	Judicial conference[184] (Allocated 11 March 2020 so not affected by COVID-19 adjournments)	Judge 8: • Notes that the revised plan and the social worker's report had not been received, and that the social worker is seeking an adjournment to consider whether an application to discharge orders will be brought. • Queries whether a declaration was made that the children were in need of care and protection and if not whether s 101 custody order might be ultra vires. • Adjourns to judicial conference on 1 August 2020.

[184] This date was allocated in March 2020. The four month period between judicial conferences was not occasioned by adjournments consequent to COVID-19.

APPENDIX C

FAM 2015-004-785 – MVCOT for [B] Children		
Date	**Event**	**Outcome**
26 August 2015	Without notice application to Auckland Family Court by the Chief Executive for a place of safety warrant.[185]	Judge 1 grants place of safety warrant.
1 September 2015	Applications by Chief Executive: • Without notice - interim custody order.[186] • On notice – declaration.[187]	Judge 2: • Grants interim custody order to the Chief Executive. • Directs, inter alia, that the application is to be called at a judicial conference within 14 days (hence by 15 September 2015). **Judicial conference is allocated for 20 November 2015*
22 September 2015	Family Group Conference	Conference participants agree that: • The children are in need of care and protection. • Declarations should be made that the children are in need of care and protection on the grounds in s 14(1)(a), (b) and (f). • Custody orders should be made in favour of the Chief Executive.[188]
29 September 2015	Chambers Decision	Case officer 1 refers to chambers the lawyer for the child request to transfer proceedings to Manukau Family Court given residence of children and parents in that jurisdiction. Judge 3 directs that conference in Auckland Family Court on 20 November 2015 is to proceed to avoid delay and the matter of transfer can be then considered.

[185] Pursuant to s 39 of the Oranga Tamariki Act 1989.
[186] Pursuant to s 78(1).
[187] Pleading the grounds in s 14(1)(a), (b) and (f).
[188] Pursuant to s 101.

20 November 2015	Father gives notice of appearance.	Father files a notice of intention to appear at the hearing of applications for custody[189] and additional guardianship orders.[190]
	Judicial Conference	Judge 4: • Makes a declaration on the grounds in s 14(1)(a), (b) and (f) though transcribed minutes subsequently issued by the registry refers to the grounds in s 14(1)(a), (b) and (c). • Notes the consent of the father and the lawyer for the child to s 101 custody and s 110(2)(b) additional guardianship orders sought by the Chief Executive. • Notes that the mother wishes to take legal advice on the plan[191] and report.[192] • Transfers proceedings to Manukau Family Court. • Directs counsel for the mother to file a memorandum within seven days (by 27 November 2015) as to the mother's instructions on the plan. If there is agreement the file is to be referred to chambers. If there is no agreement a judicial conference is to be allocated. • Continues the interim custody order.
27 November 2015	Administrative Action	Case officer 2 (Deputy Registrar) seals and issues: • Declaration. • Section 101 custody order. • Section 110 additional guardianship order.
1 December 2015	Mother files memorandum.	In accordance with Judge 4's direction on 20 November 2015 counsel for the mother files a memorandum confirming the mother's agreement with the plan. It is unclear from the file whether this memorandum was referred to chambers.

[189] Pursuant to s 101.
[190] Pursuant to s 110(2)(b).
[191] Pursuant to s 128.
[192] Pursuant to s 186. Although it is arguable that the Judge in any case was unable to proceed to make orders in the absence of mother's consent, given that the plan had been supplied to the parents by the social worker on 17 November 2015 so it was not in compliance with the s 132(2) requirement that every copy of a plan be supplied by the Registrar to entitled people no later than one working day prior to the sitting of the court.

18 July 2016	Administrative Action	Case officer 3 sends court file to Manukau Family Court noting that the "Gateway Team" had been trying to find it for months and it had been found on that day.
10 October 2016	Administrative Action	Court scheduler allocates judicial conference on 17 November 2016 and case officer 4 issues hearing notices - the lawyer for the child having made an email request of hearing dates to the Manukau Family Court on 10 May, 5 July and 7 October.
16 November 2016	Chambers Decision	Judge 5: • Considers the adjournment request from counsel for Oranga Tamariki to provide time to file a revised plan and report consequent upon a meeting that had been held on 14 November 2016. • Adjourns 17 November 2016 judicial conference to 12 January 2017. • Directs that the revised plan, report and the lawyer for the child report to be filed at least 7 days prior to conference (no later than 5 January 2017).
12 January 2017	Judicial Conference	Judge 5: • The revised plan and report were filed on that day hence consideration could not proceed.[193] • Adjourned to a judicial conference on 9 February 2017.
9 February 2017	Judicial Conference	Judge 6: • Notes Oranga Tamariki was seeking to file an amended plan and report in light of matters raised by the lawyer for the child and associated criminal proceedings involving the mother. • Continues orders and adjourns to judicial conference on 13 April 2017. • Directs a revised plan and report and requires them 14 days prior to conference (no later than 31 March 2017)

[193] Given the s 132(2) requirement that every copy of a plan be supplied by the Registrar to an entitled person no later than one working day prior to the sitting of the court.

13 April 2017	Chambers Decision	Judge 3: • Considers an adjournment request from counsel for Oranga Tamariki to a date after 19 July 2017 in order to monitor criminal proceedings concerning the mother and for a revised report and plan to be filed. • Adjourns to judicial conference on 13 April 2017 and directs allocation of a judicial conference as soon as possible after 24 May 2017. **Judicial conference allocated for 29 June 2017*
28 June 2019	Chambers Decision	Judge 4: • Considers an adjournment request from counsel for Oranga Tamariki to a date after 19 July 2017 order to monitor criminal proceedings concerning the mother and for a revised report and plan to be filed. • Adjourns to judicial conference on 29 June 2017 and directs allocation of a judicial conference to a date after 11 August 2017. • Directs that a revised plan and report is to be filed by 28 July 2017 and the lawyer for the child report is to be filed by 11 August 2017. **Judicial conference allocated for 21 September 2017*
21 September 2017	Judicial Conference	Judge 6: • Notes plans as compliant. • Continues s 101 and s 110 guardianship orders. • Directs for a review in 6 months (hence by 21 March 2017).
27 March 2018	Administrative Review	Case officer 5: • Notes that the revised plan has not been received. • Adjourns to administrative review on 15 May 2018. • Directs the Chief Executive to file a revised plan in 14 days (by 10 April 2017) and the lawyer for the child to file a report 7 days thereafter (by 17 April 2017).

18 May 2019	Administrative Review	Case officer 6: • Notes revised plans filed on 11 May 2018. • Adjourns to administrative review 5 July 2018 to monitor filing of the lawyer for the child report and confirmation of service.
24 August 2018	Chambers Decision	Judge 7 at request of the lawyer for the child allocates a judicial conference on 11 September 2018.
11 September 2018	Judicial Conference	Judge 5: • Notes plans as compliant. • Continues all orders. • Directs a review in 6 months (hence by 11 March 2019).
12 March 2019	Administrative Review	Case officer 5: • Notes revised plan has not been filed. • Adjourns to administrative review 17 June 2019. • Directs for a revised plan to be filed and served 28 days prior to administrative review (by 20 May 2019) and the lawyer for the child to report thereafter.
17 June 2019	Administrative Review	Case officer 7: • Notes revised plan has not been filed. • Adjourns to judicial conference 5 September 2019. • Directs Chief Executive to file revised plan and report at least 7 days prior (by 29 August 2019) and the lawyer for the child to file report 3 days prior (by 2 September 2019).
5 September 2019	Judicial Conference	Judge 8: • Regarding [ZB], [LB] and [SB]: notes plan of 22 August 2019 as compliant; continues s 101 custody and s 110 additional guardianship orders; directs review in 6 months (by 5 March 2020). • Regarding [WB] directs Chief Executive to file an updated report within four weeks (by 3 October 2019) and adjourns to judicial conference on 10 October 2019.

10 October 2019	Judicial Conference	Judge 5 regarding [WB]: • Adjourns at request of Chief Executive in order to file updating evidence. • Directs the Chief Executive to file a revised plan and report within 21 days (by 31 October 2019). • Directs allocation on soonest date after 1 December 2019 but before 20 December 2019 given the young person turns 18 on 7 February 2020. **Judicial conference allocated for 19 December 2019*
19 December 2019	Judicial Conference	Judge 7 regarding [WB]: • Continues orders. • Directs judicial conference in New Year to consider progress. **Judicial conference allocated for 16 April 2020 – it is not stated but it is presumed this is in respect of [WB]*
12 March 2020	Administrative Review	Case officer 8: • Notes receipt of revised plan on 9 March 2020. • Adjourns to judicial conference on 2 July 2020. • Directs the lawyer for the child report to be filed 3 day prior (by 29 June 2020).
2 July 2020	Judicial Conference	Judge 9: • Notes the revised plan seeking continuation of the custody order but questions ability to do so in apparent absence of an order having been made. • Adjourns to judicial conference before Judge 9 on 31 August 2020.

Proceeding 3: [B] Children FAM 2015-004-785

[165] The proceedings, when commenced, concerned the five children of [AB] (mother) and [JB] (father): [MB] born [date deleted] 2000; [WB] born [date deleted] 2002; [ZB] born [date deleted] 2004; [LB] born [date deleted] 2005; and [SB], born [date deleted] 2008. [MB] and [WB] ceased to be the subject of the proceedings upon each attaining the age of 18 years.

[166] Having obtained a place of safety warrant[194] for the children, the Chief Executive six days later on 1 September 2015 applied without notice for an interim custody order[195] and on notice for a declaration that the children were in need of care and protection.[196] The interim custody order was granted.

[167] A family group conference agreed on 22 September 2015 that the children were in need of care and protection and to the making of a declaration and a s 101 custody order in favour of the Chief Executive.

[168] At a judicial conference on 20 November 2015 a judge made a declaration that the children were in need of care and protection and recorded the consent of the father and of the lawyer for the children to the making of s 101 custody and s 110 additional guardianship[197] orders in favour of the Chief Executive. However, the mother wished to take legal advice on the orders proposed so the judge adjourned for advice to be sought and directed that the mother's position be put in memorandum from her counsel whereupon it was to be referred to a judge in chambers. The judge further directed transfer of the proceedings from the Auckland Family Court where they were then held to the Manukau Family Court and continued the interim custody order.

[169] On 27 November 2015 a Deputy Registrar sealed and issued the declaration and s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive, despite the judge not having made those orders.

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[194] Section 39.
[195] Section 78.
[196] Section 68.
[197] The family group conference record did not record agreement to a s 110 additional guardianship order being made.

[170] On 18 July 2016 the file was sent from the Auckland Family Court to the Manukau Family Court. On 10 October 2016 a judicial conference was allocated to 16 November 2016.

[171] Thereafter followed five judicial adjournments until 21 September 2017 when another judge at a judicial conference received revised plans as compliant, continued the s 101 custody and s 110 additional guardianship orders and directed a review of the plans in six months. Those orders have been further continued by judges on consideration of reports and revised plans on 11 September 2018, 5 September 2019 and 19 December 2019.

[172] A further report and revised plans proposing continuation of the custody order were before me for consideration on 2 July 2020. I adjourned the matter questioning my ability to continue orders that, whilst sealed, appear never to have been made. The proceedings have now been concluded by discharge of the orders. Although I considered that the orders were jurisdictionally deficient, in the absence of intent by any eligible person to make an application that might have empowered the court to remedy the deficiency I was satisfied that I nevertheless had jurisdiction to discharge them and that it was in the children's well-being and best interest to do so.[198]

[198] *FAM 2015-004-785 – MVCOT for [B] Children* 22 December 2020.

APPENDIX D
(Other Proceedings)

Proceeding 4: [L] Child FAM 2019-092-000098

[173] The proceedings concern one child, [ML] born [date deleted] 2018, of parents [GD] and [CL].

[174] The Chief Executive applied without notice on 20 November 2018 for an interim custody order[199] and an interim restraining order against the child's father[200] and on notice for a declaration that the child was in need of care and protection.[201] The interim custody order and interim restraining order were granted.

[175] At a judicial conference on 4 March 2019 a judge discharged the interim custody order and the interim restraining order and made a s 101 custody order in favour of the Chief Executive and a final s 87 restraining order against the child's father. A declaration was not made prior to the custody and restraining orders.

[176] The children's parents have applied to discharge the s 101 custody order and the father has applied to discharge the restraining order.[202] The applications are opposed by the Chief Executive. At a conference on 17 February 2021 to make directions to set the matter down for hearing I raised question about the absence of the declaration and whether this might have implications for the parents' applications.

[177] The matter was referred to chambers on 11 March 2021 to the judge who made the custody and restraining orders. The judge made a declaration and issued a relevant minute as follows:

> ……
>
> 4. The notes from the Family Group Conference record that there was direction to the making of a declaration pursuant to s 14(a), (b)

[199] Section 78.
[200] Section 88.
[201] Section 68.
[202] The child's younger sibling is also the subject of proceedings and in the interim custody of the Chief Executive. There is also an application by the parents, opposed by the Chief Executive, to discharge the interim custody order. The proceedings in respect of the sibling were commenced after 1 July 2019 so are not subject to the type of irregularity discussed in this judgment.

> and (f). This was not referred to in the review papers but plainly the order was intended to be made as a precursor to the s 101 order.
>
> 5. In addition I note that the declaration was made on the same day for [ML's] brother, [sibling's name], when identical orders were made.
>
> 6. The two children were clearly discussed separately, and given that my conclusion was that it was in the best interests of [ML] to be placed in the custody of the Chief Executive pursuant to s 101 of the Act, it is reasonable to conclude that the omission of the Declaration is either a clerical error (in transcribing) or was an "accidental slip or omission."
>
> 7. Accordingly, pursuant to Rule 204 of the Family Court Rules, the review decision dated 04 March 2019 is to be corrected at paragraph 6 so that the following order is added:
>
> > "There is a declaration pursuant to s 14(1)(a), (b) and (f) that [ML] is in need of care and protection".
> >
> > a) Sealed orders are to be issued with the amendment referred to. ….

Proceeding 5: [G-E] Child FAM 2006-009-001744

[178] The proceedings concerned one child, [TG-E] born [date deleted] 2006 of parents [DG] and [CE].

[179] The Chief Executive applied without notice on 21 June 2019 for an interim custody order[203] and on notice for a declaration that the child was in need of care and protection.[204] The interim custody order was granted.

[180] On 3 February 2020 a judge discharged the interim custody order and made s 101 custody and s 110 additional guardianship orders in favour of the Chief Executive. A declaration was not made prior to the custody and additional guardianship orders.

[181] Those orders have been further continued by judges on consideration of reports and revised plans on 6 August and 16 November 2020. A further review of the plan

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[203] Section 78.
[204] Section 68.

has been undertaken and a report and revised plan furnished to the court. The court's consideration of the report and revised plan has not yet been completed.

Proceeding 6: [AK] Child FAM 2019-092-000098

[182] The proceedings concerned one child, [AK] born [date deleted] 2019, of parents [DG] and [CE].

[183] The Chief Executive applied without notice on 4 February 2019 for an interim custody order[205] and on notice for a declaration that the child was in need of care and protection.[206] The interim custody order was granted.

[184] On 16 June 2020 a judge in chambers discharged the interim custody order and made s 101 custody order in favour of the Chief Executive. A declaration was not made prior to the custody and additional guardianship orders.

[185] The plan was reviewed and a report upon that review and revised plan proposing continuing of the custody order was placed before another judge for consideration at a judicial conference on 27 October 2020. Noting the absence of a declaration, the judge made it at the conference, relying upon s 440, and continued the s 101 custody order.

[186] A further review of the plan has been undertaken and a report and revised plan furnished to the court. The Chief Executive has also applied to be appointed as the child's additional guardian pursuant to s 110. The court's consideration of the report and revised plan has not yet been completed and the guardianship application is extant.

Proceeding 7: [KA] Child FAM 2015-092-000482

[187] The proceedings concern [KA] born [date deleted] 2004, the child of [LA].

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[205] Section 78.
[206] Section 68.

[188] The Chief Executive applied without notice on 30 April 2015 for an interim custody order[207] and on notice for a declaration that the child was in need of care and protection.[208] The interim custody order was granted.

[189] On 4 December 2015 a judge made a declaration that the child was in need of care or protection on the grounds in s 14(1)(a) and (b).

[190] A plan was prepared by the social worker recommending the making of a s 101 custody order in favour of the Chief Executive. That plan was considered by a judge in chambers on 4 December 2015. The judge approved the plan and "continued" the s 101 custody order. It does not appear that the interim custody order was discharged. No custody order has been sealed and issued. It has however been further continued by judges on consideration of reports and revised plans on six occasions since. A further review of the plan has been undertaken at a family group conference and the court is invited to treat the agreement of the conference as part of the revised plan for further continuation of the custody order. The court's consideration of the revised plan has not yet been completed.

Proceeding 8: [HC-F] Child FAM 2012-004-002347

[191] The proceedings concerned one child, [HC-F], of parents [IC] and [KF].

[192] The Chief Executive applied without notice on 24 July 2012 for an interim custody order[209] and on notice for a declaration that the child was in need of care and protection.[210] The interim custody order was granted.

[193] On 1 May 2013 a judge discharged the interim custody order and made a s 101 custody order in favour of the Chief Executive. A declaration was not made prior to the custody and additional guardianship orders.

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[207] Section 78.
[208] Section 68.
[209] Section 78.
[210] Section 68.

[194] The custody order in favour of the Chief Executive was discharged on 14 March 2017 and a s 101 custody order made in favour of the child's father. It is anticipated that the child's father will soon make an application to structure his care of the child under the Care of Children Act.