

REALISING CHILDREN'S RIGHTS UNDER THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD IN AOTEAROA NEW ZEALAND'S EDUCATION SYSTEM: PROMISES, PROGRESS AND PRIORITIES.

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ABSTRACT

2023 marks 30 years since Aotearoa New Zealand ratified the United Nations Convention on the Rights of the Child ('CRC'). In recognition of this important milestone, this paper invites reflection on the extent to which children's rights under the CRC are recognised and realised within Aotearoa New Zealand's education system. With reference to law, policy and research, it examines the progress made to date in the CRC implementation journey. Particular focus is placed on one of the four guiding principles of the Convention: the child's right under Article 12 to express their views and to have their views given due weight in all matters affecting them. Barriers to the realisation of this right within the student discipline context are explored, along with recommendations for ensuring this fundamental right is upheld for all children.

I INTRODUCTION

Thirty years ago, Aotearoa New Zealand made a commitment to the country's children by ratifying the *United Nations Convention on the Rights of the Child* ('CRC').¹ In doing so, the government undertook to take all appropriate measures to implement all the rights in the Convention for every child.² As we recognise this significant milestone, it is timely to examine the steps taken here in Aotearoa New Zealand to give effect to children's rights with specific reference to the education context. What promises were made? What progress has been made towards fulfilling these? What must the priorities be for Aotearoa New Zealand as we move forward on the *CRC* implementation journey? It is these questions that are addressed in this paper, with a particular focus on the implementation of Article 12 in the student discipline context. Through doing so this paper aims to encourage reflection on the actions required to advance and uphold the rights of the more than 1.1 million children for whom Aotearoa New Zealand is home.

II PROMISES

The *CRC* was unanimously adopted by the United Nations General Assembly in 1989. In the years since then, the *CRC* has been ratified or acceded by 196 countries, including

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¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>> ('CRC').

² *CRC* (n 1) art 4.

Aotearoa New Zealand. This makes the *CRC* the most widely ratified human rights treaty in history. Significantly, the *CRC* is the first international legally binding agreement to accord a full range of human rights to all children under 18 years of age, irrespective of their background or circumstances. When faithfully implemented, the Convention is intended to ensure that all children flourish.³

The rights contained in the 54 Articles of the Convention include civil, cultural, economic, political, and social rights. Importantly, the rights are indivisible and interdependent; they must be read together, not in isolation. By way of example, Article 3 provides that the child's best interests must be a primary consideration in all actions concerning children. Determination of the child's best interests must however be informed by the child's views, which brings into play Article 12, the focus of this article, as the child's participation is the means through which their interests can be understood and assessed.⁴

Guiding the interpretation and implementation of the *CRC* are four articles that are both rights in themselves and general principles. These are that children and young people: should not be discriminated against (Article 2); should have their best interests accounted for as a primary consideration (Article 3); have the right to survival and development (Article 6); and have the right to express their views and have their views taken seriously (Article 12). It is this latter principle that is the focus of this paper.

A Significance of Article 12

In the words of internationally renowned child rights expert Laura Lundy, '[t]his human right is the human right that can deliver all other human rights'.⁵ It affords children the right to express their views in all matters affecting them and to have their views given due weight in accordance with their age and maturity. While adults have the right to freedom of expression,⁶ Article 12 goes further. Simply listening to the child is insufficient; the views of the child have to be seriously considered. This requirement reflects the fact that children are frequently not in a position to influence the decisions that affect them. It does this by making it clear that children are social actors whose views must be taken into account.⁷ For this reason, Article 12 is widely recognised as significant not only for its content but also because of the way it affirms the child's autonomy.⁸

³ Andrew Becroft, 'Foreword' in Roseanna Bourke and Judith Loveridge (eds), *Radical Collegiality Through Student Voice: Educational Experience, Policy and Practice* (Brill Publishing, 2018).

⁴ Gerison Lansdown, 'Article 12: The Right to Be Heard' in Ziba Vaghri, Jean Zermatten, Gerison Lansdown, Roberta Ruggiero (eds), *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes* (Springer, 2022) 41.

⁵ Equity Through Education Centre, *Kia Rite! Calls to Action for Equity in Education* (Blog Post, 9 September 2022) <<https://www.equitythrougheducation.nz/latest-news/2022/9/6/kia-rite-calls-to-action-for-equity-in-education>>.

⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art. 19; *New Zealand Bill of Rights 1990* s 4.

⁷ Alison Kearney, 'An Interview with Professor Laura Lundy' (2020) 21(1) *Kairaranga* 3.

⁸ Michael Freeman, 'Children's Education: a Test Case for Best Interests and Autonomy' in Ronald Davie and David Galloway (eds), *Listening to Children in Education* (Routledge, 1996) 29.

In the education context, Article 12 is fundamental to the realisation of the right to education. As the Committee on the Rights of the Child observed in their *General Comment on the Aims of Education*, ‘Children do not lose their human rights by virtue of passing through the school gates.’⁹ Accordingly, education must be provided in a way that enables students to freely express their views in accordance with Article 12.

III PROGRESS

By ratifying the *CRC* in 1993, Aotearoa New Zealand undertook to adopt all ‘appropriate measures’¹⁰ to implement the Convention. Yet writing in 2015, Professor Anne Smith, the Inaugural Director of the Children’s Issues Centre at Otago University, described children’s rights as ‘invisible in education law.’¹¹ She further observed that, ‘the *CRC* seems to have had little impact within education.’¹² So, do these statements hold true today?

A *Incorporating the CRC into Law*

From a legal perspective, Aotearoa New Zealand has fallen short of its commitments under the *CRC*. In accordance with the rules of international law, the *CRC* is legally binding on all countries that have ratified it.¹³ However, as Aotearoa New Zealand is a dualist state, treaties only become part of domestic New Zealand law if enshrined in legislation.¹⁴ Aotearoa New Zealand has not directly incorporated the *CRC* into domestic law. Incorporation requires the *CRC* to be given standing in a country’s legal system, in legislative or constitutional terms.¹⁵ The *CRC* is attached as a schedule to the *Children and Young People’s Commission Act 2022* and reference is made to the *CRC* in a small number of statutes.¹⁶ Nonetheless, it is clear that these references to the *CRC* are not intended to give domestic legal effect to the Convention.

This lack of incorporation is significant for several reasons. First, as a State Party,¹⁷ Aotearoa New Zealand undertook to adopt ‘all appropriate legislative, administrative, and other measures’¹⁸ to implement the Convention. Second, it means that future

⁹ Committee on the Rights of the Child, General Comment No. 1, *Article 29(1) The Aims of Education*, CRC/GC/2001/1, 17 April 2001, [8].

¹⁰ *CRC* (n 1) art 4.

¹¹ Anne Smith, *Children’s Rights: Towards Social Justice* (Momentum Press, 2015) 67.

¹² *Ibid.*

¹³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

¹⁴ W. John Hopkins, ‘New Zealand’ in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford, 2011) 429.

¹⁵ Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child* (Arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, [19].

¹⁶ *Oranga Tamariki Act/ Children’s and Young People’s Well-being Act 1989* (NZ) s 5(1); *Children’s Act 2014* (NZ) s 6A.

¹⁷ This term is used to refer to countries that ratify United Nations treaties.

¹⁸ *CRC* (n 1) art 4.

governments could easily ignore children's rights.¹⁹ Third, research indicates that implementation of children's rights is greater in countries that have incorporated the *CRC*.²⁰

In an education context, the failure to refer to the *CRC* in *Education and Training Act 2020* (NZ) ('*ETA20*') is surprising. Among the government's purposes in enacting the *ETA20* was to 'improve our compliance with related international obligations.'²¹ Despite numerous select committee submissions²² calling for specific reference to be made to children's rights under the *CRC* in the Act, the *ETA20* makes no reference to the Convention. Giving effect to students' rights is stated in the *ETA20* as one of the primary objectives of Boards.²³ However, this is limited to rights within the Act itself, the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*. Even the new requirements under the *ETA20* for Boards to consult their students when developing their strategic plan and bylaws, are tempered by the phrase 'to the extent that the board considers appropriate.'²⁴ No such qualification applies to consultation with staff and the community. Clearly, these consultation options in the *ETA20* fall well short of the right of participation that is guaranteed to children under Article 12.

The lack of reference to the *CRC* in the *ETA20* is all the more perplexing given that just months before the Act passed into law, Aotearoa New Zealand pledged to recommit to the *CRC* through implementation of a legislatively mandated *Child & Youth Wellbeing Strategy*.²⁵ The Strategy 'places responsibilities on the government to set up the broad conditions to support child and youth wellbeing.'²⁶ One of the Strategy's specific objectives is to assist New Zealand in meeting its obligations under the *CRC*.²⁷ It is perhaps unsurprising that the government's incorporation of children's rights into domestic law has been described as 'piecemeal'²⁸ and 'ad hoc.'²⁹

¹⁹ Nessa Lynch, 'Incorporating the CRC in New Zealand' in Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds), *Incorporating the UN Convention on the Rights of the Child into National Law* (Cambridge University Press, 2021), 73.

²⁰ Ursula Kilkelly, Laura Lundy and Bronagh Byrne, 'The Convention on the Rights of the Child: A Thematic Analysis of the Incorporation Journey' in *Incorporating the UN Convention on the Rights of the Child into National Law* (Cambridge University Press, 2021), 333.

²¹ New Zealand, *Parliamentary Debates: Education and Training Bill: Third Reading*, 22 July 2020, 748, 19732 (Chris Hipkins, Minister of Education).

²² Office of the Children's Commissioner for Aotearoa New Zealand, Submission to the Education and Workforce Select Committee, *Education and Training Bill* (14 Feb 2020); YouthLaw Aotearoa, Submission to the Education and Workforce Select Committee, *Education and Training Bill* (14 Feb 2020).

²³ *Education and Training Act 2020* (NZ) s 127(b)(ii) ('*ETA20*').

²⁴ *ETA20* (n 23) ss 126(2), 139(3).

²⁵ Department of the Prime Minister and Cabinet New Zealand, *Child and Youth Wellbeing Strategy* (Policy Document, 2019) <<https://www.childyouthwellbeing.govt.nz/resources/child-and-youth-wellbeing-strategy>>.

²⁶ New Zealand Government, *30th Anniversary on the Rights of the Child – New Zealand Pledge* (Policy Document, November 2019) 1 <<https://www.mfat.govt.nz/assets/UN/New-Zealand-pledge-CRC30.pdf>>.

²⁷ *Children's Act 2014* (NZ) s 6A.

²⁸ Children's Rights Alliance Aotearoa New Zealand, *Comprehensive Alternative Report on Aotearoa New Zealand: Written Inputs to State Report* (Report, 15 August 2022) 17.

²⁹ *Ibid* 37.

B Participation in Policy Development

Despite the *CRC* not being incorporated into education legislation, considerable progress has been made towards upholding children's right to participation under Article 12 when developing national education policies. Leading the way in enabling diverse children's authentic voice and participation in policy development has been the Office of the Children's Commissioner for Aotearoa New Zealand.³⁰ To ensure children and young people's voices contributed to the development of the *National Education and Learning Priorities*, the Office of the Children's Commissioner in collaboration with the New Zealand School Trustees Association, engaged with over 1500 children and young people to hear their views on education.³¹ The report that was produced as a result of this research provides valuable insights into children and young people's educational experiences in Aotearoa New Zealand. Importantly, key findings from this consultation with children and young people are evident in the *National Education and Learning Priorities*,³² through priorities such as '[e]nsure places of learning are safe, inclusive and free from racism, discrimination and bullying'³³ and '[r]educ[e] barriers to education for all, including for Māori and Pacific learners/ākonga, disabled learners/ākonga and those with learning support needs.'³⁴ In this sense, children and young people's voices have contributed to education policy development at the highest level.

Engaging with children and young people has also been a feature of Education Conversation | Kōrero Mātauranga, the Government's Education Work Programme that began in 2018.³⁵ At this same time, the Ministry of Education established a Youth Advisory Group to provide a way for young people to share their experiences and perspectives on education. The Group of up to 12 young people aged 14–18 years is selected annually and is tasked with offering insights to the Ministry of Education that can inform improvements to the education system.³⁶ Additionally, the Ministry is currently working in partnership with the Office of the Children's Commissioner to amplify youth voices throughout the refresh of Te Mātaiaho | The New Zealand Curriculum. To achieve this objective, a Youth Voices Group, made up of 30 young people from diverse communities, has been established.³⁷ The *CRC*, particularly Article 12, has provided the legal and moral imperative to promote and advocate for such initiatives.

³⁰ Note the recent name change to Mana Mokopuna | Children and Young People's Commission.

³¹ Office of the Children's Commissioner for Aotearoa New Zealand and the New Zealand School Trustees Association, *Education matters to me: Key insights* (Report, 2018).

³² New Zealand Government, *National Education and Learning Priorities* (Statutory Document, 2020) <<https://assets.education.govt.nz/public/Documents/NELP-TES-documents/FULL-NELP-2020.pdf>>. This statutory document, enabled by the *ETA20*, sets out the Government's priorities for education.

³³ Ibid Priority 1.

³⁴ Ibid Priority 3.

³⁵ Te Tāhuhu o te Mātauranga | Ministry of Education, *Education Conversation | Kōrero Mātauranga* (Web Page) <<https://conversation.education.govt.nz/conversations/education-conversation/>>.

³⁶ Ministry of Education, *Youth Advisory Group: Terms of Reference* (Web Page, 2021) <<https://www.education.govt.nz/school/student-support/youth-advisory-group/terms-of-reference/>>.

³⁷ Further details about the Youth Voice Group is available at: Te Tāhuhu o te Mātauranga | Ministry of Education, *Te Poutāhū Curriculum Centre: Get Involved* (Web Page) <<https://curriculumrefresh.education.govt.nz/get-involved#who-we-re-working-with>>.

IV PRIORITIES

Notwithstanding the progress outlined above, the situation is far less positive for some of Aotearoa's most vulnerable children and young people.³⁸ The promise that *all* children enjoy *all* of their rights, in *all* circumstances does not reflect their lived experience. In the education context, this is particularly true for students who experience exclusionary discipline measures.³⁹ Aotearoa New Zealand has repeatedly been criticised by the Committee on the Rights of the Child⁴⁰ for the disproportionate overrepresentation of tamariki [children] and rangatahi [young people] Māori and disabled children in the rates of exclusionary discipline measures.⁴¹

The implementation of exclusionary discipline measures raises concerns in relation to a number of children's rights under the *CRC* including Article 2 (non-discrimination), Article 28 (right to education), and of particular significance for the purposes of this article, Article 12. Few decisions in the education context have a greater impact on a child or young person's life than one that could result in their temporary or permanent removal from school. Enabling the meaningful participation of children and young people in student discipline processes must therefore be a priority if Aotearoa New Zealand is to honour its promise under the *CRC* to uphold and protect the rights of *all* children.

A Research Insights

Notwithstanding the importance of Article 12 in the student discipline context, research indicates that there are significant barriers to the realisation of this fundamental right. This is especially true for the groups of students referred to above who are overrepresented in the rates of exclusionary discipline measures.

A number of studies conducted in Aotearoa New Zealand have explored students' experiences of exclusionary discipline measures. The young people who participated in these studies commonly reported feelings of frustration at not having the opportunity to tell their side of the story when subject to formal discipline proceedings. This included students not knowing why they had been suspended. For example, a young person who participated in the nationwide research referred to above that was undertaken by the Office of the Children's Commissioner for Aotearoa New Zealand and the New Zealand School Trustees Association, commented, 'I don't get a chance to go to school. I always get suspended first week of term. I'm not sure why. There could be 100s of reasons why

³⁸ Committee on the Rights of the Child, *Concluding Observations on the Sixth Periodic Report of New Zealand*, UN Doc CRC/C/NZL/CO/6 (6th February 2023).

³⁹ This term is used widely within the international literature to refer to school discipline action that removes a student from their usual classroom environment, either temporarily or permanently, formally or informally. In Aotearoa New Zealand exclusionary discipline measures include stand-downs, suspensions, exclusions and expulsions.

⁴⁰ The Committee is comprised of independent experts in children's rights from around the world. They are tasked with monitoring compliance with the *CRC*.

⁴¹ Committee on the Rights of the Child (n 38); Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of New Zealand* (21st October 2016).

but I never got told.’⁴² Similar sentiments were expressed by the ten Year 8–11 students who shared their experiences of formal discipline processes in Towl’s study.⁴³ Without exception, they felt aggrieved at not having the chance to tell their side of the story before being stood-down. So too, the ten Year 9–11 students who participated in a recent study conducted by Read and others⁴⁴ felt that they were not afforded the opportunity to discuss their disciplinary exclusion. Moreover, when given a safe space to express their views, the students were insightful about the reasons for their behaviour and what would keep them engaged in school.⁴⁵ This latter finding is consistent with several other studies conducted in Aotearoa New Zealand with students who have experienced exclusionary discipline measures.⁴⁶ The message from the young people involved in these studies is clear: they want the opportunity to have their voice heard in the discipline decision-making process. However, this does not reflect their lived experience of school disciplinary processes.

The findings from these studies with young people who have experienced exclusionary discipline measures are particularly interesting when considered in the context of research conducted with principals into student discipline policies and practices. As part of a mixed methods study, the author interviewed 16 principals from secondary schools across Aotearoa New Zealand.⁴⁷ During the interviews, a number of principals spoke of the difficulties of engaging some students in the discipline process. This was particularly the case at suspension meetings, which principals said some students did not attend or participate in. By way of illustration, Participant 173, the principal of a decile one⁴⁸ secondary school, explained:

[w]e’ve had parents who have turned up without their children and some of these kids could never articulate themselves anyway. They’re either too young or you just know that verbally they’re not able to communicate anything and it just wouldn’t actually be helpful.

Other principals referred to students not ‘putting their case forward’ (Participant 103) or ‘having trouble speaking for themselves’ (Participant 104) during stand-down or suspension meetings. It was not clear from the interviews whether principals had considered the barriers to young people participating in these formal discipline

⁴² Office of the Children’s Commissioner for Aotearoa New Zealand and the New Zealand School Trustees Association, *Education matters to me: Key insights* (Report, 2018) 20.

⁴³ Patty Towl, “‘I am bad apparently.’ The role of stand-down to manage behaviour in communities of learners” (PhD Thesis, The University of Otago, 2012).

⁴⁴ Emma Read, Tarryn Roberston, Vijaya Dharan and John O’Neill, ‘Secondary school students’ perceptions of their school’s disciplinary processes’ (2022) 3 *Set: Research Information for Teachers* 46.

⁴⁵ *Ibid.*

⁴⁶ Towl (n 43); Leanne Romana, ‘Including the excluded: Exploring perspectives of preventing disciplinary exclusion from school from the lived experience of students’ (Masters Thesis, Massey University, 2017); Carolyn White and Alison Kearney, ‘The use of stand-downs in New Zealand schools: What are the issues?’ (2015) 16(1) *Kairaranga* 37.

⁴⁷ Full details of the research methodology for this study can be found in: Nicola Leete, ‘New Zealand Secondary School Principals’ Understanding and Application of Laws Relating to Student Discipline: A Socio-Legal Mixed Methods Study’ (PhD Thesis, University of Canterbury, 2022).

⁴⁸ A school’s decile is a measure of the socio-economic position of its student community relative to other schools throughout the country. The decile system has recently been replaced by the Equity Index.

processes and the impact that these may have on students' rights, specifically Article 12 of the *CRC*.

B Implementing Article 12: The Lundy Model

In response to the apparent disconnect between Article 12 and principals' and students' experiences, this section explores key considerations for the realisation of this right in student discipline processes. It does so by reference to the Lundy Model,⁴⁹ a framework that is used extensively both in children's rights scholarship and practice as a way of understanding Article 12 and evaluating practice.⁵⁰ The Lundy Model conceptualises Article 12 in a legally sound yet accessible format. Although the four elements — Space, Voice, Audience, Influence — are distinct, they are also interrelated. Space and Voice relate to the child's right to express their views, while Audience and Influence relate to the child's right to have their views given due weight.

In the discussion that follows, the Lundy Model is used to: (a) critique processes and practices associated with exclusionary discipline practices; and (b) consider how barriers to realising Article 12 could be addressed. Although the focus is on processes associated with the implementation of exclusionary discipline measures, specifically stand-down and suspension meetings, it is intended to provoke wider reflection on the realisation of Article 12 in the student discipline context.

1 The Right to Express Views: Space and Voice

The first element of the Lundy Model, 'Space', refers to the need for students to be provided with a safe space to form and express their view. Any consideration of this element in the context of student discipline processes must begin by recognising the negative impact of hierarchical power dynamics on student participation.⁵¹ Typically, stand-down and suspension meetings are held in the principal's office and the school's board room respectively. Such authoritarian settings, coupled with the student's lack of familiarity with the rules and practices that govern such meetings, are not conducive to the expression of children's views.⁵² Even outside of the discipline context, the impact of power dynamics on student participation at Board of Trustees meetings has been highlighted. Young people who participated in Smith's study into the experiences of student representatives on Boards of Trustees in Aotearoa New Zealand described feeling intimidated, patronised and overwhelmed by the power and authority of other

⁴⁹ Laura Lundy, 'Voice' is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) *British Educational Research Journal* 927. The Lundy Model was revised in 2021 and the revised version is available here: Department of Children, Equality, Disability, Integration and Youth, Hub na nÓg and Laura Lundy, 'Participation Framework: National Framework for Children and Young People's Participation in Decision-Making' (Rialtas na hÉireann—Government of Ireland, 2021).

⁵⁰ For example, the Lundy Model has been adopted by the Council of Europe, European Commission, World Health Organisation, UNICEF and World Vision.

⁵¹ Ashley D. Domínguez, Valencia Clement, and Melanie Bertrand, 'The Bind of Unilateral Power Dynamics and Youth Voice in School Politics' (2022) 36(1) *Educational Policy* 169.

⁵² Ibid; Committee on the Rights of the Child, *General Comment: The Right of the Child to be Heard* (1st July 2009).

board members.⁵³ This power disparity could be expected to be even more pronounced in the context of suspension meetings. In such circumstances, it is perhaps no wonder that students have been described as the ‘silent recipients of exclusionary discipline measures.’⁵⁴

So, how might an environment in which the child feels respected and secure to express their views be created?

The author’s study⁵⁵ provides an example of one school’s approach. Participant 109, the principal of a large, ethnically diverse secondary school, spoke about how the formal discipline process at his school had recently been redesigned.

‘we looked at our values, looked at the processes, looked at who we are as a school, and opted to shift the format onto the marae, into the wharehau and with a restorative frame around it, so ...there’s no sort of overt positional, authoritative power demonstrated in the process. It’s a circle, everyone has an equal voice and whilst the process is sometimes difficult and we still adhere to the Ministry process, um it’s a context that is our own, so it’s something we’ve introduced.’

When asked whether he believed the change had impacted on student participation at the meeting, Participant 109 commented, ‘Yeah, I do think that students are more empowered to be able to speak and whānau [family] and aiga [family] are more empowered to speak.’ As such, he felt the process protected the mana and dignity of all parties. The approach described by Participant 109 not only supports the realisation of Article 12, it also goes some way to enacting the Board’s responsibility under the *ETA20* of giving effect to Te Tiriti o Waitangi by ensuring that its plans and policies reflect tikanga Māori [Māori customary practices and values] and te ao Māori [the Māori world].⁵⁶

Of course, children and young people are not a homogenous group. What constitutes a safe physical space will vary based on the student’s culture, context and needs. The important point here is that in every case a safe environment must be created for the child to participate in the proceedings. It is here that the interrelationship of the elements of Lundy’s Model is apparent. Understanding what constitutes a safe space for a student requires listening to the child or young person’s views. This brings into play the second element of the Model: ‘Voice’.

The Voice element refers to the need for children to be facilitated to understand the issues and express their views on them. A key, yet often overlooked, word here is ‘facilitated.’ The onus rests on duty bearers,⁵⁷ in this case, principals or board members, to facilitate the child’s expression of their views.⁵⁸ To this end, the Committee on the Rights of the Child have made it clear that the child must be provided with information

⁵³ Anne Smith, ‘Children and Young People’s Participation Rights in Education’ (2007) 15(1) *International Journal of Children’s Rights* 147.

⁵⁴ Vijaya Dharan & Nicole Mincher, ‘Continual Disobedience: a Term Perpetuating Exclusive Practices in Schools’ (2022) *International Journal of Inclusive Education* 1, 9.

⁵⁵ Leete (n 47).

⁵⁶ *ETA20* (n 23) s 127(1)(d).

⁵⁷ States Parties that agree to be bound by the *CRC* become duty bearers. In practice, this means that everyone who works for the government has an obligation to uphold the Articles in the *CRC*.

⁵⁸ Lansdown (n 4).

about the processes that will be followed, the possible outcomes and their consequences, and their right to be heard.⁵⁹ In administrative proceedings, such as those relating to student discipline, Article 12 not only assures the child the right to express their views, it also provides a choice as to how he or she wants to be heard, directly or through a representative, if at all. In this way, Article 12 explicitly recognises the need for representation and advocacy in discipline proceedings.

On the surface, these requirements of Article 12 appear to be covered in the *Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999* SR 1999/202. The principal is required to provide the student and their parent with information on stand-downs or suspensions provided by the Ministry of Education.⁶⁰ In the case of a suspension, the Board of Trustees must ensure, inter alia, that written details of the procedures followed at suspension meetings are provided to the student and their parent, along with the principal's report to the board.⁶¹ However, two crucial aspects of Article 12 are not covered by the Rules. First, that information is provided in a format appropriate to the child's age and capacities. Second, that the child is supported to communicate their views.

These two aspects of Article 12 are particularly important given the overrepresentation of neurodivergent students⁶² and students with communication difficulties in the rates of exclusionary discipline measures.⁶³ Some insight into the communication difficulties experienced by these students and the impact these may have on their participation in student discipline processes may be gleaned from research in the youth justice context. Consistent with overseas research,⁶⁴ a school-to-prison pipeline has been identified in Aotearoa New Zealand, meaning that many young people involved in the youth justice system have experienced exclusionary discipline measures.⁶⁵ Among young people in the youth justice system there is a high incidence of neurodiversity and/or

⁵⁹ Committee on the Rights of the Child (n 53).

⁶⁰ *Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999* (NZ) r 9.

⁶¹ *Ibid* r 15.

⁶² Neurodivergent is an umbrella term used to refer to people who demonstrate traits and characteristics associated with diagnoses such as Attention Deficit Hyperactivity Disorder, Autism, Developmental Language Disorder, Fetal alcohol spectrum disorder and Dyslexia. The term was coined by Australian sociologist Judy Singer, *Neurodiversity: The birth of an idea* (2017).

⁶³ Nicholas Bowden et al, 'Association between High-Need Education-Based Funding and School Suspension Rates for Autistic Students in New Zealand' (2022) 176(7) *JAMA Pediatrics* 664; Mercy Mhuru, *He Whakaaro – The Educational Experiences of Disabled Learners* (Report, 2020); Judy Clegg et al, 'Language Abilities of Secondary Age Pupils at Risk of School Exclusion: A preliminary report' (2009) 25(1) *Child Language Teaching and Therapy* 123.

⁶⁴ Christopher Mallett, 'The School-To-Prison Pipeline: A Critical Review of the Punitive Paradigm Shift' (2016) 33(1) *Child and Adolescent Social Work Journal* 15; Pamela Snow, 'Speech-Language Pathology and the Youth Offender: Epidemiological Overview and Roadmap for Future Speech-Language Pathology Research and Scope of Practice' (2019) 50(2) *Language, Speech & Hearing Services in Schools* 324.

⁶⁵ Ian Lambie and Peter Gluckman, *It's Never Too Early, Never Too Late: A Discussion Paper on Preventing Youth Offending in New Zealand* (Report, Office of the Prime Minister's Chief Science Advisor, 12 June 2018) <<https://doi.org/10.17608/k6.OPMCSA.7391243.v2>>; Ian Lambie, *What Were They Thinking? A Discussion Paper on Brain and Behaviour in Relation to the Justice System in New Zealand* (Report, Office of the Prime Minister's Chief Science Advisor, 29 January 2020) <<http://hdl.handle.net/2292/51311>>.

communication difficulties.⁶⁶ Research conducted in Aotearoa New Zealand has shown that many of these young people are unable to participate effectively in youth justice proceedings without support.⁶⁷ The young people have spoken of feeling stressed, anxious and frustrated in situations where the stakes are high and they did not understand or they could not say what they wanted to say.⁶⁸ Communication differences and/or difficulties often manifest as a reluctance to speak, disinterest, belligerence and/or lack of eye contact, all of which may be negatively construed by decision-makers.⁶⁹ Parallels may be noted here with some of the issues raised by principals in the author's study when describing the perceived lack of engagement from some students in exclusionary discipline processes.

Any barriers to being able to participate fully in the process – be it through language or cultural barriers; and/or difficulties with hearing, auditory processing, or language skills – have implications for the student's human rights. This highlights the importance of ensuring students receive support to understand the issues and to express their views.

So how might the child be facilitated to understand the issues and express their views?

As a starting point, child-friendly versions of the information handouts on the processes associated with stand-downs and suspensions need to be developed.⁷⁰ While the Rules require the principal to provide both the student and their parents with the Ministry of Education information on stand-downs and suspensions, only 'parent' versions of these documents are available.⁷¹

Crucially, there is a need to raise awareness among principals and board members alike of how communication differences and difficulties might present in young people including the fact that they are often masked. Along with this, guidance needs to be provided for these adults on how they can adapt their communication to meet the needs of the young person, thereby supporting their participation. To this end, a recent study conducted in Aotearoa New Zealand highlights the valuable role of speech language

⁶⁶ Andrew Becroft, 'The Youth Courts of New Zealand in Ten Years Time: Crystal Ball Gazing or Some Realistic Goals for the Future?' (Speech, National Youth Advocates/Lay Advocates Conference, Auckland, Aotearoa New Zealand, 13 July 2015); Kate Peirse-O'Byrne, *Neurodisability and Youth Offending: the Connection Has Been Made* (Special Report, The Youth Court of New Zealand, October 2014) <https://www.dyslexiafoundation.org.nz/dyslexia_advocacy/pdfs/neurodisability_nz_report.pdf>; Sally Kedge and Clare McCann, *Report for Kingslea School: Language and Communication Skills among Young People at a Youth Justice Residence* (Report, 20 July 2020) <<https://www.kingslea.school.nz/research-and-development/>>.

⁶⁷ Kelly Howard, Clare McCann and Margaret Dudley, 'It's Really Good... Why Hasn't it Happened Earlier?' Professionals' Perspectives on the Benefits of Communication Assistance in the New Zealand Youth Justice System' (2019) 53(2) *Australian & New Zealand Journal of Criminology* 265.

⁶⁸ Kedge and McCann (n 66).

⁶⁹ Lambie (n 65); Anita Gibbs and Keisa Sherwood, 'Putting Fetal Alcohol Spectrum Disorder (FASD) on the Map in New Zealand: A Review of Health, Social, Political, Justice and Cultural Developments' (2017) 24(6) *Psychiatry, Psychology and Law*, 825.

⁷⁰ The following document created by the European Commission provides excellent guidance on the creation of child-friendly documents: *Creating Child-Friendly Versions of Written Documents* (Guidelines, European Commission, 2021) <<https://www.qub.ac.uk/research-centres/CentreforChildrensRights/CCRFilestore/Fileupload,1269252,en.pdf>>.

⁷¹ The parent information handouts are available from: Te Tāhuhu o te Mātauranga | Ministry of Education, *For Parents and Whānau: Stand downs, Suspensions, Exclusions, Expulsions* (29 May 2023, Web Page) <<https://parents.education.govt.nz/secondary-school/your-child-at-school/standdowns-suspensions-exclusions-expulsions/>>

therapists working as part of a team in secondary schools to support young people who have experienced a stand-down or suspension.⁷² In this study, the speech language therapist supported school staff to understand the young people's communication needs and the relationship between their communication difficulties and their behaviour. Feedback from the young people, their whānau and school staff was very positive. Consistent with previous research involving young people with communication difficulties,⁷³ the students in the study were insightful about what adults could do to make speaking and listening easier for them. This highlights the importance of adults seeking guidance from young people themselves and in accordance with the next two elements in the model, listening to and acting upon this guidance to adapt their communication accordingly.

2 *The Right to Have Views Given Due Weight: Audience and Influence*

As with Space and Voice, the elements of Audience and Influence are interrelated. The child's views must be listened to by those who have responsibility to act, taken seriously and given due weight.

At first glance the 'Audience' element of the Lundy Model would seem to be satisfied by the fact that those with responsibility to act, namely the principal or board members, are present at stand-down and suspension meetings. However, reflection on this element raises an interesting question about the board composition at suspension meetings. In Aotearoa New Zealand it is common practice for a discipline subcommittee of the Board of Trustees to conduct suspension meetings. Interestingly, although all boards of state schools where students are enrolled in year levels above Year 9 are required to have a student representative,⁷⁴ they are seldom included in the discipline subcommittee.⁷⁵ Yet the feedback where the student representative is part of the discipline committee is very positive. In particular, their relationship as a peer of the suspended student means they are able to relate to and communicate with them in a different way from the rest of the board members and their presence goes some way to reducing the inherent child-adult power imbalance at these meetings.⁷⁶ Given the value of student representatives on discipline committees, why is this not common practice? One reason for this may relate to adults' beliefs about the appropriateness of a student's involvement in what may be considered a decision for adults. The impact of adults' perceptions of children's capabilities has certainly been identified as a barrier to adults respecting and operationalising the fourth element in the Lundy Model: 'Influence'.

⁷² Laura Makker, 'How Speech-Language Therapists Can Support Secondary School Students Whose Behaviour Needs Affect Their Ability to Build Positive Relationships with Others, Manage Self, and Engage in Learning' (Masters Thesis, Massey University, 2023).

⁷³ Kedge and McCann (n 66); Thomas Hopkins, Judy Clegg and Joy Stackhouse, 'Young Offenders' Perspectives on Their Literacy and Communication Skills' (2016) 51(1) *International Journal of Language & Communication Disorders* 95.

⁷⁴ *ETA20* (n 23) s 119.

⁷⁵ New Zealand School Trustees Association, *Student Representative Handbook* (October, 2018) <https://www.schoolboardelections.org.nz/assets/Becoming-a-Trustee/e5c277e504/student-rep-handbook_web.pdf>.

⁷⁶ *Ibid.*

The Influence element requires decision-makers to take the child or young person's views seriously and give them due weight in accordance with their age and maturity. As mentioned above, this can be very difficult for adults as it challenges deeply held beliefs about the nature of childhood and children's capability. Traditional views of children as adults in waiting, along with the hierarchical power dynamics referred to above, can lead to children's views being ignored based on the premise that adults know best.⁷⁷ It is precisely because of this that Article 12 includes the explicit requirement for decision-makers to give due weight to the child's views.⁷⁸ This not only recognises their agency as rights holders, it also acknowledges that children and young people are experts in their feelings, thoughts and perspectives.⁷⁹

So, how can we ensure that the child's views are given due weight in student discipline decision-making?

Requiring principals and boards to explain both in their written report and in their feedback to the suspended student how the student's views were taken into account is a key way of guarding against the tokenistic⁸⁰ treatment of student voice. There is often a misconception that 'giving due weight' means the child's views or suggestions are determinative. This is not the case. Rather, 'giving due weight' requires children and young people to be told how their views were considered, why they were or were not acted on and why the particular outcome has been reached.⁸¹

C Raising Awareness of the CRC

Having explored possible ways of addressing barriers associated with implementing Article 12 in the student discipline context, this final section of the paper highlights the urgent need to raise awareness of the *CRC*. In 2023 in Aotearoa New Zealand this is arguably the most significant obstacle to realising children's rights. After all, educators cannot respect and uphold children and young people's rights if they do not know that they exist.

There is a paucity of research exploring educators' familiarity with the *CRC* in Aotearoa New Zealand. However, the research which is available indicates that knowledge of the Convention is limited. Of the 76 New Zealand secondary school principals who completed a Student Discipline: Law, Policy and Practice Survey for the author's study, just over half (52.6%, $n = 40$) recognised the *CRC* as relevant in the student discipline context. Only 42.1% ($n = 16$) of those principals were able to provide a brief explanation of the *CRC*'s relevance. Research conducted last year by the Education Review

⁷⁷ Committee on the Rights of the Child ($n = 52$).

⁷⁸ Kearney ($n = 7$).

⁷⁹ Department of Children, Equality, Disability, Integration and Youth, Hub na nÓg and Laura Lundy ($n = 49$).

⁸⁰ This term is used in the literature on children's participation to refer to situations where young people are asked to express their views but where their views do not have impact on decisions. See for example Roger Hart, 'Children's Participation: From Tokenism to Citizenship' (UNICEF, 1992).

⁸¹ Laura Lundy and Amy Brown, 'Revisiting the Three 'R's in Order to Realize Children's Educational Rights Relationships, Resources, and Redress' in Jonathan Todres and Shani M. King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press, 2020) 386.

Office,⁸² the government's external education evaluation agency, also identified a concerning lack of awareness among principals of their legal obligations towards disabled students. This included the rights contained in the *CRC*.

This lack of awareness of the *CRC* is significant given that the government undertook in ratifying the *CRC* to make the principles and provisions of the Convention widely known among adults and children alike.⁸³ Indeed one of the roles of educators as duty bearers under the *CRC* is to build the capacity of children and young people to advocate for their rights.⁸⁴ Yet, as with educators, research indicates that awareness of children's rights under the *CRC* is limited among children and young people in Aotearoa New Zealand. UNICEF and Save the Children New Zealand ran workshops with 1198 New Zealanders up to 18 years old from across Aotearoa New Zealand. They found that knowledge of many *CRC* rights was 'extremely low'⁸⁵ and in some cases inaccurate. McCluskey and O'Neill similarly found limited knowledge and understanding of the *CRC* among the ten secondary school students who were interviewed for their study.⁸⁶ Being aware of and knowing about the rights in the *CRC* is essential to being able to advocate for and exercise these rights. Interestingly, while educators are often cautious about teaching students about their rights (Lundy & Martinez Sainz, 2018), the benefits of doing so are experienced by students, the school as a whole and society (Nastasi & Naser, 2020). Of particular note given the focus in this paper on student discipline, research indicates that human rights education can result in a more positive, safer school climate (Jerome et al., 2015).

The Committee on the Rights of the Child has repeatedly called on Aotearoa New Zealand to take active steps to raise awareness of the *CRC* to ensure its consistent application, including through the development of a nationwide awareness raising strategy.⁸⁷ In relation to Article 12 specifically, the Committee has urged States Parties to provide training for educators at all levels of the education system on the right to participation and its application in practice.⁸⁸ Developing such an awareness, and crucially, an understanding of what the *CRC* requires in practice within education contexts, is an essential pre-requisite to ensuring all children experience their rights.

⁸² Education Review Office, *Thriving at school? Education for Disabled Learners in Schools* (Report, 2022).

⁸³ *CRC* (n 1) art 42.

⁸⁴ Brian Howe and Katherine Covell, *Empowering Children: Children's Rights Education as a Pathway to Citizenship* (University of Toronto Press, 2005).

⁸⁵ Rayden Horton et al, *Our Voices, Our Rights* (Report, Save the Children New Zealand, 2016) 17. <<https://resourcecentre.savethechildren.net/document/our-voices-our-rights/>>.

⁸⁶ Emma McCluskey and John O'Neill, 'Adolescents' Understanding of Their Rights and Experiences of Autonomy' (2021) 6(3) *International Journal of Student Voice* (online) <<https://ijsv.psu.edu/volume-6/>>.

⁸⁷ Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of New Zealand* (21st October 2016); Committee on the Rights of the Child, *Concluding Observations on the Sixth Periodic Report of New Zealand*, UN Doc CRC/C/NZL/CO/6 (6th February 2023).

⁸⁸ Committee on the Rights of the Child (n 52).

V CONCLUSION

As we prepare for new horizons in education law, we must remind ourselves of the promises Aotearoa New Zealand made to the country's children and young people some thirty years ago by ratifying the *CRC*. Looking back at the progress made in the education context toward realising one of the fundamental values and rights in the Convention, Article 12, it is clear that there is some cause for celebration. In particular, children and young people are increasingly having their voices heard at the highest level in education policy development. However, as this paper has highlighted with reference to the implementation of Article 12 in student discipline processes, the situation is far less positive for some of Aotearoa New Zealand's most vulnerable children and young people. It is through exploring areas such as this, where there are challenges and tensions in the realisation of children's rights, that we can understand the actions required to turn the rhetoric of the *CRC* into reality for *all* children. Renewing our commitment to the *CRC* requires each and every one of us to consider the steps we can take in our daily practice to minimise the gap between children's rights and their lived experiences. As professionals working in the education context, and therefore duty bearers, we have a legal and moral imperative to do so.

Keywords:

United Nations Convention on the Rights of the Child, children's rights, student discipline.