

HE PĀHARAKEKE, HE RITO
WHAKAKĪKĪNGA WHĀRUARUA

HE PĀHARAKEKE, HE RITO WHAKAKĪKĪNGA WHĀRUARUA

Oranga Tamariki Urgent Inquiry

WAI 2915

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Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Kelvin Davis
Minister for Children

The Honourable Willie Jackson
Minister for Māori Development

Parliament Buildings
WELLINGTON

29 April 2021

*Ka takina te mauri
Ko te mauri i ahua noa
Ki runga ki ngā taura
Ki ngā tauira
Ki runga ki te kāhui o ngā ariki.
I tipu ko te pū, ko te weu,
ko te rito ko te take
ko te kāhui ririki.
Tēnei ka tukua kia puta ki te whai ao
Ki te ao mārama.*

E ngā Minita, ngā maioha matakuihui ki a kōrua. Nō mātau te mauri manahau ki te tuku atu i tā mātau pūrongo – *He Pāharakeke, he Rito Whakakikīngā Whāruarua* – ki a kōrua, hei mātakitaki mā te Kawana-tanga, mā te Manatū Oranga Tamariki, mā ngā kaituku kerēme, mā te marea o Aotearoa me ngā tamariki i taka ki raro i ngā manaakitanga, takaruretanga, aha ake rānei a Te Manatū Oranga Tamariki me ōna kātua o mua atu. He mea āta wānanga e mātau e Te Rōpū Whakamana i te Tiriti o Waitangi te ingoa o tā mātau pūrongo. Taka ana ā mātau whakatau ki tēnei whakatauki i te mea ko te mahi a te pāharakeke he awhi i te rito. Ko tōna

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ritenga ko te whānau e awhi ana i te tamaiti kia ora, kia pakari, kia āhei ai ki te whakaheke i te whakapapa o te whānau. Koia te rito whakakikīnga whāruarua. He oi.

We enclose our report addressing claims concerning the disproportionate number of tamariki Māori taken into State care by Oranga Tamariki.

This report is a result of hearings conducted in Wellington, Auckland, and Hastings in July, August, October, and November 2020. We heard closing submissions on 15 and 16 February 2021.

The disparities we examine are both enduring and stark. We collate as an appendix some of the key data. It is sufficient to note the following from the evidence we have heard. Between 2000 and 2018, the incidence of tamariki Māori aged 16 and under in State care rose from one in every 125 Māori children, to one in every 64. By 2012, tamariki Māori were five times more likely than their non-Māori counterparts to enter State care. Māori were 54.7 per cent of children in care in June 2013, climbing to 61.2 per cent of children in care in 2017. The proportion of Pākehā children in care over the same period reduced from 33.2 per cent to 26 per cent.

Our inquiry has been focused on the following three questions:

- Why has there been such a significant and consistent disparity between the number of tamariki Māori and non-Māori children being taken into State care under the auspices of Oranga Tamariki and its predecessors?
- To what extent will the legislative, policy, and practice changes introduced since 2017, and currently being implemented, change this disparity for the better?
- What (if any) additional changes to Crown legislation, policy, or practice might be required in order to secure outcomes consistent with te Tiriti/the Treaty and its principles?

We have been assisted in our inquiry by the Crown's early acknowledgement that the significant disparity between the number of tamariki Māori and non-Māori being taken into care is unacceptable and that the principles of the Treaty of Waitangi require that active and positive steps be taken to address the disparity. The Crown also accepts that in addition to contemporary socio-economic factors, the broader forces of colonisation and structural racism and the ongoing effect of historical injustices on iwi, hapū, and whānau have been significant contributing factors to the disparity. The Crown acknowledged that it has failed to fully implement the recommendations of the 1988 Ministerial Advisory Committee report known as *Puao-te-Ata-tu* and that this has impacted upon outcomes for tamariki Māori, whānau, hapū, and iwi and undermined Māori trust and confidence in the Crown. The Crown also

acknowledges the role that poor practice, lack of engagement, and poor cultural understanding have played in creating distrust throughout the care and protection system.

On these matters, there is no significant disagreement between the Crown, claimants, and interested parties. We consider these to be well-documented features of the care and protection system that go towards explaining why there has been such a persistent disparity between the number of tamariki Māori and non-Māori children taken into State care since Oranga Tamariki and its predecessors were first established in 1989.

There is, however, a significant difference between the position of the Crown and the claimants on whether the policy and practice changes introduced since 2017 will change the disparity for the better.

In chapter 2, we consider the terms of te Tiriti/the Treaty and its principles. We note that article 2 of the Māori text guarantees to Māori tino rangatiratanga over both physical possessions and kāinga. The word 'kāinga' captures a range of meanings including home, residence, village, or homeland. This is a guarantee of the right to continue to organise and live as Māori. Fundamental to that is the right to care for and raise the next generation.

The disparity we examine has arisen and persists in part due to the effects of alienation and dispossession, but also because of a failure by the Crown to honour the guarantee to Māori of the right of cultural continuity embodied in the guarantee of tino rangatiratanga over their kāinga. It is more than just a failure to honour or uphold, it is also a breach born of hostility to the promise itself. Since the 1850s, Crown policy has been dominated by efforts to assimilate Māori to the Pākehā way. This is perhaps the most fundamental and pervasive breach of te Tiriti/the Treaty and its principles. It has also proved to be the most difficult to correct, in part due to assumptions by the Crown about its power and authority, and in part because the disparities and dependencies arising from the breach are rationalised as a basis for ongoing Crown control. To our minds, the disparities are a consequence of the Crown's intrusion into the rangatiratanga of Māori over kāinga.

In addition, we have found a range of breaches of the principles of partnership, active protection, and options, all of which individually and in combination operate to cause significant prejudice. Our primary recommendation is that the Crown steps back from further intrusion into what was reserved to Māori under te Tiriti/the Treaty, and allow Māori to reclaim their space. We explain in chapters 4 and 5 the systemic features of this system which entrench disparity and serve to further weaken the whanaungatanga bonds that are the foundation of whānau, hapū, and iwi. We also explain why we consider the legislative and policy

changes introduced since 2017 will not be sufficient to realise the kind of transformation required to achieve a Tiriti/Treaty-consistent future.

Māori must be given the right to chart their own path towards realisation in contemporary times of the Treaty promise of rangatiratanga over their kāinga. In our view, this is a transformation the Crown must support, but not one that it can or should lead. We refrain from overly prescriptive recommendations and instead place emphasis upon the process by which Māori can lead the transformation.

We recommend that a Māori Transition Authority be established. This body must be independent of the Crown and its departments. Its primary function is to identify the changes necessary to eliminate the need for State care of tamariki Māori. This body should be established as a priority and given a wide mandate to consider system improvements both within and outside of the legislative and policy settings for Oranga Tamariki.

We see a role for the Transition Authority in considering and approving ways to transfer, where appropriate, some of the powers, functions, and responsibilities currently performed by Oranga Tamariki or other Crown agencies. The Transition Authority should have power to effect such a transfer where satisfied that the particular Māori community or organisation has the necessary capacity and capability. The Transition Authority would also have the ability to direct resourcing to support that transfer subject to the appropriate accountability and reporting requirements.

We recommend that the Crown assist the Transition Authority with information and advice as required and also ensure that the Transition Authority has sufficient financial and administrative support to undertake and deliver a reform of this magnitude.

What we recommend is a Transition Authority with a clear mandate to design and reform the care and protection system for tamariki Māori, coupled with authority to work in genuine partnership with the Crown to ensure a modified system is properly implemented.

While we support calls for transformation towards a ‘by Māori for Māori with Māori’ approach, there are some caveats. We do not support calls by some claimants for the abolition of Oranga Tamariki. For at least the foreseeable future we see a role for an Oranga Tamariki statutory social worker, backed by the State’s coercive powers in cases where a Māori organisation (be it whānau, hapū, or a Māori provider) meets resistance to an intervention considered necessary for the safety of a child or children. We accept without hesitation that all children have the right to be protected from abuse and harm, and that the State has a legitimate function, backed by its coercive powers to provide that protection where necessary. With respect to tamariki Māori, we see the question of who should hold and

exercise that power in the longer term as a matter that can be considered as part of the process of transformation we outline. In the meantime, and during the transition phase, there needs to be clarity about this and, as a matter of both practicality and safety, we think this power should remain with Oranga Tamariki.

A number of what we consider to be constructive proposals for legislative change were drawn to our attention by various witnesses. For ease of reference we have included these proposals as an appendix to our report so that they may be considered as part of the work of the Transition Authority.

We register a caution about the risk of replacing one bureaucracy with another. While we accept that a significant transformation is required, we do not see it as simply a case of calculating and transferring to a new Māori organisation proportionate responsibility and resource from Oranga Tamariki. Such an approach risks transferring a number of system problems and also runs the risk of diverting focus onto resourcing issues before system design is properly worked through. Such an approach also risks 'commercialising' kinship.

We are also mindful that family dynamics and identity are complex. This can mean that who should provide intervention or support services is not always straightforward. Tamariki Māori who have been separated from their whakapapa and who have been in State care for some time cannot simply be taken from what they know to whanaunga they have never met. There are also questions of capacity and access to specialised help in Māori communities that will need to be worked through. We note these matters because of the need to proceed with care so as to minimise the risk of further harm and also because we consider it important that there be space for local solutions to emerge and grow.

It is important to understand that the need for change and the process of transformation we recommend has nothing to do with separatism and everything to do with realising the Treaty promise, that two peoples may coexist harmoniously. As the authors of *Puao-te-Ata-tu* succinctly stated over 30 years ago:

The traditional policy of assimilation and one law for all has become so ingrained in national thinking that it is difficult for administrators to conceive of any other, or to appreciate that indigenous people have particular rights to a particular way of life.

Finally, the panel would like to record its appreciation for the constructive and professional way Crown counsel and Crown witnesses took part in our inquiry. We also acknowledge the considerable assistance

we received from claimant counsel and thank them for their cooperation and understanding given the constraints that accompany an urgent inquiry such as this. Throughout our hearings we were assisted by Ophir Cassidy, a senior lawyer (and recently appointed District Court judge) with extensive and valuable experience in the Family Court. We are deeply grateful for her assistance. Our final acknowledgment is to all the claimant witnesses who shared personal and traumatic stories with us. We heard a range of remarkable and often difficult evidence. We have moved to report as quickly as possible because we want this report to be available to government so that it may be considered along with policy work underway in response to the reports of the Māori-led Inquiry, the Chief Ombudsman, and the Children's Commissioner. We have tried to capture some of the lived experiences shared with us in both open and confidential sessions, together with some examples of good practice by use of a number of factual summaries. In so doing, it is our hope that these illustrations will serve the purpose for which they were offered to us, that they will make a difference for the mokopuna to come.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'm. Doogan', with a long, sweeping horizontal stroke extending to the right.

Judge Michael Doogan
Presiding Officer

ACKNOWLEDGEMENTS

The Tribunal would like to thank all staff involved for their assistance with this report, especially Genevieve O'Brien, Daniel Morrow, Ngawai McGregor, and Tiana Tuialii. Thanks also to those staff who assisted with the inquiry and hearings, particularly Jenna-Faith Allan, Sean Stack, Brianna Boxall, Robbie Stenberg, and Tinei Mamea. We also wish to acknowledge the support of research counsel Annelise Samuels and Allie Maxwell; the assistance of Kimberley Matau, personal assistant to Judge Doogan; and the typesetting support of Dominic Hurley and Jim Scott. Lastly, the Tribunal would like to express their gratitude to Ophir Cassidy in her capacity as counsel assisting the Tribunal throughout these hearings.

ABBREVIATIONS

ADHD	attention deficit hyperactivity disorder
AJHR	<i>Appendix to the Journal of the House of Representatives</i>
app	appendix
CA	Court of Appeal
CCS	Complaints, Compliments, and Suggestions Operating Model
ch	chapter
cl	clause
CPRP	care and protection resource panel
CYF	Child, Youth, and Family
CYFS	Child, Youth, and Family Service
doc	document
ed	edition, editor
FGC	family group conference
FRNZ	<i>Family Reports of New Zealand</i>
ltd	limited
MDG	Māori Design Group
memo	memorandum
MFC	Oranga Tamariki – Ministry for Children
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
MWWL	Māori Women's Welfare League
p, pp	page, pages
para	paragraph
PC	Privy Council
POS	place of safety
ROC	report of concern
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
UNROC	United Nations Declaration of the Rights of the Child
v	and
vol	volume
VOYCE	Voice of the Young and Care Experienced
Wai	Waitangi Tribunal claim
WINTeC	Waikato Institute of Technology
w/N	without notice

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2915 record of inquiry, a select index to which is reproduced in appendix iv. A full copy of the index is available on request from the Waitangi Tribunal.

CHAPTER 1

THE CONTEXT FOR THIS INQUIRY

He pāharakeke, he rito whakakīkinga whāruarua

The flax bush contains the centre shoot which will fill the valleys

1.1 WHAT IS AT ISSUE?

In 2017, Oranga Tamariki – Ministry for Vulnerable Children (hereafter referred to as Oranga Tamariki) – came into existence as successor agency to Child, Youth and Family (CYF).¹ This government department was empowered by statute to ensure the care and protection of vulnerable children (1999–2017).

This inquiry addresses claims submitted to the Waitangi Tribunal under urgency regarding the disproportionate numbers of tamariki Māori being brought into State care and protection, and the functioning and cultural orientation of this system. Claimants make a range of specific allegations relating to the operation of Oranga Tamariki and its predecessors. However, the overarching issue the claims raise is that policies and practices inconsistent with te Tiriti o Waitangi/the Treaty of Waitangi have caused significant and irreversible prejudice to tamariki Māori taken into State care, as well as their whānau, hapū, and iwi. This prejudice, the claimants allege, is exacerbated by the disproportionately high number of tamariki Māori continuing to enter the State care and protection system.²

Claimants and the Crown acknowledge the fact of a significant disparity, and agree that it is unacceptable and needs to change.³ In keeping with the urgent basis of this inquiry, we accept as true the existence of long-term and fundamental racial disparity in the State care and protection system. The characteristics of this disparity are summarised in appendix 11, which sets out the relevant data. In this report we focus on the three issue questions we have identified for consideration in this report. These questions are set out in full in section 1.3.

1. Throughout this report, we refer to the various iterations of Child, Youth & Family as CYF. These include the Children & Young Persons Service (established in 1992); the Children, Young Persons & their Families Agency; the Child, Youth & Family Services department of the Ministry of Social Development (established in 1999); and, of course, the Child, Youth & Family business unit of the Ministry of Social Development (established in 2006).

2. Memorandum 2.5.1, pp 18–19

3. Submission 3.3.17, p 3; submission 3.3.34, p 13; submission 3.3.20, p 5; submission 3.3.21, p 4; submission 3.3.24, p 26; submission 3.3.27, p 2; submission 3.3.29, p 1; submission 3.3.30, p 1; submission 3.3.32, p 32; submission 3.3.33, p 5; submission 3.3.34, p 2; submission 3.3.35, p 7; submission 3.3.36, p 2

1.2 THE PROCEEDINGS

In 2017 and 2018, we received seven applications seeking an urgent inquiry into the settlement of historical grievances relating to Māori children placed in care. In 2019, we received two applications specifically concerning the contemporary actions of Oranga Tamariki.⁴

On 25 October 2019, the chairperson of the Waitangi Tribunal declined the applications for an urgent inquiry into the settlement of historical grievances. The chairperson noted the Government had initiated a Royal Commission of Inquiry into historical abuse in State care and faith-based institutions, and therefore decided it would be an inefficient use of Tribunal resources to simultaneously undertake an urgent inquiry into historical abuse of children in State care. Instead, these historical claims would be heard as part of a future kaupapa inquiry.⁵ However, the chairperson accepted for urgent inquiry the two applications raising allegations concerning the contemporary actions of Oranga Tamariki, as these concerned ‘a pressing national issue for many Māori and there is a risk of significant and irreversible prejudice to whānau, hapū and iwi’. Counsel for two of the historical claims (‘The Māori Children Placed in State Care Claim’ and ‘The Adoption Act 1955 (Smale) Claim’),⁶ also applied for them to be heard jointly with two of the contemporary applications (‘The Māori Mothers Claim’, and ‘The Oranga Tamariki Claim’).⁷ This request was granted.⁸

The chairperson concluded that the scope of the inquiry would be limited, as many of the claimants’ concerns were being addressed in independent public inquiries being conducted by the Whānau Ora Commissioning Agency,⁹ the Office of the Children’s Commissioner, the Royal Commission of Inquiry, and the Ombudsman. Two issues were identified for the Tribunal’s consideration:

- (a) Having regard to the rising and disproportionately high number of tamariki Māori being taken into state care under the auspices of Oranga Tamariki, is Crown legislation, policy, and practice inconsistent with the principles of the Treaty and the Crown’s Treaty duties to Māori? If so,
- (b) What changes to Crown legislation, policy, and practice are required to ensure Treaty compliance?¹⁰

In the 25 October 2019 memorandum, Judge Michael Doogan was appointed as presiding officer for this urgent inquiry, and Professor Pou Temara, Kim Ngarimu, and Professor Rawinia Higgins were appointed as members of the Tribunal panel.¹¹

4. Memorandum 2.5.1, p 2

5. Ibid, pp 8–9, 16, 18

6. Claims Wai 2615 and Wai 1911 respectively.

7. Claims Wai 2823 and Wai 2891 respectively.

8. Memorandum 2.5.1, p 23

9. Document A30

10. Memorandum 2.5.1, pp 22–23

11. Ibid, pp 23–34

On 11 March 2020, Judge Doogan outlined a proposal to begin the inquiry with an initial focus on contextual evidence from a range of claimant, Crown, and Tribunal-called witnesses.¹² These hearings were intended to assist the Tribunal in understanding the established trend of a rising and disproportionate number of tamariki Māori being taken into State care, as well as to form some preliminary views to guide more detailed inquiry planning.

On the same day, experienced family court lawyer Ophir Cassidy was appointed to provide the panel with expert advice pertaining to Family Court uplift processes, and other legal and procedural issues.¹³

On 18 June 2020, the presiding officer issued a memorandum setting out the approach to be taken at these initial hearings, where witnesses would speak to their research or experience.¹⁴

The first hearings took place on 30 and 31 July, and 7 August, in the Waitangi Tribunal's hearing room in Wellington. After hearing from the parties, we subsequently developed a specific procedure for closed sessions, set out by way of a memorandum dated 25 September 2020.¹⁵

On 19 to 23 October, the first of the subsequent hearings was held at the Vodafone Events Centre in Manukau, Auckland. A further week of hearings was held on 27 to 30 October, at the Hawkes Bay Racing Centre in Hastings. During these two weeks, we heard claimant evidence in open and closed sessions. There were also a number of Tribunal-called witnesses.

On 25 to 27 November, the third week of hearings was held in the Waitangi Tribunal's hearing room in Wellington. On 14 and 15 December, the fourth week of hearings was held, also in the Waitangi Tribunal's hearing room in Wellington. During these two weeks, we heard Crown evidence in both open and closed sessions, and also evidence from the Children's Commissioner, Judge Andrew Becroft.

On 15 and 16 February 2021, we convened to hear closing submissions in the Waitangi Tribunal's hearing room in Wellington. Due to the ongoing impacts of Covid-19 and the public safety measures necessitated at this time, the hearing was conducted remotely, with counsel appearing by audio-visual link.

1.3 ISSUES FOR DETERMINATION

As noted above, the two issues originally identified for the Tribunal's consideration were:

- (a) Having regard to the rising and disproportionately high number of tamariki Māori being taken into state care under the auspices of Oranga Tamariki, is

12. Memorandum 2.5.14, p 2

13. Memorandum 2.5.13, p 2

14. Memorandum 2.5.25, p 4

15. Memorandum 2.6.8

Crown legislation, policy, and practice inconsistent with the principles of the Treaty and the Crown's Treaty duties to Māori? If so,

- (b) What changes to Crown legislation, policy, and practice are required to ensure Treaty compliance?

On 18 June 2020, Judge Doogan issued a memorandum setting out the three targeted, issue-related questions that would inform the remainder of our inquiry:

- (a) Why has there been such a significant and consistent disparity between the number of tamariki Māori and non-Māori children being taken into state care under the auspices of Oranga Tamariki and its predecessors?
- (b) To what extent will the legislative policy and practice changes introduced since 2017, and currently being implemented, change this disparity for the better?
- (c) What (if any) additional changes to Crown legislation, policy or practice might be required in order to secure outcomes consistent with te Tiriti/the Treaty and its principles?¹⁶

A particular focus would also be placed on the period 2015 to the present. Our response to these questions is set out in this report.

1.4 THE CLAIMANTS, THEIR CLAIMS, AND THE INTERESTED PARTIES

The Tribunal received 51 claims for this inquiry, lodged mostly between November 2019 and July 2020. They came from individuals, whānau, hapū, iwi, and other entities including trusts, District Māori Councils, and rūnanga. Of these claims, 20 are redacted and confidential. Applications for interested party status were also received, and five were granted. Appendix 11 to this report details the full list of claims, claimants, and interested parties to this inquiry. The claimants' allegations are set out in more detail in chapters 4 and 5.

1.5 CROWN CONCESSIONS

We acknowledge the Crown's constructive participation in this inquiry, and set out here the concessions the Crown has made on the issues before us.

The Crown acknowledges the significant disparity between the number of tamariki Māori and non-Māori being taken into the State care system, and accepts that this disparity is unacceptable and the principles of te Tiriti/the Treaty require that active and positive steps be taken in order to address this.¹⁷

The Crown further submits that since Oranga Tamariki's inception this 'disparity may be reducing'.¹⁸ In support of this claim, Crown counsel refers to recent

16. Memorandum 2.5.25, p 3

17. Submission 3.3.34, p 13

18. Ibid, p 20

data which shows that entries into care for tamariki Māori have declined in recent years.¹⁹ The Crown says this indicates ‘promising progress’, and notes that more data will be needed in the years to come in order to establish whether positive results are in fact trends.²⁰

The Crown asserts that the drivers behind disparity are complex. As such, they urge caution in drawing the conclusion that the disparity experienced by tamariki Māori and their whānau is a direct result of the actions of the Crown or Oranga Tamariki and its predecessors.²¹ In her statement of 24 November 2020, however, Gráinne Moss (chief executive of Oranga Tamariki at the time of the inquiry) made the following concessions on behalf of the Crown concerning the care and protection system:

The Crown has failed to fully implement the recommendations of *Pūao Te Ata Tū*²² in a comprehensive and sustained manner. This implementation failure has impacted outcomes for tamariki Māori, whānau, hapū and iwi. Further than this, it has undermined Māori trust and confidence in the Crown, as well the belief in the Crown’s willingness and ability to address disparities.

Structural racism is a feature of the care and protection system which has adverse effects for tamariki Māori, whānau, hapū and iwi. This structural racism has resulted from a series of legislative, policy and systems settings over time and has degraded the relationship between Māori and the Crown. The structural racism present in the care and protection system reflects its presence in society more generally, which has meant that more tamariki Māori are reported, thus coming to the attention of the care and protection system. The impact of structural racism on outcomes for and experiences of tamariki Māori and their whānau, and on culture and trust, means that the Crown should have identified the need to tackle structural racism when establishing Oranga Tamariki.

Historically, Māori perspectives and solutions have been ignored by the care and protection system. In order to address this historic aversion, Oranga Tamariki needs to partner and engage with Māori so together they can deliver better outcomes for tamariki Māori.²³

Turning to the care and protection system, the Crown concedes that structural racism is a feature of Oranga Tamariki and its predecessors, and has resulted from various legislative, policy, and systems settings over time. The Crown acknowledges that this has had adverse effects on tamariki Māori, whānau, hapū, and iwi, and has detrimentally affected the relationship between Māori and the Crown. Further, the Crown acknowledges the role that poor practice, lack of engagement,

19. Ibid, p 5

20. Ibid, p 20

21. Ibid, p 21

22. The 1986 report of the ministerial advisory committee that reviewed the Department of Social Welfare from a Māori perspective.

23. Submission 3.3.34, p18

and poor cultural understanding have played to create distrust throughout the care and protection system.²⁴

As to its role in the care and protection system, the Crown accepts that tamariki Māori and the whānau unit are taonga requiring protection; from this flows Tiriti/Treaty obligations to the individual tamaiti, whānau, hapū, and iwi. These include a Crown obligation to ‘support, strengthen and assist whānau Māori to care for their tamaiti or tamariki to prevent the need for their removal from home if possible.’²⁵ Equally, however, the Crown states that – consistent with its Tiriti/Treaty obligations – it has an ongoing role and responsibility to provide a care and protection system for tamariki.²⁶ Looking forward, the Crown reinforces that it understands and accepts the system must continue to change and the role of Māori, hapū, and iwi organisations to grow; otherwise, the challenges that the State care and protection system has struggled with for decades will continue, regardless of who is making the decisions.²⁷

Lastly, the Crown concedes that, historically, Māori perspectives and solutions have been ignored across the care and protection system.²⁸ As part of this, the Crown also acknowledges that it has failed to fully implement the recommendations of the 1986 ministerial advisory committee report *Puao-te-Ata-tu* in a comprehensive or sustained manner, which has impacted outcomes for tamariki Māori, whānau, hapū, and iwi, and undermined Māori trust and confidence in the Crown and its willingness and ability to address disparities. To address this, the Crown acknowledges that it must ‘partner and engage with Māori so together Oranga Tamariki and Māori can deliver better outcomes for tamariki Māori.’²⁹

1.6 THE STRUCTURE OF THIS REPORT

In chapter 2, we set out our jurisdiction and the relevant Tiriti/Treaty principles. We also consider the two texts of te Tiriti/the Treaty, and in particular, article 2, which we consider of special significance to this inquiry.

Chapter 3 provides a descriptive overview of the evolution of successive systems the Crown has implemented to care for and protect vulnerable children in Aotearoa New Zealand, and the social and political circumstances in which they emerged and operated. Our purpose in doing so is to provide necessary context for the discussion of the three issues central to this inquiry that follows.

In chapters 4 to 6, we focus in turn on those three issues – the reasons for the long-term disparity in the number of Māori and non-Māori tamariki entering the care and protection system (chapter 4); the degree to which changes to this system since 2017 are (or have the immediate potential to), reduce this disparity (chapter 5); and what, if any, changes need to occur to ensure a Tiriti/Treaty-compliant

24. Submission 3.3.17, p 4

25. Submission 3.3.34, p 16

26. Ibid

27. Ibid, p 18

28. Document A184, pp 1–2

29. Submission 3.3.34, p 18

future care and protection system (chapter 6). On each issue, we outline the parties' positions and then set out the Tribunal's analysis and conclusions.

Finally, appendix 11 provides an overview of the statistics relevant to the rates of Māori and non-Māori children in the care and protection system. This overview is primarily focused on, but not limited to, the period from 2015 to the present.

CHAPTER 2

THE TIRITI / TREATY CONTEXT

He kura kāinga e hokia

The treasured home will be returned to

We begin this chapter by setting out our jurisdiction to hear these claims. We then consider te Tiriti / the Treaty principles we see as applicable to the issues before us. In determining what Tiriti / Treaty principles and standards are relevant, we have been guided by previous Tribunal inquiries and reports. However, the distinctive circumstances of this inquiry require us to adapt and, in some respects, advance prior jurisprudence. In later chapters, we assess the consistency of the Crown's policy and legislation against these principles.

2.1 JURISDICTION

Section 6 of the Treaty of Waitangi Act 1975 allows for any Māori to make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policy, act, or omission made by the Crown after 6 February 1840. A well-founded claim is one which demonstrates that Crown acts and omissions have breached Tiriti / Treaty principles, and that this breach has caused or will likely cause prejudice to Māori. If we find a claim to be 'well founded', we may recommend to the Crown ways to compensate for or remove the prejudice, or to ensure others are not similarly affected in the future.

2.2 TIRITI / TREATY PRINCIPLES

Our function is to 'make recommendations on claims relating to the practical application of the principles of the Treaty and . . . to determine its meaning and effect and whether certain matters are inconsistent with those principles'. We are required to have regard to the two texts of te Tiriti / the Treaty, and for the purposes of the Treaty of Waitangi Act 1975, we have exclusive authority to determine the meaning and effect of te Tiriti / the Treaty as embodied in the two texts and to decide issues raised by the differences between them.¹

The 'principles' of te Tiriti / the Treaty are the underlying mutual obligations

1. Treaty of Waitangi Act 1975, preamble, s 5(2)

and responsibilities placed on the parties by te Tiriti/the Treaty. They enable te Tiriti/the Treaty to be applied as a living document, including to circumstances not foreseen in 1840. A focus on the terms alone may negate te Tiriti's/the Treaty's spirit and lead to a narrow and technical approach:

The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts in the first schedule to the Treaty of Waitangi Act 1975 are not translations the one of the other and do not necessarily convey precisely the same meaning.

The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit.²

The 'principles' of te Tiriti/the Treaty include, but are not confined to, the actual terms of te Tiriti/the Treaty.³ As Justice Somers observed, '[a] breach of a Treaty provision must . . . be a breach of the principles of the Treaty'.⁴

2.3 TE TIRITI / THE TREATY – THE TWO TEXTS

Over several decades, the courts and the Tribunal have considered questions arising from the fact that the English and Māori versions of te Tiriti/the Treaty are not translations one of the other. The Tribunal found – in its report on the Motunui–Waitara claim – that if questions arise as to which text should prevail, the Māori text should be treated as the primary reference. This view is based on the predominant role the Māori text played in securing signatures of the various chiefs.⁵ The Tribunal elaborated on this in its report on the Orakei claim:

Few, if any, of the Maori signatories could read English nor could all of them read Maori. But the Maori version was for them the only relevant text. It seems clear that it was written and subsequently explained by Williams in terms that were most likely to be acceptable to the Maori chiefs.⁶

The Tribunal accordingly found that in the case of conflict or ambiguity between the English and Māori versions, 'considerable weight' should be placed on the Māori text. More recently, in the Te Paparahi o te Raki Inquiry, the Tribunal concluded that it was bound by the Treaty of Waitangi Act 1975 to regard te Tiriti/the Treaty as comprising two texts. The Tribunal noted that once it had considered

2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 662, 663; see also Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 386

3. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 513

4. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 693

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 49

6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 181

the English text with an open mind, it was not under an obligation to find a middle ground of meaning between the two versions. Considerable weight was given to the Māori text in establishing the Treaty's meaning and effect because the Māori text was the one that was signed and understood by the rangatira.⁷ This is the approach we also adopt and follow.

2.4 ARTICLE 2: TINO RANGATIRATANGA OVER KĀINGA

Article 2 of the English text of te Tiriti/the Treaty

confirms and guarantees to the chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess.

The focus of this guarantee is upon the authority Māori exercise over physical resources and possessions. The guarantee not only is to the chiefs but extends to their respective families and the individuals within these families. The relevant part of article 2 of the Māori text provides:

Ko te tuarua,

Ko te Kuini o Ingaranui ka wakarite ka wakaee ki nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani, te tino Rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

In stage 1 of the Te Paparahi o te Raki Inquiry, the Tribunal summarised evidence concerning the translation of article 2 as follows:

Kawharu translated this authority back in to English as 'the unqualified exercise of their chieftainship over their lands, villages and all their treasures'; Salmond and Penfold cast it as 'unfettered chiefly powers' over 'their lands, their dwelling-places and all of their valuables'; Henare called it 'full authority and power of their lands, their settlements and surrounding environs, and all their valuables'; Hohepa translated it as 'the absolute unfettered chieftainship over their lands, villages and treasures'; Edwards called it 'the absolute governance of all of their lands their homes and all that belongs to them'; and Matiu and Mutu called it 'the unqualified exercise of their paramount authority over their lands, villages and all their treasures'.⁸

As matters were argued before us, there was not a particular focus on the article 2 guarantee of tino rangatiratanga over kāinga, although claimant counsel were

7. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report of the Te Paparahi o te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 522

8. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 350

unanimous in the view that the present legislative and policy settings for Oranga Tamariki are inconsistent with te Tiriti/the Treaty. There was also near unanimous support for remedies that would see the power and control held by Oranga Tamariki over whānau and tamariki ‘devolved’ or ‘returned’ to Māori. We see the article 2 guarantee of tino rangatiratanga over kāinga as of particular importance. In our view, a clear appreciation of what that guarantee means is the necessary starting point for an assessment of contemporary Crown policy and legislation for consistency with te Tiriti/the Treaty promise.

‘Kāinga’ is defined in *Te Mātāpunenga* – a compendium of references to the concepts and institutions of Māori customary law – as follows:

Kāinga, A term covering notions of home, and the place where home is located, that is, residence, village, encampment, region or homeland. A related term is papakāinga, denoting a home base, a ‘true home’ (the element papa refers to a house-site or the earthen floor of a traditional house). The term wākāinga refers to ‘home’ recalled from a distant place, and the phrase kāinga tautohe ‘quarrelled-over homeland’ refers to areas where different hapū or other groups have or claim conflicting rights of use or access. (The word comes from Proto Polynesian *kāinga: ‘place of residence, home, people of the place’).⁹

Kāinga captures a range of meaning, including a village or a home. Continuity of chiefly authority over not just land and resources, but also the people is directly guaranteed in the Māori text of te Tiriti/the Treaty. This is nothing less than a guarantee of the right to continue to organise and live as Māori. Fundamental to that is the right to care for and raise the next generation.

The urgent issue before us concerns the long-term and significant disparity between the number of tamariki Māori and non-Māori children being taken into State care. The disparity has arisen and persists in part due to the effects of alienation and dispossession, but also because of a failure by the Crown to honour the guarantee to Māori of the right of cultural continuity embodied in the guarantee of tino rangatiratanga over their kāinga. It is more than just a failure to honour or uphold, it is also a breach born of hostility to the promise itself. Since the 1850s, Crown policy has been dominated by efforts to assimilate Māori to the Pākehā way. This is perhaps the most fundamental and pervasive breach of te Tiriti/the Treaty and its principles. It has also proved to be the most difficult to correct, in part due to assumptions by the Crown about its power and authority, and in part because the disparities and dependencies arising from the breach are rationalised as a basis for ongoing Crown control.

When we started hearing evidence in July 2020, 4,179 tamariki Māori – representing 69 per cent of the total care population – were (as of the preceding month)

9. Richard Benton, Alex Frame, and Paul Meredith, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Wellington: Victoria University Press, 2013), p 104

in State care, as set out in section II.3.1.2 of appendix II.¹⁰ This imbalance represents an astonishing level of intrusion into the lives of whānau by the State. The fact that this level of encroachment by the Crown into the lives of whānau and tamariki is profoundly inconsistent with te Tiriti/the Treaty and its principles is obvious, and is not contested by the Crown. In chapter 4 of this report, we set out in greater detail what we see as the primary causes of the disparity. For the purposes of this discussion of te Tiriti/the Treaty and its principles, however, it is necessary to first say something more about the significance of kāinga, cultural connection, and the implications of disconnection. We see this, together with the discussion of Tiriti/Treaty principles that follows, as the necessary foundation for an understanding of what is required to move towards legislation and policy that is consistent with te Tiriti/the Treaty and its principles, and ultimately towards realisation of te Tiriti/the Treaty promise: that two peoples may coexist here.

We are fortunate to have the perspective of Ahorangi Tā Pou Temara as a Tribunal panel member. Tā Pou was born and raised at Ruatāhuna in a Māori-speaking community living on ancestral lands. As a panel, we asked Tā Pou for his thoughts on the significance of kāinga. This is what he told us:

Kāinga is home as opposed to a place where one lives. It is a homeland, and for me Ruatāhuna will always be my home, my kāinga. My house in Hamilton is my whare, not my kāinga. In non-Māori terms it could be viewed as my home, but for Māori of my generation, Hamilton is not my kāinga and it can never be my kāinga. I do not have a whakapapa to the whenua of my house in Hamilton, I don't have a relationship to the trees, to the river, to the sky above my house. I don't have a relationship to the wind that blows around my house. Nor do I have a relationship to the hills or the animals and creatures that live in the forest of those hills. I don't have a relationship with the people who live in Hamilton other than a physical relationship. I don't have a spiritual relationship.

However, in Ruatāhuna there is immediate rapport. It is my kāinga, my ahuru mōwai – my sanctuary; my Pakairiri – my shield; my ururanga tē taka – the place where I can rest and sleep without disturbance and without fear. This rapport is because I have a relationship both physically and spiritually to the whenua through whakapapa. I have an affinity with my whenua because my history is there and the people who made that history are mostly buried there. I have an affinity, because my whenua – my afterbirth, which nurtured me in the kōpū of my mother for nine months of my being, is buried in that whenua, the land which I call my whenua, my kāinga. It is the kāinga that I call my whenua kura, my treasured whenua. I'm reminded of our whakatauki, 'he kura kāinga e hokia', a treasured kāinga will be returned to, a treasured kāinga is where one finally returns to – to die.

I have an affinity with the mountains, the hills, the prominent features on the whenua of my kāinga, the rivers and streams that flow past my kāinga, the trees and

10. Document A53, p 56

forest that stand and the fruits from them. I can reach out without fear and pluck them. From another branch of that whānau of trees, I gather leaves and bark to tend to my ailments. I see the trees as Tāne, Lord of the forest, birds and creatures of that forest and I give thanks to Tāne through karakia for its bounty called te pua a Tāne.

I can whakapapa to the sky of my kāinga, to the stars that I see at night. As I look up I recognise them, and I know they recognise me. I recognise the winds that blow in my kāinga called te uru kāraerae. I recognise another wind called tūtakangahau. I recognise them for the messages and the warnings that they bring. It is these winds of my kāinga that give rise to our whakatauki 'hokia ki ō maunga kia purea koe e ngā hau' (return to your mountains to be cleansed by the wind).

I have an affinity with the places that I go to at my kāinga. I know them, I am at ease in that environment. I know the voices of that environment, I know what they are telling me. It is only in my kāinga at Ruatāhuna that my meetings with the spirits of those voices are meetings of joy and matemateāone. Matemateāone, that deep rooted relationship that is almost indescribable, that speaks about blood and blood relationship in the whenua, in the skies and in the taiao between Rangi and Papa. Matemateāone, which speaks about a yearning for the whenua and my kāinga that results in illness and sometimes in death – and only the sighting and the touching of the feet and hands to that kāinga can that matemateāone be mitigated.

On the other hand, in my house in Hamilton, if I were to dream about the spirits of my ancestors, they are mostly meetings of sadness and yearning because I am separated from them and the kāinga that they are at rest in.

As a result of the pressures that are visited upon me in my house and my place of work in Hamilton, those pressures can only be addressed by visiting the wāhi tapu of my kāinga, the places where I can conduct karakia by the streams that I render tapū for that brief occasion. It is only in those waters that I feel the freedom to conduct the rituals and karakia that releases me from the burdens of my house outside of my kāinga.

My kāinga is imbued with the words of wisdom of my ancestors which drives me to go back to my kāinga every now and again to be cleansed by the waters and winds. When I stand on the ground of my kāinga I feel the power, the vitality surging through me from the ground, through my feet, through my body to my head. From Rangi I feel the same sensation from my head going downwards in my body to my feet and into the ground. I can never experience that anywhere else on this planet.

Kāinga as a home, a residence, is much more than simply a place where a whānau may live. In the sense that Tā Pou uses the term, it is the place where cultural identity is formed, nurtured, and sustained.

During our hearings, we were fortunate to hear from Waihoroi Shortland and Dame Iritana Tāwhiwhirangi. Both were raised steeped in Māoritanga and both reflected on the importance of this upbringing to their lives and identity. Mr Shortland was born in Kawakawa and was raised outside of his birth family. He said he was born Te Aupouri and Ngāti Rangi but was 'chosen' and 'grew up' as Ngāti Hine. In his evidence, Mr Shortland discusses his understanding of the

Māori worldview of tamariki and whānau. He says the starting point for the Māori worldview is ‘he tamaiti, he taonga’; every child is precious, every child is a taonga of their entire whānau, hapū, and iwi – and as such tamariki are the responsibility of all of them.¹¹

He explains that it is whakapapa that connects tamariki – to their parents, to their tūpuna, to the atua, and to the spiritual world. And through whakapapa, tamariki are endowed with attributes fundamental to their cultural, physical, and spiritual well-being such as mana, tapu, wairua, and mauri. Further, and importantly, rangatiratanga is the inherent birthright of all tamariki Māori. Mr Shortland explained that a critical part of the well-being of tamariki is maintaining a balance across these dynamics. He told us that each aspect of their being and world must be acknowledged and enhanced, and therefore, anyone who contributes to the raising of tamariki is responsible for nurturing not only their physical traits but their spiritual traits also. Mr Shortland says:

Our task is to give our Māori ideologies credence. It is a broad cultural perspective, and anyone seeking to have a role in the life of tamariki Māori needs to understand it. Once you have an understanding, we then need to ask how we invest in that practically. Some of the investment needs to go into reconnecting with each other, with our pa harakeke, and reconnecting with our cultural roots, because in this day in age, we seem to be moving further and further apart.¹²

Mr Shortland states that when he thinks about children in the traditional context of whānau, there are three broad categories – tamariki whānau (children born of the whānau); tamariki whāngai (children cared for or taken into the care of a broader whānau relationship); and tamariki atawhai (children raised from birth outside of their own whakapapa). Reflecting on his own life story, Mr Shortland says that he comes under the ‘tamariki atawhai’ category – ‘I was not born to my family, they are the family that fate chose for me, and I consider myself incredibly lucky that they were chosen . . . My experience was the very best-case scenario.’¹³

In hearings, Mr Shortland said there was never a time in his life that he did not know who his birth parents were and that his adopted parents ensured he understood his own whakapapa. In hand with this, they raised him in te reo Māori. Those two elements together, Mr Shortland said, put him in a space in which he was able to call upon throughout his life.¹⁴ Mr Shortland emphasised that in situations where tamariki need to be cared for outside of their immediate whānau,

it is critical that the child still has access to his or her culture. It is also critical that those tasked with caring for that child, have an understanding of what that entails.

11. Document A32, p 2

12. Ibid, p 3

13. Ibid, p 4

14. Transcript 4.1.7, p [407]

Without this, regardless of whether one has the best of intentions, the child would be denied an opportunity to grow within his or her own culture. One can grow up in a home that provides for the physical needs, but without the cultural perspectives that might be available through a Māori whānau, the cultural deprivation can be quite marked.¹⁵

Dame Iritana was born in Hicks Bay and is of Ngāti Porou, Ngāti Kahungunu, Ngāpuhi, Canadian, and English descent. In hearings, Dame Iritana reflected to the Tribunal that she had grown up in her own tribal area where she learnt

what it meant to be Māori, to speak Māori, to think Māori and to act Māori and it was a very comfortable, warm, loving, cultural framework that I grew up in . . .

You grow up in that kind of environment you can fly the universe. When you don't then we're saddled with what we've got today worrying about our children and what's happening to them.¹⁶

What Tā Pou Temara, Waihoroi Shortland, and Dame Iritana Tāwhiwhirangi speak to is the power of a childhood realised within te Tiriti/the Treaty promise of tino rangatiratanga over kāinga. How that promise can be realised for this generation, and those to come, is the issue at the heart of this inquiry. Its importance is captured succinctly at the start of *Te Korimako*, a publication designed to educate and support whānau who come to the attention of Oranga Tamariki and the Family Court. Justice Sir Joseph Williams notes:

For generation upon generation, whanaungatanga has been the very core of our identity. The last century and a half has caused the weave of whanaungatanga to loosen. Now, with removals at record levels, strengthening and protecting this weave is our most important work. Without whanaungatanga, who will these tamariki be? And without them, who are we?¹⁷

We now turn to te Tiriti/the Treaty principles we consider relevant to the context of this inquiry, beginning with partnership.

2.5 PARTNERSHIP

Te Tiriti/the Treaty did not confer upon the Crown a supreme and unilateral right to make and enforce laws over Māori. In its stage 1 report, the Te Paparahi o te Raki Inquiry focused specifically upon the meaning and effect of te Tiriti/the Treaty in February 1840. Its 'essential conclusion' was that

15. Document A32, p 4

16. Transcript 4.1.4, p 155

17. Justice Sir Joseph Williams, *Te Korimako – Legal Education: A Māori Initiative to Educate and Support Whānau who come to the Attention of Oranga Tamariki and the Family Court* (Rotorua: Te Kōpū Education and Research Ltd, 2018)

the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over Māori.¹⁸

Te Mana Whatu Ahuru: Report into Te Rohe Pōtae Claims characterised the relationship between rangatiratanga and the kāwanatanga of the Crown in the following terms:

Our conclusion is that the Treaty guaranteed to Māori their tino rangatiratanga. This was a guarantee that Māori would be able to continue to exercise full authority over lands, homes, and all matters of importance to them. This, at a minimum, was the right to self-determination and autonomy or self-government in respect of their lands, forests, fisheries, and other taonga for so long as they wished to retain them. That authority or self-government included the right to work through their own institutions of governance, and apply their own tikanga or system of custom and laws.

Kāwanatanga, as they saw it, was a power to govern and make laws, but it was a power that particularly applied to settlers, settlement and international relations, and – to the extent that it might apply to Māori – was to be used for the protection of Māori interests, and in a manner that was consistent with Māori views about what was beneficial to them. It was therefore not the supreme and unfettered power that the Crown believed it to be; rather, it was a power that was conditioned or qualified by the rights reserved to Māori.¹⁹

The Tribunal recognised the essentially overlapping nature of respective authorities of the Crown and Māori, and affirmed the requirement that the relationship be conducted honestly, fairly, and in good faith in the spirit of cooperation and partnership. The Tribunal found:

In any negotiations over laws and institutions to give effect to kāwanatanga and tino rangatiratanga, neither party could impose its will. These matters could only be worked out through ongoing dialogue and partnership, in which the parties acted with the utmost good faith. From this are derived the principles of partnership and good governance.²⁰

18. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 526–527

19. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version, Parts I and II* (Wellington: Waitangi Tribunal, 2018), pp 158, 169

20. *Ibid*, p 183

In our next chapter, we consider the evolution of Crown legislation and policy as it relates to Māori whānau and tamariki. What is clear from this overview is the essentially unilateral way in which the Crown developed and then implemented these policies. There is a strong undercurrent of paternalism particularly in the early twentieth century developments, aspects of which carried right through to the latter part of the twentieth century. Although legislation and policy concerning care and protection of children intrudes into the most intimate aspects of whānau life, there is little evidence of Tiriti/Treaty partnership in the design or implementation of Crown policy and legislation. The first substantial articulation of a Māori point of view is not apparent until the 1988 publication of the *Puao-te-Ata-tu* report. As the Crown has appropriately acknowledged, despite initial promise, there has been a failure to adopt and implement recommendations of that important report.

In *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, the Tribunal noted the particular importance of the partnership principle in assessing the nature and implementation of State policy. The Tribunal pointed out that partnership recognises that Māori have the right to choose how they organise themselves and how or through what organisation they express their tino rangatiratanga. This requires the Crown to be willing to work through the structures Māori prefer, whether through iwi, hapū, and whānau or any other organisation. The requirement for the Crown to partner with Māori in the development and implementation of policy is especially relevant when Māori are expressly seeking an effective role in the process, and the requirement to partner is heightened where disparities in outcomes exist.²¹

We see this finding as of particular relevance to the circumstances of this inquiry. Although we proceeded under urgency with relatively limited hearing time, we were fortunate to hear from a wide range of Māori leaders, whānau in contact with the system, and experts in relevant fields. The call for transformational change was striking, and echoes the voices reflected in the Māori-led inquiry, the reports of the Children's Commissioner and the Ombudsman.²² While the call for transformational change is clear, the form it should take and how to achieve it is less clear. We say more about this later in our report. In terms of the applicable Tiriti/Treaty principles, partnership in this context will require the Crown to be versatile and receptive to the different needs of various Māori communities. For reasons we explain in our final chapter, we also believe partnership in this instance will mean allowing Māori to take the lead on the transformation itself.

The Tribunal has characterised the partnership principle as a relationship under te Tiriti/the Treaty that is subject to ongoing negotiation and dialogue. The Crown and Māori would work out the practical details of how kāwanatanga and tino rangatiratanga would coexist. In that relationship, both partners owe each

21. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2019), pp 28–29

22. Documents A30, A34, A54

other a duty to act honourably and in good faith, and neither partner could act in a manner that fundamentally affects the other's spheres of influence without their consent, unless there were exceptional circumstances.²³ These findings are of particular importance in our consideration of the way forward, matters to which we turn in our final chapter.

2.6 ACTIVE PROTECTION

The courts and the Tribunal have found that the Crown's duties under te Tiriti/the Treaty are not merely passive, but extend to an obligation to actively protect Māori rights and interests guaranteed under te Tiriti/the Treaty. The duty of active protection arises from te Tiriti/the Treaty partnership itself, through the exchange of kāwanatanga and tino rangatiratanga.²⁴

In *Te Mana Whatu Ahuru*, the Tribunal noted that the Crown is obliged to use its power of kāwanatanga to actively protect the Māori rights and interests guaranteed under articles 2 and 3 of te Tiriti/the Treaty.²⁵ In the *Hauora* report, the Tribunal found that the principle of active protection included the Crown's obligation to actively protect Māori tino rangatiratanga and the Māori right to autonomy. It went on to say:

Thus, in the modern context, the Tribunal has considered that the Treaty guarantee of tino rangatiratanga affords Māori, through their iwi, hapū, or other organisations of their choice, the right to decision-making power over their affairs. As the Tribunal noted in the *Ngāpuhi Mandate Inquiry Report*, 'the capacity of Māori to exercise authority over their own affairs as far as practicable within the confines of the modern State' is key to the active protection of tino rangatiratanga.²⁶

The *Hauora* report also confirmed that active protection requires the Crown to focus specific attention on inequities experienced by Māori and, if need be, provide additional resources to address the causes of those inequities. This becomes a matter of particular urgency when Māori interests and rights derived from te Tiriti/the Treaty are under great threat. The Crown's obligation of active protection is heightened where 'adverse disparities in health status between Māori and non-Māori are persistent and marked'. Therefore, in such circumstances, active protection may compel the Crown to target more resources according to need in order to reduce structural or historical disadvantage.²⁷ As the Tribunal said in its

23. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p189

24. Waitangi Tribunal, *Hauora*, p30; Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2018), p23; Waitangi Tribunal, *Tū Mai te Rangi! Report on Crown and Disproportionate Reoffending Rates* (Lower Hutt: Legislation Direct, 2017), p21; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664

25. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p189

26. Waitangi Tribunal, *Hauora*, p30

27. *Ibid*, p32

Tū Mai te Rangi report, '[w]e consider the obligation actively to protect Māori interests to be heightened in the knowledge of past historical wrongs done by the Crown and any prejudice that has affected subsequent generations.'²⁸

In the *Report on the Te Reo Maori Claim*, the Tribunal found that the principle of protection applied to Māori language and culture. 'The word ["guarantee"] means more than merely leaving the Maori people unhindered . . . [It] requires steps to be taken to ensure that Maori people have and retain their full exclusive and undisturbed possession of their language and culture.'²⁹

We explore more fully in chapters 3 and 4 the nature of the current child protection system and the issues that arise in terms of consistency with te Tiriti/ the Treaty and its principles. For present purposes it is sufficient to note that a fundamental rethink is required as to what the Crown's duty of active protection now requires in relation to Oranga Tamariki and its operations.

Current policy and legislation is dominated by a child rescue imperative. We accept without hesitation that all children have the right to be protected from abuse and harm, and that the State can and should use its coercive powers where necessary to protect vulnerable children. But the key lies in the description of the principle itself. The principle is active protection, not passive or reactive protection.

Active protection requires a clear understanding of what the guarantee of tino rangatiratanga over kāinga means, and careful consideration of what would now promote its maintenance and restoration. Active protection means recognising that Māori parents struggling in poverty have an equal right as citizens to meet their children's needs as do the better-off in society. Active protection means recognising that the vast majority of whānau in contact with Oranga Tamariki are not out to harm their tamariki, but they may have ongoing needs that place stress on the whānau. These include factors such as poverty, poor housing, poor mental health, substance abuse, intimate partner violence, or children with high needs. Growing inequality and the disparities in child protection, education, justice, and health that result are not the inevitable outcomes of individual choice. They are substantially the outcomes of legislation, policy, and economic settings about which a society has choices. Active protection requires substantive changes designed to address these structural conditions.

Active protection does not mean intervening forcefully in the lives of whānau only when the cumulative effect of stress meets the threshold for State rescue of a child or children. Active protection certainly does not mean intervening forcefully in the lives of whānau in ways that are arbitrary or inconsistent, or the result of poor practice, or reflect institutional or personal racism.

28. Waitangi Tribunal, *Tū Mai te Rangi*!, p 22

29. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993), p 20

2.7 EQUITY

The principle of equity arises out of the Crown's duty to act fairly and with justice to all citizens. Article 3 of te Tiriti/the Treaty confirms to Māori all the rights and privileges of British subjects.³⁰ The Tribunal in its *Hauora* report and earlier in *The Napier Hospital and Health Services Report* finds that article 3 not only guarantees Māori freedom from discrimination but also obliges the Crown to positively promote equity.³¹

The Tribunal in the *Hauora* report notes:

In this way, the principle of equity is closely linked to the principle of Active Protection. Alongside the Active Protection of tino rangatiratanga is the Crown's obligation, when exercising its kāwanatanga, to protect actively the rights and interests of Māori as citizens. At its core, the principle of equity broadly guarantees freedom from discrimination, whether this discrimination is conscious or unconscious.³²

The Tribunal has also found that the principle of equity applies regardless of the cause of the disparity.³³ The Tribunal in its *Hauora* report notes that equity of service may differ from a equality of outcome:

A policy or a service that establishes equal standards or a treatment of care across the whole population may still result in inequitable outcome for Māori. This could be the case, for instance, if other barriers (such as costs, geography, or racism) prevent Māori from accessing services, treatment or care. The Treaty principles of equity and active protection therefore require the Crown to make every reasonable effort to eliminate barriers to services that may contribute to inequitable health outcomes. This . . . may require additional resources, proportionate to address the inequities that exist.³⁴

While we see the principle of equity as important and relevant, there are subtle but important differences in the way the principle applies to the disparity we consider, and the disparities and inequities examined by the Tribunal in the stage 1 Health Services and Outcomes Kaupapa Inquiry.

The difference is best explained by reference to the title of our report, *He Pāharakeke, he Rito Whakakikīnga Whāruarua*. Flax bushes are pā harakeke or a kāinga for the rito (the child). This whakataukī emphasises the importance of the whānau (the pā harakeke) as the place to nurture the child (the rito) and thereby

30. Treaty of Waitangi Act 1975, sch 1, art 3

31. Waitangi Tribunal, *Hauora*, p 33; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 48, 62

32. Waitangi Tribunal, *Hauora*, p 34

33. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 8, p 3773

34. Waitangi Tribunal, *Hauora*, pp 34–35

ensure the continuity of a whakapapa line. It also reminds us of the devastating impact of child uplifts on the pā harakeke, and more specifically the impact this has on the wider whānau, their kāinga, and ultimately their continued existence as Māori.

When considering how to eliminate the disparities between the number of tamariki Māori and non-Māori children being taken into State care, the principle of equity does not mean policy should be directed towards achieving rates of uplift and entry into care for Māori in proportion to their population size.

In other words, consistency with te Tiriti/the Treaty and its principles will not be achieved simply by reducing disparities to a point where the number of tamariki in Māori in State care is proportionate to the number of Māori in the wider New Zealand population. This is not what the principle of equity means or requires.

The fundamental requirement for Tiriti/Treaty consistency is not equity in terms of relative rates of entry into State care or equity of funding to run a care and protection service. Te Tiriti/the Treaty consistent objective is recognition and restoration of rangatiratanga over kāinga, which in turn means strong, connected whānau looking after their own tamariki and thriving as Māori.

For reasons we explain later in this report, we conclude that the principles of active protection and equity require the Crown to recognise and accept that the systemic features that cause and sustain the disparities in the number of tamariki Māori being taken into State care require a major system change, together with a significant reallocation of resources towards strengthening whānau, in particular, through the use of 'by Māori for Māori' service provision.

2.8 OPTIONS

The principle of options derives from the Tiriti/the Treaty guarantee to Māori of both tino rangatiratanga in article 2 and the rights and privileges of British citizenship under article 3. In *Te Mana Whatu Ahuru*, the Tribunal affirmed the principle of options set out in a number of previous Tribunal reports, noting 'Māori have the right to continue to govern themselves along customary lines, or to engage with the developing settler and modern society, or a combination of both.'³⁵

The Tribunal in the *Hauora* report noted not only the importance of the availability of options but also the need to ensure that they are properly resourced:

The Tribunal has also identified the principle of options, which broadly determines that, as Treaty partners, Māori have the 'right to choose their social and cultural path'. This right derives from the Treaty's guarantee to Māori of both tino rangatiratanga and the rights and privileges of British citizenship. The principle of options, therefore, follows on from the principles of partnership, active protection, and equity and protects Māori in their right to continue their way of life according to their indigenous

35. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p189

traditions and worldview while participating in British society and culture, as they wish.³⁶

It follows that, in its modern application, the principle of options requires that the Crown must adequately protect the availability and viability of kaupapa Māori solutions in the social sector as well as so-called mainstream services in such a way that Māori are not disadvantaged by their choice.³⁷

and further:

the principle of options obliges the Crown to provide Maori with a real choice, rather than a choice only in name.³⁸

One of the striking features of the evidence we heard was the resilience of individual Māori, and their whānau, in the face of systemic racism and material deprivation bringing them into frequent contact with the care and protection system. We have been struck by the tenacity with which Māori individuals, whānau, and communities have strived to maintain their culture and connection, and to pass this taonga to the next generation.

It has taken over 20 years for Katie Murray and her team at Waitomo Papakāinga to regain a measure of control over the flow of tamariki into State care. As Ms Murray described it, her underlying objective was to put up a ‘wall’ between tamariki and the State agencies. It should not have been so hard, and the battle she described represents one example of a breach of the principles of active protection and options.³⁹

The centrality of the principle of options lies in the obligation upon the Crown to adequately protect the availability and viability of kaupapa Māori solutions. This is of critical importance in terms of the recommendations for change we make in our final chapter. We heard from a wide range of individuals and organisations, all of whom have endeavoured to meet the needs of their communities, and to keep tamariki and whānau safe and connected. As we describe in later chapters, some were able to work in conjunction with Crown agencies or with some form of Crown resourcing or support. A number chose not to enter into arrangements with the Crown due to the difficulties and transaction costs associated with securing and maintaining Crown-approved provider status, or resistance to what was seen as a ‘master-servant relationship’.

36. Waitangi Tribunal, *Hauora*, p 35; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1988), p 195; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274; Waitangi Tribunal, *Napier Hospital and Health Services*, p 65; Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 28

37. Waitangi Tribunal, *Hauora*, p 35; Waitangi Tribunal, *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wellington: Legislation Direct, 2013), p 68

38. Waitangi Tribunal, *Hauora*, p 36

39. W 4.1.4, p 175

What is clear is that there is a very significant groundswell of Māori support for ‘by Māori for Māori’ solutions. Good faith application of the principle of options will require the Crown to constructively engage with those currently engaged in the provision of services to Māori whānau and with those seeking to build and restore the strength of whānau.

2.9 REDRESS

In *Te Mana Whatu Ahuru*, the Tribunal succinctly described the principle of redress as follows: ‘Should the Crown act in excess of its kāwanatanga powers, or should it breach the Treaty’s terms in any other way by act or omission resulting in prejudice, the Crown should compensate.’⁴⁰

We also note that the Tribunal in the Ngai Tahu Sea Fisheries Inquiry – in referencing the *New Zealand Maori Council v Attorney-General* – found that: ‘If failure by the Crown to protect a tribe’s rangatiratanga results in detriment to Maori there is an obligation on the Crown to make redress.’⁴¹ This finding was echoed again in the Ngawha Geothermal inquiry.⁴²

In the Aquaculture Inquiry, the Tribunal thus found: ‘It is well established that redress is required where the Crown fails actively to protect Māori interests, including the rangatiratanga of Māori over their taonga.’ It went on to note: ‘This duty exists to ensure that any failure to discharge Tiriti/Treaty obligations in the past can be rectified by addressing the current and future needs of Māori.’⁴³

The form of redress was considered by the Tribunal in *The Report on the Management of the Petroleum Resource*. The Tribunal stated that ‘endowment’ (or redress), ‘involves both the means for economic and social development looking forward and the means to ensure the survival and wellbeing of tribal taonga, including language, culture, customs, lands, and other resources.’⁴⁴

Furthermore, we note that the Tribunal, in *He Maunga Rongo: Report on Central North Island Claims*, said:

redress should be based upon a restorative approach, with its purpose being, in article 2 claims, to restore iwi or hapu rangatiratanga over their property or taonga where the parties agree. In some circumstances, restoration of tribal mana may require some other remedy. In others, the passing of legislation to recognise rangatiratanga, the return of land, and some other form of redress may be sufficient to achieve this result. Where there has been significant environmental damage, these measures may not be adequate. Sometimes there will be a need for a programme of restoration work. This

40. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p189

41. Waitangi Tribunal, *Ngai Tahu Sea Fisheries*, p 272

42. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p101

43. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p71

44. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p168

may require the joint efforts of a number of agencies working with Maori if that is what the parties agree to. If that is an option, new regimes may need to be developed for the joint management of significant tribal or hapu taonga.⁴⁵

Lastly, we note the relevance of the findings of the Te Tau Ihu Inquiry, where the Tribunal stated: 'In the view of the Privy Council, where the Crown's own actions have contributed to the precarious state of a taonga, there is an even greater obligation for it the Crown to provide generous redress as circumstances permit.'⁴⁶

As we discuss later in this report, it is difficult to overstate the severity of the breaches we have found of the guarantee of tino rangatiratanga over kāinga and of the principles of partnership, active protection, and options.

The prejudice arising is profound. In confidential sessions we heard directly from those who had tamariki taken from them by Oranga Tamariki. The impacts are felt over generations. We heard from those who had been in care about the effects of disconnection and we heard from a range of remarkable individuals and organisations working to help whānau in contact with the system.

The case for substantial redress is obvious, but its form less so. While there are differences of emphasis in the redress the claimants seek, the fundamental plea is that the Crown acknowledge its failures of policy and process, accept that the 2017 reforms are not a sufficient answer, and commit to working in true partnership with Māori to transform the care and protection system.

We think nothing less is required, and we consider in our final chapter what redress of that character might look like.

45. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1248

46. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 6

CHAPTER 3

THE EVOLUTION OF CARE AND PROTECTION SYSTEMS IN NEW ZEALAND

Ka pō, ka pō, ka pūao ngā hua te atatū

The darkness is always replaced by the dawn and its potential

3.1 INTRODUCTION

This chapter provides an overview of the successive systems the Crown has implemented with the aim of providing care and protection for vulnerable children in Aotearoa New Zealand. The purpose of this outline is to briefly trace the evolution of these systems relevant to tamariki Māori, to provide necessary factual context for the discussion of our issues for inquiry that follow. This outline is not intended to cover the historical ground being investigated in more detail by other inquiries. We provide this outline noting the Crown concession described in chapter 1, that acknowledges the historical developments necessary for understanding the current operation of State uplift of tamariki Māori. This outline is purely descriptive and makes no assessment of the adequacy of earlier State care systems or their Tiriti/Treaty compliance.

First, we briefly summarise the systems in place from 1925 to 2015. We also examine two seminal reports, published in 1988 and 2015 respectively, which prepared the ground for the establishment of Oranga Tamariki in 2017. The remainder of the chapter describes Oranga Tamariki's purpose, functions, and operations, as at the time of this inquiry. At the outset, we note our gratitude to the parties for providing two chronology documents of the care and protection system filed on our record of inquiry. In the following chapter, we draw regularly from sources listed in these documents.¹

3.2 THE CHILD WELFARE DIVISION, 1925–70S

From the mid-to-late nineteenth century, a range of institutions provided for orphaned, neglected, or criminal children in Aotearoa New Zealand. From the early 1850s, most orphanages or children's homes were run by churches and benevolent groups. However, children were also housed in State-run industrial

1. Submissions 3.1.104(b), 3.1.151(a)

schools established under the Neglected and Criminal Children Act 1867.² Courts had the power to commit children they considered neglected or abused to these schools. Over coming decades, growing awareness of the plight of children saw the Crown acquire additional statutory powers. The Children's Protection Act 1890, for example, allowed police to intervene when children were at risk, and place them into care.³ The Crown also played a bigger role in monitoring and regulating private homes, also known as 'baby farms', established for the care of very young children separated for various reasons from their birth parents.⁴

Responsibility for industrial schools was transferred from the Justice Department to the Education Department in 1880, marking a shift in the perceived role of these institutions from punitive to reformatory – a departure in thinking about child welfare that would steadily become more widespread.⁵ Government policy would also increasingly favour placing children in foster care rather than institutions, reflecting a growing belief that children were better cared for in 'a family setting'.⁶

A national charitable aid system was established in 1885 through which district boards distributed aid (funded largely through rating and central government subsidies) to help pay for the care of children in institutional and foster care. The boards also provided financial support for children living with their own families.⁷ Beyond providing charitable aid, however, the Crown's role in the care and protection of children during these years was limited. Apart from the industrial schools (which began to close or be reorganised from 1916), neither the Government nor the district boards generally ran institutions for children directly.⁸ By the 1920s, greater attempts were underway to keep children with their families. According to historian Bronwyn Dalley: '[n]eglected and abused children could still be removed, but the emphasis was on preventing problems from becoming more serious'.⁹

The Child Welfare Act 1925 was a landmark development that 'set the basic contours of the State's approach to the welfare of children and young people for most of the rest of the century, consolidating a range of earlier developments into a

2. Kerry Pollock, 'Children's Homes and Fostering – Government Institutions', in *Tē Ara – The Encyclopedia of New Zealand*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/childrens-homes-and-fostering/page-2>, accessed 4 March 2021

3. The Children's Protection Act 1890, s7

4. Bronwyn Dalley, 'Child Abuse – State Action on Child Abuse', in *Tē Ara – The Encyclopedia of New Zealand*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/child-abuse/page-3>, accessed 4 March 2021

5. Tim Garlick, *Social Developments: An Organisational History of the Ministry of Social Development and its Predecessors, 1860–2011* (Wellington: Steele Roberts Aotearoa, 2012), p 13

6. Pollock, 'Children's Homes and Fostering – Government Institutions'

7. Kerry Pollock, 'Children's Homes and Fostering – Church Institutions and Charitable Aid', in *Tē Ara – The Encyclopedia of New Zealand*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/childrens-homes-and-fostering/page-1>, accessed 4 March 2021

8. Ibid; Pollock, 'Children's Homes and Fostering – Government Institutions'

9. Dalley, 'Child Abuse – State Action on Child Abuse'

broad system.¹⁰ The Act established the original State child welfare agency in New Zealand: the Child Welfare Branch of the Department of Education.¹¹ For the first time, 'the welfare of the child' was to be at the forefront when care and protection decisions were made.¹² A new Children's Court was established, and child welfare officers could investigate the family situations of children who came to the court's attention.¹³ The Child Welfare Branch and child welfare officers could also become involved with children and their families who were not going through the court system – for example, illegitimate children, and those who had been fostered or adopted. This 'preventive' role, although not stipulated in the legislation, became an increasing focus of the Child Welfare Branch.¹⁴

Prior to the mid-twentieth century, as a predominantly rurally based people, Māori seldom came to the attention of welfare officers and did not play a significant part in the care and protection system.¹⁵ A New Zealand Council of Educational Research review of the Child Welfare Division found that, amongst the approximately 2,500 children in church-run care institutions in 1940, none were Māori.¹⁶ A series of social shifts associated with the Second World War, however, brought the Child Welfare Branch into greater contact with Māori. First, growing movement of Māori to cities and towns in search of economic opportunities meant child welfare officers and police increasingly focused on, and worked in, urban Māori communities; the result was a higher number of Māori children appearing in the Children's Court.¹⁷ Secondly, an expansion of offices in rural districts such as Northland and the East Coast increased exposure of officers to Māori children in these communities. Thirdly, the social disruption of wartime stoked fears about the breakdown of the traditional family unit and a perceived rise in juvenile delinquency.¹⁸

Over the ensuing three decades, whether as a result of increased attention or of social problems, Māori became over-represented in the child welfare and criminal justice systems, a trend that continued throughout the twentieth and early twenty-first centuries.¹⁹ As historian Bronwyn Dalley has observed, the Crown – despite its broader assimilationist policies – made some attempt to ensure that tamariki Māori separated from birth whānau, as a result of either adoption or welfare concerns, were kept within Māori communities. This policy partly reflected concerns

10. Garlick, *Social Developments*, p13

11. In 1948, the Child Welfare Branch became the Child Welfare Division, a transformation that signalled an increasing professionalisation of the State's child welfare work and social work generally: Garlick, *Social Developments*, p 59. Eventually, the division would evolve into Oranga Tamariki.

12. Garlick, *Social Developments*, p 53

13. Ibid

14. Ibid, pp 55–56

15. Pollock, 'Children's Homes and Fostering – Government Institutions'

16. Document A40(a), p16

17. AJHR, 1941, E-4, p 4

18. Garlick, *Social Developments*, pp 57–58

19. Ibid, p57

about the impacts of cultural dislocation, but was also motivated by ‘[l]ess salutary motives’, such as the belief Māori had a detrimental influence on Pākehā.²⁰

The 1960s to 1970s saw a rapid rise in the institutionalisation of Māori children and adolescents. Statistician Leonard Cook, who gave expert evidence for this inquiry, noted that in the late 1960s, Māori children were experiencing an ‘extraordinary demographic transition’. In 1966, Māori children aged under 15 had become half of the Māori population. Their number had almost doubled from 1951. The growth and increasingly urban identity of the Māori youth population in this period amplified their social visibility and vulnerability to surveillance – and also that of their whānau and Māori communities in general. The rate of detention of Māori boys and girls through the Children’s Court rose rapidly.²¹

By the early 1970s, calls for change in the care and protection system were mounting. After the post-war ‘baby-boom’, the number of young people in the national population had doubled. The number of Children’s Court appearances and child welfare cases had also risen dramatically: by 1971/72, the total number of children under the Child Welfare Division’s supervision or care was more than twice that in 1948/49, jumping from 7,267 to 16,356.²² Official policy was that children should be kept ‘within a family environment’ through foster care, although an increasing shortage of available private homes made this difficult and residential institutions were also under pressure.²³ At the same time, frustrations were rising within the Child Welfare Division itself which, according to one historian, had long sought ‘to outgrow its parent department, to expand beyond “education” and even “child welfare” into more of a general “social welfare” agency that targeted families in need of assistance as a means of influencing the home environment’.²⁴ Staff within the division recognised the organisation’s limitations and inability to get to the root causes of the social problems that had emerged in the post-war period.²⁵ In response to all these factors, the Child Welfare Division and its authorising legislation were replaced in 1972.²⁶

3.3 DEPARTMENT OF SOCIAL WELFARE, 1970S

The National Government elected in 1969 promised to address the social and economic problems facing New Zealand – recession, the loss of traditional export markets, rising unemployment, an increase in ‘social dislocation and crime’.²⁷ Among other election promises, it sought to bring together the Department of Social Security (responsible for pensions and employment) with the Child Welfare

20. Bronwyn Dalley, ‘Moving Out of the Realm of Myth: Government Child Welfare Services to Maori, 1925–1972’, *New Zealand Journal of History*, vol 32, no 2 (1998), p 194

21. Document A40(a), p 29

22. Garlick, *Social Developments*, p 62

23. *Ibid*, pp 62–63

24. *Ibid*, pp 64–65

25. *Ibid*, p 64

26. *Ibid*, p 89

27. *Ibid*, p 87

Division to form a single department. The Department of Social Welfare Act 1971 was duly enacted and the new department established the following year.

Described by some as a 'shot-gun marriage', the merger of the two former agencies presented structural, geographical, and philosophical challenges.²⁸ The department's Social Work Division became responsible for many aspects of the work formerly carried out by the Child Welfare Division.²⁹ However, its formation was intended to be a distinct break with the past: staff were to adopt broader social work methodologies and approaches, receive intensive professional development and training, and deliver services across the entire field of personal and family welfare.³⁰

The Children and Young Persons Act 1974 replaced the Child Welfare Act 1925 and supported the Social Welfare Division's shift to a professional casework approach. While the Act emphasised 'community and parental responsibility for children's welfare', it retained processes and mechanisms for the removal of children from harmful environments.³¹ However, despite the Act being heralded as a significant departure from its predecessor, both the residential population placed in State care and the number of State wards continued to rise.³²

The Children and Young Persons Act 1974 also created new demands on the under-resourced Social Work Division, which, according to historians, meant it struggled to provide preventative services to families. Even though the number of social workers grew, they were largely directed towards urgent matters relating to children and young people or managing the department's statutory responsibilities under the new Act. According to Garlick, for example, any preventive work that was undertaken tended to focus on the living situations of children and young people who had already come under the attention of the authorities.³³

Thus, according to Garlick, dealing with heavy caseloads and its statutory responsibilities, the original vision for the Department of Social Welfare was unable to be 'sufficiently realised'.³⁴ Its functions had 'hardly been extended'³⁵ and it found itself increasingly having 'to make the most effective use of scarce resources'.³⁶ At the same time, a range of major reports called for greater community participation in service planning and provision, particularly as Māori were increasingly

28. Margaret McClure, *A Civilised Community: A History of Social Security in New Zealand 1898-1998* (Auckland: Auckland University Press, 1998), p 176 (Garlick, *Social Developments*, p 90)

29. Garlick, *Social Developments*, p 88

30. *Ibid*, p 92

31. Bronwyn Dalley, *Family Matters: Child Welfare in Twentieth-Century New Zealand* (Auckland: Auckland University Press, 1998), p 264 (Garlick, *Social Developments*, p 93)

32. Garlick, *Social Developments*, p 93

33. *Ibid*

34. Social Council, *Towards a Social Welfare Review: Report of a Working Party on Social Welfare* (Wellington: Department of Social Welfare, 1973), p 11 (Garlick, *Social Developments*, p 93)

35. Juliet Elworthy, 'The Development of Social Welfare Services in New Zealand: Supplementary Paper No 1' (Wellington: Ministerial Task Force on Social Welfare Services, 1986), p 11 (Garlick, *Social Developments*, p 94)

36. AJHR, 1976, E-12, p 6 (Garlick, *Social Developments*, p 94)

asserting their right to care for their own children and young people.³⁷ Small community and non-government groups offering a range of welfare services and support proliferated, and the department introduced new mechanisms to coordinate them.³⁸

By the end of the 1970s, the national economy was under immense pressure – and, by consequence, so too was the Muldoon government. The number of registered unemployed people was rising, increasing the number of pensions and benefits that needed to be processed. As a result, most of the department's attention and resources were focused on discharging its social security functions. Even though the needs of the Social Work Division were measurable and immediate, it could not compete when it came to the allocation of additional resourcing. Despite the social and economic turmoil of this time period, the number of social workers remained near static.³⁹

In 1982, a review of the Social Work Division encouraged a more community-based social work model and recommended the delegation of social work decision-making.⁴⁰ In 1983, the Department of Social Welfare established the Maatua Whāngai programme as an 'alternative care system' which looked to place children in Māori homes rather than Social Welfare homes or institutions.⁴¹

3.4 PUAO-TE-ATA-TU, 1988

In 1985, the Minister of Social Welfare, Ann Hercus, appointed a ministerial advisory committee to investigate and report on the operations of the department from a Māori perspective. In particular, the committee was to advise 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'.⁴² The committee was chaired by Tūhoe academic and civil servant, John Rangihau. A strategic thinker with an increasing influence within the department in the 1980s, Rangihau was seen as suited to the task of advising on the 'most appropriate means to achieve a bicultural approach to policy, planning and service delivery within the department, and thus improve the department's image among Māori'.⁴³

The committee's findings were first published in the 1986 report *Puao-te-Ata-tu (Day Break): The Report of the Ministerial Advisory Committee on a Maori*

37. Garlick, *Social Developments*, pp 103–104

38. *Ibid*, p 94

39. *Ibid*, p 101

40. *Ibid*, pp 103–104

41. Dalley, *Family Matters*, p 264 (Garlick, *Social Developments*, pp 103–104)

42. Maori Perspective Advisory Committee, *Puao-te-Ata-tu (Day Break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Wellington: Department of Social Welfare, 1988), p 5

43. Roka Rangihau, 'John Te Rangianiwaniwa Rangihau', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, <https://teara.govt.nz/en/biographies/5r6/rangihau-john-te-rangianiwaniwa>, accessed 27 February 2021

*Perspective for the Department of Social Welfare.*⁴⁴ The report was highly critical of the department and identified ‘institutional racism’ as a major problem, with the agency imposing a strongly European cultural perspective on its Māori clients.⁴⁵ Although the committee did not quantify how many of its clients were Māori, it noted that ‘in recent years, concern has grown at the high numbers of young Maori in the Department’s institutions and those who make up its social work case loads.’⁴⁶ Elsewhere, the report observed that the clientele of the country’s social welfare institutions and the courts was ‘predominantly Maori.’⁴⁷

The committee found that the department had failed to protect the interests of Māori. It had profoundly misunderstood the place of the child in Māori society and the relationship of Māori children with whānau, hapū, and iwi structures.⁴⁸ The committee argued that the department was not capable of meeting its goals without major changes in its policy, planning, and service delivery; and that these changes were essential and urgent. The committee also called for changes to the Children and Young Persons Act 1974, and to the operations of the courts relating to care of Māori children. Among the committee’s numerous recommendations were that the Government:

- ▶ redress historical imbalances;
- ▶ commit to ending all forms of racism;
- ▶ allocate an equitable share of resources to Māori incorporating the values, culture, and beliefs of the Māori people in all policies;
- ▶ attack and eliminate deprivation and alienation;
- ▶ ensure that departmental recruitment, staffing, and training policies did not disadvantage Māori;
- ▶ recognise and utilise appropriately different skills of Māori staff;
- ▶ ensure that communication practices took account of the needs of Māori and other ethnic groups;
- ▶ promote and fund schemes which harness the initiative of Māori and the wider community to address problems;
- ▶ ensure effective coordination of planning, policy, and practice to tackle serious economic and social problems; and
- ▶ return Maatua Whāngai to its original focus and allocate additional funding to strengthening whānau/hapū/iwi development.⁴⁹

While many of the report’s recommendations were ultimately not implemented, the report and the movement for reform it helped create, encouraged the Crown’s introduction of a revamped care and protection system for children. We outline this new organisation below.

44. The report was first published in 1986. As the 1988 version was submitted in evidence for this inquiry, this is the version we refer to throughout this report.

45. Document A55, pp 7, 16, 22, 23, 39, 77

46. Ibid, p15

47. Ibid, p 7

48. Ibid

49. Submission 3.3.12, pp 1–2; doc A55, pp 9–14

3.5 CHILD, YOUTH AND FAMILY, 1989–2016

As part of its response to *Puao-te-Ata-tu*, the Crown introduced the Children, Young Persons, and Their Families Act 1989. The Act aimed to promote the well-being of children in ways that were ‘culturally appropriate, accessible and community-based, and which enabled parents and family groups to take charge of their child protection roles.’⁵⁰ In doing so, the Act heralded significant changes.⁵¹

The Act had several key overarching principles centred around tikanga Māori. These included the participation of whānau, hapū, iwi, and family in decision-making; strengthening and maintaining the relationship between a child or young person and their whānau, hapū, iwi, and family; and the consideration of how decisions would affect the stability of a child or young person and their whānau.⁵² During the period these overarching principles were in place, the Act had a significant impact on the operations of Child, Youth and Family (CYF).

CYF’s strategic priorities included ‘quality social work practice; working together with Māori; voices of children and young people; connecting communities; and leadership’, yet there was ongoing confusion about the prioritisation of objectives.⁵³

Between 2002 and 2014, there was a 222 per cent increase in annual notifications received by the agency (which consist of reports of concern and Police family violence referrals). Such a dramatic increase put considerable pressure on the agency and there were multiple reviews in the coming years, as well as 14 organisational restructures in 10 years (1998–2008). This restructuring took place as a result of CYF being unable to demonstrate that it was making a positive difference in the lives of children and young people, in addition to much a wider ideological reform movement within the public sector.⁵⁴ As a result, the agency became a business unit within the Department of Social Welfare from 1992–1999, a stand-alone entity from 1999–2006, before it was finally integrated into the Ministry of Social Development in 2006.⁵⁵

One of the Act’s key innovations was the introduction of family group conferences for tamariki or young people coming into contact with the Family Court. Family group conferences were inspired by tikanga Māori, and sought to involve whānau, hapū, and iwi in decision-making where there was a care and protection issue.⁵⁶ A number of people typically attended the conferences, including a mediator, a youth justice coordinator, the police, and anyone involved in the case. After presenting official information to the tamariki or young person, their family, and the victim, the agency professionals (in this case, a youth justice coordinator)

50. Garlick, *Social Developments*, p 132

51. Ibid, p 132; doc A25, p 6; doc A53, pp 9–10

52. Document A181, p 143

53. Modernising Child, Youth and Family Expert Panel, *Modernising Child, Youth and Family Expert Panel Interim Report* (Wellington: Ministry for Social Development, 2015), p 51 (doc A181, p 143)

54. Document A181, p 114

55. Ibid

56. Ibid; doc A25, p 6

would proceed to develop a plan and a resolution with the family. This was seen as a significant shift, as only matters not resolved by the conference could be referred to the Family Court.⁵⁷ The Act also separated youth justice functions from care and protection functions – a separation that helped allow community-based child and family and iwi support services to be developed for tamariki and young people.⁵⁸ In the midst of these restructures, another major report on the CYF agency was released, with significant implications as detailed in the following section.

3.6 EXPERT ADVISORY PANEL REPORT, 2015

In April 2015, the then Minister for Social Development, Anne Tolley, established an expert advisory panel to review the care and protection system, and to determine how the lives of vulnerable children in New Zealand could be transformed.⁵⁹ The panel's inquiry into the care and protection system reflected an increasing awareness within government that the institution needed to be modernised in order to produce better outcomes for children, including tamariki Māori. Its interim report underpinned the need for change, arguing that CYF was not meeting the needs of vulnerable children and young people, and was not supporting them to fulfil their potential as adults.⁶⁰

The panel's report, released in December, echoed these findings. The current system was found to be fragmented and lacking accountability. It had proved itself unable to prevent re-abuse and re-victimisation, and to tackle the over-representation of Māori children.⁶¹ The report noted that, of the 230,000 New Zealand children considered to be vulnerable 'at some point during their childhood', six out of 10 were likely to be Māori. Compared to the total population, Māori children and young people were twice as likely to be notified to CYF.⁶²

The panel agreed that vulnerable children 'have the best chance of leading a full and happy life if they live within families that give them life-long, stable, loving relationships and if they belong to communities which cherish them'.⁶³ To achieve this, their report said a different kind of system was needed – not a social welfare system, but a 'cross-sector social investment system drawing on the capability of professionals, the community and, most importantly, New Zealand families'. It should be based on six foundational building blocks:

- ▶ an investment approach to prioritise long-term outcomes;
- ▶ strategic partnering to broker the right services for the right families at the right time;

57. Garlick, *Social Developments*, p 132

58. Document A53, p 9

59. The panel comprised Paula Rebstock (chair), Commissioner Mike Bush, Peter Douglas, Duncan Dunlop, Helen Leahy, and Professor Richie Poulton: doc A24, p 239.

60. Document A24, p 35

61. Ibid, pp 6–7

62. Ibid

63. Ibid, p 3

- high aspirations for Māori children and young people;
- a consistent practice framework across the system;
- a child-centred system that embeds the voices of young people in the design and delivery of services; and
- all New Zealanders engaged in supporting vulnerable children through the system.⁶⁴

The report then set out detailed recommendations for a future operating model. These included recommendations about core services, delivery channels, technology, organisation, people, property and locations, policy and legislation, and success measures with which to evaluate the performance of the future agency.⁶⁵

The operating model that resulted from these recommendations is the focus of this inquiry: Oranga Tamariki – Ministry for Vulnerable Children.

3.7 ORANGA TAMARIKI – MINISTRY FOR CHILDREN, 2017

In response to the findings of the 2015 Expert Panel Advisory Report (and reflecting the longstanding recommendations of *Puao-te-Ata-tu*), Cabinet agreed that a bold and urgent overhaul of the care and protection and youth justice systems was needed. It also agreed that the current legislation (the Children, Young Persons, and Their Families Act 1989) was not providing a sufficiently robust, child-centred foundation for the care and protection system.⁶⁶

Oranga Tamariki – Ministry for Children was established in 2017, following government decisions on the Expert Panel report.⁶⁷ Originally named ‘Oranga Tamariki – Ministry for Vulnerable Children’, the word ‘vulnerable’ was quickly dropped.⁶⁸ This new stand-alone ministry was purposed to provide a ‘single point of accountability for services for vulnerable children and young people’ and would drive the transformation of the care and protection system for children.⁶⁹

Two key legislative reforms were intended to facilitate the desired transformations. First, the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Act 2016 became effective in April 2017. This stipulates that children and young people should be supported, where appropriate, to express their views and to participate in proceedings which significantly affected them. Those views must be taken into account. The Act also places

64. Document A24, pp 10–12

65. Ibid, pp 26–31

66. Ibid, pp 20, 156

67. Oranga Tamariki, *Briefing to the Incoming Minister for Children* (Wellington: Oranga Tamariki, 2020), p 8

68. Tracey Martin, ‘Oranga Tamariki – Ministry for Children’, media release, 18 January 2018, <https://www.beehive.govt.nz/release/oranga-tamariki%E2%80%94ministry-children>, accessed 13 April 2021

69. Anne Tolley to Cabinet Social Policy Committee, ‘Establishment of the Ministry for Vulnerable Children, Oranga Tamariki – Transition Arrangements: Allocation of Capability and Appropriations, and Arrangements for Corporate Services’, report, [2016]

a duty on the chief executive to ensure that independent advocacy services are available to children and young people in care. The Act also raised the age of care and protection to include 17-year-olds and enabled a broader range of professionals to perform a wider range of functions.⁷⁰

Second, the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 came into effect in July 2017. The Act renamed the Children, Young Persons, and Their Families Act 1989 as the Oranga Tamariki Act 1989,⁷¹ and laid the foundations for the new Oranga Tamariki ministry by:

- ▶ changing the purposes and principles of the Act to better ensure children and young people were at the centre of decision making – while considering them within the context of their whānau, hapū, iwi, and broader community groups (sections 9–11, 16);
- ▶ strengthening provisions for government agencies to share information about children and young people (section 41);
- ▶ enhancing complaints processes (section 13);
- ▶ allowing young people to remain or return to living with a caregiver until the age of 21, with transition support and advice available until the age of 25 (sections 128–129);
- ▶ inserting section 7AA to place a duty on the chief executive to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (section 14);
- ▶ facilitating a more preventative approach to care and protection, and youth justice (section 101);
- ▶ creating national care standards to ensure consistent care for children and young people (section 134); and
- ▶ expanding the jurisdiction of the Youth Court (section 113).⁷²

Some amendments took effect immediately; other provisions came into force on 1 July 2019 if not brought in earlier by Order in Council.⁷³ Section 7AA, notably, came into effect in 2019.

The ministry became operational in April 2017. Headed by a chief executive, it featured a ‘flat’ management structure intended to facilitate the urgent system overhaul envisaged and required by Cabinet.⁷⁴ Ministerial responsibility for Oranga Tamariki was (and continues to be) held by the Minister for Children.⁷⁵

70. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017

71. With an accompanying title of the Children’s and Young People’s Well-being Act 1989.

72. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017

73. ‘Investing in New Zealand’s Children and Their Families’, Ministry of Social Development, <https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/new-childrens-agency-established.html#PhasetwolegislationreformnbsChildrenYoungPersonsandTheirFamiliesOrangaTamarikiLegislationAct20174>, accessed 11 February 2021

74. Ministry of Social Development, ‘An Overview of the Ministry of Social Development for New Ministers’ (Wellington: Ministry of Social Development, 2016), p 12

75. The current Minister for Children is the Honourable Kelvin Davis. His ministerial predecessors to the office (since Oranga Tamariki’s inception) are Anne Tolley and Tracey Martin.

3.7.1 Founding purpose

Upon its establishment, Oranga Tamariki laid out six foundational building blocks to guide its new operating model and way of working:

- ▶ *A child-centred approach*: to embed the voices of children and young people into all decision-making.
- ▶ *An investment approach*: to consider a lifetime view of the well-being of children and young people, coupled with an aim to intervene early to address their needs.
- ▶ *A practice framework*: to develop a trauma-informed and system-wide framework to guide Oranga Tamariki and others working with vulnerable children, young people, and their families.
- ▶ *High aspirations for tamariki Māori*: to be achieved through working closely with whānau, hapū, and iwi, and monitoring progress.
- ▶ *Strategic partnerships*: to actively build bridges with Oranga Tamariki's partners, and encourage more shared responsibility.
- ▶ *Engaging all New Zealanders*: to work to raise awareness and help communities to step forward to support vulnerable children and young people.⁷⁶

These building blocks reflected those identified by the Expert Advisory Panel Report in 2015.⁷⁷

3.7.2 Functions

As a new agency, Oranga Tamariki's general functions include provision of the following:

- ▶ statutory care and protection (including, where necessary, uplifts into State care);
- ▶ youth justice services;
- ▶ adoption services, including in relation to inter-country adoptions and international agreements;
- ▶ implementation of the Vulnerable Children's Plan;
- ▶ funding and contracting services for vulnerable children and young people;
- ▶ family violence and sexual violence services relating to child victims or perpetrators;
- ▶ complaint mechanisms and support for grievance panels (for residences); and
- ▶ policy advice relevant to these functions.⁷⁸

Oranga Tamariki is responsible for administering several acts, including the Oranga Tamariki Act 1989, the Children's Act 2014,⁷⁹ and the Children's Commissioner Act 2003. It also has responsibility for the operational administra-

⁷⁶ Ministry for Vulnerable Children, Oranga Tamariki, *Strategic Intentions, 2017–2022* (Wellington: Ministry for Vulnerable Children, Oranga Tamariki, 2017), p 18

⁷⁷ Document A24, p 3

⁷⁸ Ministry for Vulnerable Children, Oranga Tamariki, *Strategic Intentions, 2017–2022*, p 11

⁷⁹ Specifically, Oranga Tamariki is responsible for administering parts 1 and 2 of the Act, which deal with cross-agency arrangements to support vulnerable children and young people and with child protection policies.

tion of the Adoption Act 1955, the Adoptions (Intercountry) Act 1997, and the Adult Adoption Information Act 1985.⁸⁰

The agency's operating model consists of six functions: intake, assessment and referral; early intervention; intensive intervention (which can include uplift); care; youth justice; and transition support.⁸¹

3.7.3 Process governing the placing of tamariki and young people into care and protection custody

We now turn to the agency's function that is most relevant to this inquiry: how Oranga Tamariki responds to notifications of care and protection concerns for children. The agency's response comprises three main elements, which are described below. We also set out, in figure 3.1, the Children's Commissioner's overview of the process.

3.7.3.1 Report of concern and initial assessment

Under section 15 of the Oranga Tamariki Act 1989, anyone concerned about the safety and well-being of a child can make a report of concern to Oranga Tamariki.

This triggers an initial assessment by a social worker, who works with the referer to understand the concerns, needs, and risks of the tamariki. After this initial assessment, the social worker can decide to take no action, provide advice, make a referral for support from another service, or undertake a statutory investigation under the Act.⁸² Under section 17 of the Act, social workers are required to complete only such investigation as is deemed necessary or desirable.

3.7.3.2 Investigation

If the social worker does consider a statutory investigation is either necessary or desirable, they will complete a 'Child or Family Assessment' or a 'Child Protection Protocol Investigation'.⁸³ Both are informed by the Oranga Tamariki's Tuituia Assessment Framework, which considers the needs and strengths of tamariki, their parents and caregivers, and the whānau, social, cultural and environmental influences surrounding them. The framework also explores a range of safety and well-being criteria; including identity and culture, education, safety and basic care, and networks of support. The investigation can mobilise support to address needs and concerns, and allows safety planning to occur. These can avert the need for further statutory intervention or entry into care.⁸⁴

At the conclusion of the investigation, the social worker will assess whether the child's risk of current or future harm has been sufficiently ameliorated. Three mechanisms govern this critical decision.⁸⁵ First, the decision is supervised by

80. Ministry for Vulnerable Children, Oranga Tamariki, *Strategic Intentions, 2017–2022*, p 11

81. Document A20, p 7

82. Document A10, p 4

83. Child Protection Protocol Investigations are used where the allegations could reach a threshold for criminal offending: doc A10, p 5.

84. Document A10, p 5

85. Ibid, pp 6–7

3-7-3-2

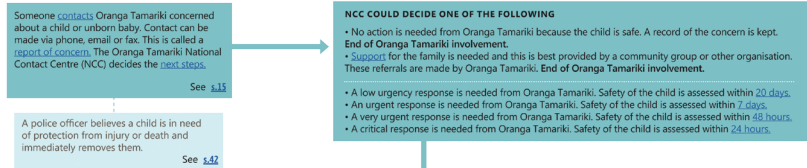
CARE AND PROTECTION KEY DECISION MAKING POINTS



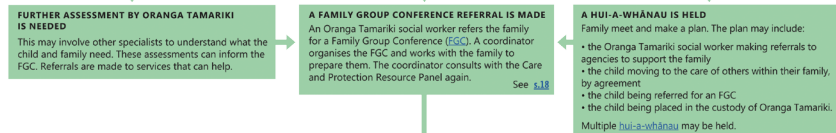
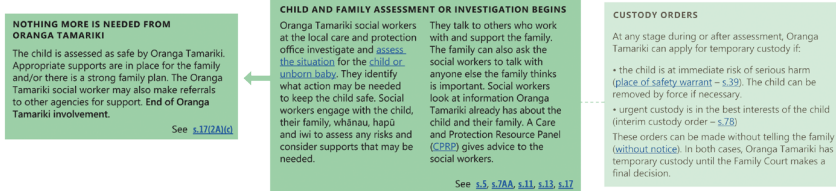
This brief process map for families, and those who support them, shows the Oranga Tamariki process when it is notified of care and protection worries for children. Every family's journey is unique. However, this map outlines what a family could experience.

It is important to note the Office of the Children's Commissioner has chosen to end this map at the point of the Family Group Conference (FGC) and its outcomes. Oranga Tamariki and the Family Court could continue to be involved in the lives of families after the FGC and arrangements for the care of the children could change.

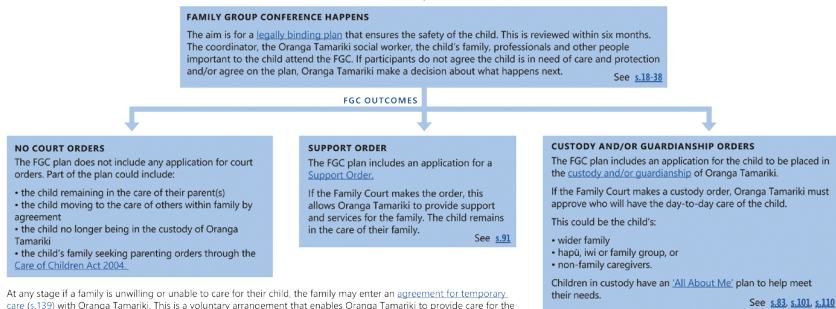
CONCERNS REPORTED



ASSESSMENT OR INVESTIGATION



SAFETY PLAN CREATED



At any stage if a family is unwilling or unable to care for their child, the family may enter an **agreement for temporary care** ([s.129](#)) with Oranga Tamariki. This is a voluntary arrangement that enables Oranga Tamariki to provide care for the child. This agreement can be terminated at any time, either by the child's family or by Oranga Tamariki.

CORRECT AS AT JANUARY 2020

Figure 3.1: Oranga Tamariki process map
Source: document A27

senior and experienced practitioners to ensure the social worker is focused on the needs of the tamariki, whānau, and caregivers, and to ensure that all relevant procedures, policies, and practice standards are adhered to. Secondly, a child and family consultation is required. This assists social workers to identify indicators of danger or harm, safety, and strengths. This consultation must take place before any recommendation is made that a child be placed into custody. Finally, a consultation with a care and protection resource panel is required. These panels are funded by Oranga Tamariki and comprise local community members with professional, community, and cultural knowledge, as well as experience of children and young people. The panel helps inform the social worker's decision-making, especially by identifying possible alternatives to a child being brought into care.⁸⁶ Once an investigation is opened, social workers are required to consult a care and protection resource panel as soon as possible.⁸⁷

Once these steps are complete and the social worker decides a child is in need of care and protection, the matter must be immediately reported to a care and protection coordinator. In turn, the coordinator must convene a family group conference.⁸⁸

3.7.3.3 Family group conference

The family group conference allows the child and members of their whānau, iwi, and hapū to meet with social workers and other involved professionals to discuss and create a legally binding plan to ensure the child's safety and well-being. If participants do not agree that the child is in need of care and protection, or do not agree to the plan, Oranga Tamariki makes a decision about what will happen next.

Oranga Tamariki may decide on a family group conference plan which does not include any court orders, or make an application for a support order to the Family Court. If the Family Court makes the order, this allows Oranga Tamariki to provide support and services to the family and the child remains in the care of their family. Alternatively, Oranga Tamariki may apply to the Family Court for the child to be placed in the custody/guardianship of Oranga Tamariki. If the Family Court makes such an order, Oranga Tamariki must approve who will have day-to-day care of the child.⁸⁹

3.7.4 Section 7AA

The primary legislative reform made to the Oranga Tamariki Act 1989 (as outlined above at section 3.7) was the insertion of a new section 7AA. This came into force on 1 July 2019 and is specific to tamariki Māori. It defines the duties of the chief executive in relation to te Tiriti/the Treaty:

86. Document A10, pp 6–7

87. Oranga Tamariki Act 1989, s17(1)(b)

88. Ibid, s18

89. Document A27, p1

3.7.4.1

- (1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).
- (2) The chief executive must ensure that—
 - (a) the policies and practices of the department that impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department:
 - (b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:
 - (c) the department seeks to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to—
 - (i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and their whānau who come to the attention of the department:
 - (ii) set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department:
 - (iii) enable the robust, regular, and genuine exchange of information between the department and those organisations:
 - (iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations:
 - (v) provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce:
 - (vi) agree on any action both or all parties consider is appropriate.
- (3) One or more iwi or Māori organisations may invite the chief executive to enter into a strategic partnership.
- (4) The chief executive must consider and respond to any invitation.
- (5) The chief executive must report to the public at least once a year on the measures taken by the chief executive to carry out the duties in subsections (2) and (4), including the impact of those measures in improving outcomes for Māori children and young persons who come to the attention of the department under this Act and the steps to be taken in the immediate future.
- (6) A copy of each report under subsection (5) must be published on an Internet site maintained by the department.⁹⁰

3.7.4.1 Mana tamaiti policy objectives

To meet its statutory obligation under section 7AA(2)(b), Oranga Tamariki's policies, practices, and services are required to 'have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the

90. Children, Young Persons, and their Families (Oranga Tamariki) Legislation Act 2017, s7AA

whanaungatanga responsibilities of their whānau, hapū, and iwi.⁹¹ The Act defines mana tamaiti as the ‘intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.’⁹² To fulfil this obligation, Oranga Tamariki developed its Mana tamaiti policy, which outlines the following objectives:

- ensuring the participation of tamariki Māori, rangatahi, whānau, hapū, and iwi in decisions affecting them at the earliest opportunity;
- supporting, strengthening and assisting whānau Māori to care for their tamariki and rangatahi to prevent the need for them to enter care or youth justice;
- supporting tamariki Māori to establish, maintain, and strengthen their sense of belonging through cultural identity and connections to whānau, hapū, and iwi;
- prioritising the placement of tamariki Māori within their broader whānau, hapū and iwi wherever possible; and
- supporting, strengthening and assisting tamariki and rangatahi Māori and their whānau to prepare for their return home or transition into the community.⁹³

3.7.4.2 Partnerships and satellite organisations

To meet its various new obligations under section 7AA, Oranga Tamariki has built strategic partnerships with iwi and other organisations. Thus far, each partnership, co-design initiative, or agreement between iwi or Māori organisations and Oranga Tamariki has been unique. Some notable examples include:

3.7.4.3 Maori Design Group

The Maori Design Group was established alongside Oranga Tamariki as an external reference group. Appointed by the chief executive of Oranga Tamariki, members represent a wide range of community groups with expertise relating to whānau, hapū, and iwi.⁹⁴ They provide input into Oranga Tamariki policies, practices, and services. Such input aligns with the section 7AA(2)(b) duty upon the chief executive to ensure that policies, practices, and service delivery have regard to mana tamaiti.

3.7.4.4 Strategic partnership agreements

Oranga Tamariki also has several strategic partnership agreements with different groups including Ngāi Tahu, Ngāpuhi, Waikato-Tainui, Ngāi Tuhoe, the Māori Women’s Welfare League, and the Eastern Bay of Plenty Iwi Provider Alliance.⁹⁵

91. Oranga Tamariki Act 1989, s 7AA(2)(b)

92. Ibid, s 2(1)

93. Document A20, p 7; Oranga Tamariki, *Annual Report 2018/19* (Wellington: Oranga Tamariki, 2019)

94. Document A20(a), pp 7–8

95. Ibid, p 4; ‘Working with Others’, Oranga Tamariki, <https://www.orangatamariki.govt.nz/about-us/how-we-work/working-with-others>, accessed 13 April 2021

These strategic partnerships are developed through a co-design process premised on shared power and decision-making.

3.7.4.5 Memoranda of understanding

Oranga Tamariki has memoranda of understanding (MOU) with Ngāti Porou, Ngāti Kahungunu, Ngāti Tūwharetoa and the Taupo Collective Impact governance group, and the New Zealand Māori Council. These were signed before 1 July 2019. The ministry also has several social accords and relationship agreements.⁹⁶ The New Zealand Māori Council is uniquely placed, as it has a statutory mandate to work for and on behalf of the wider Māori community in New Zealand – as per the Māori Community Development Act 1962.⁹⁷ The memorandum between the Council and Oranga Tamariki formalises the parties' mutual commitment to creating better outcomes for tamariki and their whānau.⁹⁸

3.7.4.6 Independent organisations

Oranga Tamariki has partnerships with independent organisations, such as VOYCE (Voice of the Young and Care Experienced) – Whakarongo Mai. This is an independent connection and advocacy service that is separate from Oranga Tamariki, though Oranga Tamariki provides links to VOYCE services on their website. VOYCE was co-designed by children with care experience, for children with care experience. Their mission is to amplify the voices of children in care and ensure that they are heard.⁹⁹

3.7.4.7 Current reports

Oranga Tamariki has increasingly become the focus of considerable attention and review, in light of several tamariki uplifts which have received a high profile in the media. In 2020, several reports were issued on the ministry, including the Report of the Children's Commissioner, the Ombudsman's Investigation Report – *He Take Kohukihuki: A Matter of Urgency*, and the Whānau Ora Report – *Ko Te Wā Whakawhiti: A Māori Inquiry into Oranga Tamariki*.¹⁰⁰ Oranga Tamariki has also, in July 2020, released its first section 7AA report, which documents the progress of Oranga Tamariki in improving outcomes for Māori tamariki and their whānau.¹⁰¹

96. Document A169, p 128; 'Working with Others', Oranga Tamariki, <https://www.orangatamariki.govt.nz/about-us/how-we-work/working-with-others>, accessed 13 April 2021

97. Maori Community Development Act 1962, ss 17–18

98. Document A169, p 270

99. Document A20(a), pp 7–8

100. Documents A30, A34, A54

101. Document A53

CHAPTER 4

CAUSES OF DISPARITY

Ki te tapepa te tāhū, ka horo te whare

If the ridge-pole is not balanced, the house will collapse

4.1 INTRODUCTION

Having considered, in chapter 3, the evolution of care and protection systems in New Zealand, and how the current Oranga Tamariki system works, we are now in a position to address the first issue question set out for consideration in our inquiry: why has there been such a significant and consistent disparity between the number of tamariki Māori and non-Māori children being taken into State care under the auspices of Oranga Tamariki and its predecessors? What, if any, Tiriti/Treaty breach arises from this? Reflecting the urgent nature of this inquiry, we have predominantly focused on the period from 2015 onwards.

Before addressing this question, we first reiterate our introductory remarks in chapter 1. As all parties to this inquiry have accepted both the significant and consistent disparity between the number of Māori and non-Māori tamariki entering into State care, and the unacceptable nature of this disparity, this chapter only briefly sets out the scope of the disparity, in section 4.2. There, we review and summarise the data on disparity – notwithstanding the variability in its quality – before turning immediately to the true issue at stake: the causes.

We found it helpful for our consideration of possible Tiriti/Treaty breach to consider the causes of the disparity in two parts. First, we consider factors that, it has been argued before us, are predominantly *external* to the Crown's care and protection system for children. What external factors (if any) have impacted on the ability of Oranga Tamariki to reduce the consistent disparity? (Section 4.3). Secondly, we consider factors *internal* to Oranga Tamariki, and how they may contribute to disparity (section 4.4). On each topic, we set out the parties' positions but reserve our own consideration until section 4.6.

In section 4.5, we set out the evidence and experiences of various claimants and witnesses – some of whom gave evidence in confidential sessions. These narratives illustrate the impact of Oranga Tamariki on the lives of particular Māori whānau.

We begin section 4.6 by discussing these examples, before moving to our analysis and conclusions on the earlier subjects. We consider whether there has been a breach of te Tiriti/the Treaty or its principles, and if so, whether prejudice to

Māori has resulted. Where we determine breach and prejudice have occurred, we set out our formal findings.

4.2 WHAT IS THE DISPARITY BETWEEN THE NUMBER OF MĀORI AND NON-MĀORI TAMARIKI ENTERING INTO CARE?

While the fact of a consistent disparity is not in issue between the parties, it is important for the purposes of our report to highlight a number of features concerning the scale and the nature of the disparity.

We find the evidence of former government statistician Leonard Cook, a witness called by the claimants in this inquiry, very helpful. He advises us that available official statistics show the total number of children entering State care has decreased since 2000. Nonetheless, the proportion of tamariki Māori – as opposed to non-Māori children – in State care has actually increased (illustrated more fully in appendix 11, section 11.3.1 and figure 11.5).¹ This proportional increase, Mr Cook explains, is the result of entries to care decreasing at a faster rate for non-Māori children as opposed to tamariki Māori.

Mr Cook further explains that between 2000 and 2018, the incidence of tamariki Māori aged 16 and under in State care rose from one in every 125 Māori children, to one in every 64.² By 2012, tamariki Māori were five times more likely than their non-Māori counterparts to enter State care.³ This is further illustrated in appendix 11, section 11.3.1 and figure 11.5. Associate Professor Emily Keddell of the University of Otago's Social and Community Work Programme also spoke to similar disparities:

In the overall, all-age care numbers, Māori disproportionality has increased from 100 per 10,000 in 2012, to 132 per 10,000 in 2017. Māori over-representation continues to climb compared to children from other ethnic groups, and compared to the overall Māori child population. For example, Māori were 54.7% of children in care in June 2013, but 61.2% of children in care in 2017, despite the estimated resident Māori under-17 population remaining steady over that time period at around 25%. The Pākehā proportion of children in care over the same time period reduced from 33.2% to 26%.⁴

Mr Cook also explains that it is important to view such trends within a wider context that accounts for both exits from State care and populations as a whole. He notes that unless the entry of tamariki into care is viewed within this context, it is impossible to adequately examine the wider picture of increasingly disproportionate numbers of tamariki Māori in State care.⁵ He also notes:

1. Document A17, p 2

2. Ibid

3. Document A176(c)(i), p 11

4. Emily Keddell, 'Harm, Care and Babies: An Inequalities and Policy Discourse Perspective on Recent Child Protection Trends in Aotearoa New Zealand', in *Aotearoa New Zealand Social Work*, vol 31, no 4, p 25

5. Document A17, p 2

From the beginning of the Child Welfare Division in 1925 up to the 1970s, it appears from the reports cited above that children were generally taken into care because of their perceived delinquency. While any turning point is difficult to establish, there are indications from the escalation in care and protection notifications from 2004 when the Department of Social Welfare Differential Response Model was put in place. The increased share of families with babies or very young children which came to the notice of Department of Social Welfare suggests a resulting increase in situations where the State is judging the apparent delinquency of mothers. A fact sheet published by MSD in 2012 noted that:

Under five percent of children born between 1993 and 1999 were known to the care and protection system before age two. This proportion increased to 14 percent of children born in 2008. The main contributor was a rise in notifications. During the early 2000s, partly in response to increased concerns over family violence and high-profile child deaths, agencies and members of the community were encouraged to increase vigilance, to work more closely with CYF, and to notify where they had concerns.

Mr Cook continued:

The occasional impact of sentinel events was perhaps magnified more than usual in 2008 by the period after the publicity given to the earlier deaths of Nia Glassie and the Kahui twins, with about 1,000 more children taken into care during 2008, with numbers reaching approximately 6,000, then returning over the following three years back to the previous level of about 5,000 children. This period highlights the rapidity and scale with which extreme events can influence entry to care.⁶

As Associate Professor Emily Keddell describes,

Although overall the numbers of children in care have increased, entries to care have reduced 2013–2018 by 10%. Exits have reduced much more sharply, by 34%. Once they [children] are placed in care, they are more likely to stay for longer, pushing up overall numbers in care at any one time.⁷

In particular, the removal (or ‘uplift’) of pēpi Māori from their whānau has become the subject of much scrutiny, following an attempted uplift from Hastings Hospital in 2019 – known in the media and in this inquiry as the ‘Hastings uplift’.

Between 2015 and 2018, the total number of newborn babies (under three months old) removed from their mothers and placed in State custody increased from 211 to 281.⁸ The data also shows that, in 2018, five babies a week were being

6. Ibid, pp10–11

7. Keddell, ‘Harm, Care and Babies’, p 25

8. Document A176(c)(i), p 13

separated from their mothers – the significant majority of which were Māori.⁹ In 2019, the number of newborn babies taken into custody dropped to 248, however, these uplifted babies remained – at 69 per cent – predominantly Māori.¹⁰

The report of the Children's Commissioner notes that this data on the removal of pēpi Māori into the custody of the State shows a deep, persistent, and increasing inequity. In 2019, 823 reports of concern regarding unborn pēpi Māori were made to Oranga Tamariki, an 800 per cent increase, compared to the equivalent number reported to Child, Youth and Family in 2004.¹¹ This contrasts with a much lower increase in reports of concern for non-Māori unborn babies. The data also indicates an increasing trend towards pre-birth decisions to take pēpi into custody. This trend has been greater for Māori than non-Māori, as seen in figure 11.3 in appendix 11.¹²

Disparity between tamariki Māori and non-Māori children is evident across all age groups, not just pēpi Māori. Indeed, as at 31 December 2020, Māori comprised 75 per cent of the children and young people currently in the Youth Justice custody of the chief executive. This compares to the 9 per cent in custody who identify as New Zealand European or other.¹³ As a 15-year-old in a youth justice residence describes, 'they are all Māori in here. It's like being in YJ [youth justice] is a Māori thing'.¹⁴

4.3 CAUSES OF THE DISPARITY: FACTORS EXTERNAL TO ORANGA TAMARIKI AND ITS PREDECESSORS — COLONISATION AND ITS IMPACTS

This section considers what factors *external* to Oranga Tamariki and its predecessors (if any) have affected the ability of the ministry to reduce the consistent disparity between the number of Māori and non-Māori tamariki taken into care.

4.3.1 The claimants' position

Claimants (and interested parties) argue that the enduring and widespread impacts of colonisation have had profound and deeply intertwined consequences for Māori people. They say that the Crown's failure to address many of these consequences has led to an environment of structural racism within Oranga Tamariki and its predecessors. They state that this structural racism is the primary reason

9. Document A6, p 4; Michelle Duff, 'The Number of Newborn Babies Removed from their Parents is Rising', Stuff, 12 December 2018, <https://www.stuff.co.nz/national/107671720/the-number-of-newbornbabies-removed-from-their-parents-is-rising>, accessed 13 April 2021

10. Document A34, p 9

11. Ibid, p 10

12. Document A29, p 6

13. 'December 2020 – Text Only', Oranga Tamariki, 22 February 2021, <https://www.oranga-tamariki.govt.nz/about-us/reports-and-releases/quarterly-report/text-only>, accessed 13 April 2021

14. Document A34, p 8

why care and protection systems have – to date – been unsuccessful in reducing the disparate numbers of Māori and non-Māori tamariki being taken into care.¹⁵

Waihoroi Shortland, claimant for Te Rūnanga o Ngāti Hine for and on behalf of descendents of Torongare and Hauhaua, describes the issue in this way:

Colonisation [has] infiltrated the lives of our tupuna, and the consequences have seeped down through the generations leaving devastation in its wake. Today, the negative impacts of colonisation can be seen in every aspect and at every level of our community. In my view, colonisation was the genesis of this disconnect and disharmony.¹⁶

Among the negative impacts of colonisation, claimants draw attention to its pernicious corollaries: racism, historical injustice, intergenerational trauma, and persistent inequity across a broad range of social well-being and socio-economic measures.

Turning to the first corollary of colonisation in more detail, claimants and expert witnesses argue that racism pervades wider New Zealand society.¹⁷ Johnny Apatu, a witness providing evidence in support of claimant Rex Timu, notes that ‘we [Māori] are the living result of that racism . . . every Māori person knows what racism feels like.’¹⁸ Claimants note and support the *Puao-te-Ata-tu* report, which identified three broad forms of racism as innate to colonisation: personal, cultural, and institutional. The report elaborated:

Personal racism manifested by attitude or action is the most obvious form and the one most easily confronted. Although it is not now as unfashionable as it was a decade ago there is a considerable reservoir of social resistance to it and a range of law and social practice arrayed against it.

Cultural racism is manifested by negative attitudes to the culture and lifestyle of a minority culture or the domination of that culture and its efforts to define itself by a power culture. An obvious form is the selection by a power culture of those aspects of the minority culture which it finds useful or acceptable. Essential dimensions of the minority’s values and lifestyle are discarded to its detriment. Tourism, education and advertising offer numerous examples.

The most insidious and destructive form of racism, though, is institutional racism. It is the outcome of monocultural institutions which simply ignore and freeze out the cultures of those who do not belong to the majority. National structures are evolved which are rooted in the values, systems and viewpoints of one culture only.

15. Submission 3.3.33, p 17

16. Document A32, p 8

17. Document A34, p 15; doc A149, p 3; doc A39, pp 3, 6; submission 3.3.21, p 17; submission 3.3.23, p 23; submission 3.3.24, pp 25–27; submission 3.3.26, pp 13–18; submission 3.3.27, pp 19–20; submission 3.3.31, p 5

18. Document A70, pp 3–4

Participation by minorities is conditional on their subjugating their own values and systems to those of 'the system' of the power culture.¹⁹

To these, Judge Andrew Becroft (who gave expert evidence as the Children's Commissioner) adds a fourth form of racism – epistemological racism. In his evidence, he characterises this as:

The view that Western knowledge is superior to mātauranga Māori and the basis on which other forms of racism are based. This may yet be the most insidious form of racism, as it provides the English language and cultural coding upon which the machinery of government has been developed.²⁰

Judge Becroft observes that epistemological racism has driven the Crown's assimilation policies by privileging Pākehā language and culture and defining Māori equivalents as 'other'. Furthermore, he comments, this 'was no accidental racism: it was by determined intent and design'.²¹ Mr Shortland describes the impact on Māori:

We were told that our beliefs, our way of thinking, and our language were wrong. When you have those types of ideas drilled into you, you start to believe them and sadly this perspective is now far too prevalent among our people. We now have generations of Māori who do not practise tikanga or speak the language. This is a devastating loss for our people.²²

Claimants identify other historical injustices arising from colonisation and the racist Crown legislation and policies which followed. They say that policies of assimilation, combined with urbanisation, have fractured traditional relationships, denigrated cultural practices, and led to widespread loss of te reo and tikanga.²³ Claimant counsel submit that the taking of Māori land has also had immense ramifications, leaving Māori dispossessed and alienated from their ancestral lands and resources.²⁴ Claimants say that, as a result, Māori are suffering in poverty.²⁵ Witness Amadonna-Noema Jakeman notes:

19. Document A55, p 19

20. Document A34, p 15

21. As prime examples, Judge Becroft notes the 1847 Education Ordinance (which introduced English as the language of instruction) and the 1880 Native Schools Code (which focused the curriculum on basic literacy and numeracy, manual labour for boys, and domestic labour for girls): doc A34, p 15.

22. Document A32, p 8

23. Submission, 3.3.16, p 11; submission 3.3.31, p 7; claim 1.1.4, p 13; claim 1.1.7, pp 2–3; claim 1.1.8, pp 2–3; claim 1.1.9, pp 2–3; claim 1.1.10, p 3; claim 1.1.15, p 10; transcript 4.1.7, p [151]

24. Submission 3.3.15, p 3; submission 3.1.168(a)

25. Document A45, p 5; doc A44, p 15; doc A59, p 2

Poverty has a huge impact on Maori whanau and their ability to look after their children. . . . The fact that many Maori whanau live in poverty and are divorced from their papakainga or shared collective whenua is a direct result of raupatu and colonisation. It is no wonder we are seeing flow-on effects like homelessness, other socio-economic issues, and so forth.²⁶

Dr Lillian George also emphasises the pernicious impacts of poverty on whānau:

issues arise most of the time out of poverty. Poverty is the primary cause. Poverty is the context.

The government needs to look at the context of issues and deal with the context when developing law and policy. Policy for any welfare issue needs to look at the context of poverty – not the symptom – which may be the addiction, crime, or abuse in question.

Government law and policy is not addressing the context of whanau living in poverty and all the issues that brings. As a result, the government's support services are not reaching whanau in need.²⁷

The Ombudsman's report *He Take Kōhukihuki* also makes clear that 'the burden of poverty' needs to be urgently addressed, and notes the 'Guidelines for the Alternative Care of Children', adopted by the United Nations General Assembly:

Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.²⁸

Claimants argue that these historical injustices are felt today in a wide range of well-being and socio-economic inequities and have had compounding traumatic effects across generations.²⁹ Dr Rawiri Waretini-Karena, a claimant from Waikato Tainui Waka, Ngāti Hine, and Ngāti Kaahu, explains that historical and intergenerational trauma for Māori is 'the application of discriminatory and detrimental practices that range from oppressive to genocidal, based on ideologies of superiority, for the purpose of alienating another culture from their lands, wealth and resources across generations.'³⁰

26. Document A66, p 4

27. Document A61, p 4

28. Document A54, p 211; *United Nations Guidelines for the Alternative Care of Children* GA Res 64/142 (2010), II B 14

29. Submission 3.3.20, pp 64–72; submission 3.3.21, p 14; submission 3.3.23, p 22; submission 3.3.31, p 8; submission 3.3.27, p 27; doc A92, p 5

30. Document A39, p 3; claim 1.1.4, p 3

In his evidence, Dr Waretini-Karena also draws on Professor Karina Walters' definition of intergenerational trauma as 'an event or series of events perpetrated against a group of people and their environment, namely people who share a specific group identity with genocidal or ethnocidal intent to systematically eradicate them as a people or eradicate their way of life'.³¹

Turning to the impact of intergenerational and historical trauma on his own whānau, Dr Waretini-Karena describes how colonisation and its impacts have successively traumatised four generations of the family, including his father, who was removed as a child by the State. His father's experiences as a ward of the State instilled toxic and abusive patterns of behaviour, which he then replicated with his son. As a result, Dr Waretini-Karena describes the environment into which he was born as 'indicative of the movie, *Once Were Warriors*'.³² These intergenerational and cumulative traumas shaped the trajectory of his early life. Several other claimants also told us of experiencing intergenerational trauma stemming from the involvement of their whānau with the State's care and protection system, often over a long period of time.³³

Nicola Dally-Paki, claimant from Ngāpuhi and Tūwharetoa, connected the current disparity in the number of Māori and non-Māori being taken into State care with a deep history of complex trauma for whānau, hapū, and iwi:

The disparity can be traced back to colonisation, back to assimilation policies of the Crown . . . back to the State-forced breakdown of the whānau and hapū units with the urbanisation of our Māori whānau. . . . back to raupatu and the mamae of having your connection to your whenua severed. They can be traced back to the beating . . . our pakeke took for speaking their language. They can be traced back to 180 years of enactment of legislation aimed at the oppression of Māori. Māori have long suffered the implications of colonisation which have manifested into Māori having the highest statistics in all the worst areas here in New Zealand. We can only agree with this assessment that an incontrovertible link exists between colonisation and a pattern of profoundly unequal social outcomes for Māori. The past and present disproportion of tamariki Māori entering the child and protection system must be considered, at least in part, a product and reflection of this reality.³⁴

Claimant counsel argue Māori are thus prejudiced by the ongoing impacts of colonisation, and that the Crown is breaching its duty of active protection until it takes 'all reasonable steps' to address the inequity and its underlying causes – which, claimants say, the Crown has so far failed to do.³⁵

31. Document A39, p 3

32. Document A5, pp 5–6

33. Ibid, p 5; doc A37, p 2; doc A88, pp 1–5; doc A99, pp 10–11

34. Transcript 4.1.7, p [151]

35. Submission 3.3.24, pp 15, 27; submission 3.3.26, pp 13–14

4.3.2 The Crown's position

The Crown accepts that forces external to Oranga Tamariki, such as 'colonisation and structural racism' reflecting that of broader society, and the 'ongoing effect of historical injustices on iwi, hapū and whānau', have been significant contributing factors to the disparate number of Māori and non-Māori tamariki being taken into care.³⁶ Similarly, in its report *An Approach to Measuring Disparity and Disproportionality in the Care and Protection System*, Oranga Tamariki acknowledges that 'contributing factors to disparity can also be found throughout history and across multiple facets of our society. These factors may include . . . the effects of colonisation'.³⁷

Crown witness Shayne Walker acknowledges that colonisation and its subsequent traumatic effects have 'scarred' Māori, and explains that one of the ways in which Māori are experiencing ongoing colonisation is through socio-economic deprivation.³⁸ The Crown supports this argument, and says that the scale of Māori deprivation is the most significant driver of disparity between Māori and non-Māori tamariki entering State care.³⁹ Referring to an Oranga Tamariki research report, Hoani Lambert – deputy chief executive of Oranga Tamariki during the inquiry – notes:

ethnicity is statistically associated with differences in first time involvement with Oranga Tamariki for children in all age groups across most stages of the Care and Protection system. However, disparities experienced by tamariki Māori are less when socioeconomic and other factors are controlled for.⁴⁰

Mr Lambert goes on to explain that more work is needed to understand 'the more precise causes' of the disparity between Māori and non-Māori tamariki entering care.⁴¹ Further, he acknowledges that, from frontline experiences, Oranga Tamariki knows tamariki coming to the attention of the organisation have multiple and complex needs. Crown counsel submits that family violence, methamphetamine, and other drug and alcohol misuse and dependency, and stark material deprivation – including in health, education, and housing – are major drivers of the disparity.⁴²

According to Oranga Tamariki's then-chief executive, Gráinne Moss:

Disparity is manifested in a range of compounding and long-term issues, at the heart of which is deprivation, poverty, unstable employment and housing, poor health and education outcomes.

36. Submission 3.3.34, pp 18, 21; submission 3.3.17, p 2

37. Document A173(a), p 41

38. Document A51, pp 3–4

39. Document A49, pp 1–2; doc A50, p 3; doc A49, p 1; transcript 4.1.5, p 142

40. Document A49, pp 1–2

41. Ibid

42. Submission 3.3.34, p 21

As *Pūao Te Ata Tū* stated ‘There is no doubt that the young people who come of the attention of the Police and the Department of Social Welfare [Oranga Tamariki] invariably bring with them histories of substandard housing, health deficiencies, abysmal education records, and an inability to break out of the ranks of the unemployed.’⁴³

The Crown clearly recognises that the disparity is unacceptable, and that the principles of Te Tiriti/the Treaty require the Crown to take active and positive steps to address it. The Crown submits that Oranga Tamariki has developed and implemented policies and measures specifically targeted at addressing disparities and improving outcomes for Māori.⁴⁴ We will examine these further in chapter 5.

The Crown notes that, while it has provided evidence on historical matters – and accepts historical injustices and colonisation have impacted the current disparity in entries into care and protection – it has done so largely for the purpose of providing context. In its view, the narrow scope of this urgent inquiry does not allow for recommendations for redress for historical acts or omissions of the Crown.⁴⁵

4.4 CAUSES OF THE DISPARITY: FACTORS INTERNAL TO ORANGA TAMARIKI AND ITS PREDECESSORS

The claimants raise a range of concerns about factors internal to the operation of Oranga Tamariki that they say contribute to the disparity. These concerns can be summarised as concerns about Crown control; legislative and policy coherence; the notify–investigate model; cultural competency; variable practice; family group conferences; section 78 (with or without notice uplift) practices; and monitoring and accountability. These are addressed here in turn.

4.4.1 Crown control

4.4.1.1 The claimants’ position

Claimants observe that Oranga Tamariki is created, controlled, and led by the Crown.⁴⁶ Claimants submit that a ‘fundamental power imbalance’ results from this asymmetrical control, as the Crown continuously fails ‘to share power and resources with Māori over the care and protection of tamariki Māori and their whānau at both structural and operational levels.’⁴⁷ They argue that this failure perpetuates a structurally racist system and is a significant cause of disparity.

Claimants point to the *Puao-te-Ata-tu* report, and express frustration with the Crown’s failure to implement that report’s recommendations for ameliorating the existing power imbalance between Māori and the Crown. *Puao-te-Ata-tu* acknowledged that ‘Maori people must be involved in making the decisions that affect

43. Document A195, pp1–2

44. Submission 3.3.34, p13

45. Ibid, p34

46. Submission 3.3.24, pp27–28

47. Submission 3.3.21, p39; transcript 4.1.8, p[19]

their future. This means direct involvement in Social Welfare policy, planning and service delivery at the tribal and community level.⁴⁸ The report called for a social welfare policy aimed at attacking and eliminating deprivation and alienation by:

- a) allocating an equitable share of resources;
- b) sharing power and authority over the use of resources;
- c) ensuring legislation which recognises social, cultural, and economic values of all cultural groups and especially Maori people; [and]
- d) developing strategies and initiatives which harness the potential of all of its people, and especially Maori people, to advance.⁴⁹

Claimants argue these concerns and recommendations are still pertinent. Solomon Tipene, a claimant on behalf of Te Rūnanga o Ngāti Hine, argues that the Crown has allowed institutional racism to continue to pervade the system since the report's release more than 30 years ago. He says 'the issues that were relevant back then, are still relevant today. The system is not working because the Government hold all the power and money.'⁵⁰

In the claimants' assessment, the Crown's retention of power and resources has led it to assume ultimate responsibility for the well-being of all children and for protecting them from harm within their homes. Thus, the child protection model is characterised by a 'reliance on state and judicial intervention in families.'⁵¹ Claimants argue that, when State care and protection systems intervene in Māori whānau and kāinga, they contribute to the breakdown of whānau and hapū rangatiratanga.⁵² They also point out that this 'paternalistic' framework – in which the Crown assumes responsibility for making key decisions affecting Māori, rather than Māori themselves – has been the public service model for decades.⁵³ Claimants again point to the *Puao-te-Ata-tu* and its acknowledgement of the Crown's foundational 'doctrine that the Pakeha knew best for the Maori'.⁵⁴ The report said:

The history of New Zealand since colonisation has been the history of institutional decisions being made for, rather than by, Maori people. Key decisions on education, justice and social welfare, for example, have been made with little consultation with Maori people. Throughout colonial history, inappropriate structures and Pakeha involvement in issues critical for Maori have worked to break down traditional Maori

48. Document A55, p 16

49. Ibid, p 26

50. Document A64, p 47

51. Submission 3.3.7, pp 9–10; Catherine Love et al, *Enhancing Tamariki and Whānau Participation in Decision Making: External Evaluation Report* (Wellington: Oranga Tamariki, 2019), p 21

52. Submission 3.3.23, p 22

53. Submission 3.3.25, p 3

54. Document A59, p 69

society by weakening its base—the whanau, the hapu, the iwi. It has been almost impossible for Maori to maintain tribal responsibility for their own people.⁵⁵

Claimants assert that, while Māori continue to be denied the opportunity ‘to meaningfully and genuinely shape the legislation involving the care and protection of tamariki Māori, in a way that expresses a tikanga and whānau approach’, the disparities will be perpetuated.⁵⁶

Claimant counsel submit that Māori have ‘[t]he right as a Tiriti partner to choose how to express their tino rangatiratanga’.⁵⁷ They say this obliges the Crown under te Tiriti/the Treaty to share power and resources so that Māori can build and maintain a ‘care and protection’ system for Māori, by Māori, and with Māori.

4.4.1.2 *The Crown’s position*

The Crown accepts that tamariki Māori and the whānau unit comprise a ‘taonga requiring protection’ and this status gives rise to the Crown’s obligations to the individual tamaiti, whānau, hapū, and iwi. Therefore, the Crown asserts, its role is to support, strengthen, and assist whānau Māori to care for their tamaiti or tamariki so that there is no need for them to be removed from their homes.⁵⁸

However, the Crown emphasises that, consistent with its Tiriti/Treaty obligations, it also has an ongoing responsibility to provide a care and protection system.⁵⁹ As we set out in chapter 1, the Crown acknowledges that Oranga Tamariki must continue to change, and that the role of Māori, hapū, and iwi organisations must continue to grow. Otherwise, the Crown accepts, the challenges that the State care and protection system has struggled to overcome for decades will simply continue, regardless of who is leading it.⁶⁰

The Crown concedes that, historically, Māori perspectives and solutions have been ignored across the care and protection system.⁶¹ Crown witness Shayne Walker shared similar views to some claimants about the lack of power-sharing, saying:

Government departments want other people involved but they want to control everything. Māori have made it clear they want to genuinely work together with Oranga Tamariki. This is not about giving iwi providers and Māori organisations heaps of pūtea (although this does help). Māori partners need to be involved in defining the needs and problems, to be centrally part of designing the strategy to solutions and sharing resources, knowledge and decision making to make it work. As Moana Jackson has said, true partnership acknowledges the right of Māori to have the power

55. Document A55, pp18, 69

56. Submission 3.3.23, p 25

57. Submission 3.3.33, p 9

58. Submission 3.3.34, p16

59. Ibid

60. Ibid, p17

61. Ibid, p18

to define, to protect and to decide. There is a real opportunity to move beyond 'commissioning relationships' to real partnerships.⁶²

The Crown submits that Oranga Tamariki needs to continue to partner and engage with Māori to deliver better outcomes for tamariki Māori.⁶³ Hoani Lambert emphasises the importance of sharing power and resources with iwi and Māori, and says:

To truly improve outcomes for tamariki and rangatahi Māori and their whānau, we need partnership which cuts across Crown agencies . . . This will mean a commitment to continuing, evolving partnership. This will mean sharing power and providing resources to iwi and Māori organisations so that they can make decisions about how they care for their tamariki and whānau.⁶⁴

Ms Moss also acknowledges the importance of Oranga Tamariki partnering with Māori:

We hear the calls from Māori that whānau, hapū and iwi must be empowered to care for their own tamariki. We can't do this alone. This problem is too big for one government agency to solve. Oranga Tamariki plays a significant part and we are working on playing our part much better. We accept the only way forward is to work in partnership with Māori and the whole of the Crown to make this real.⁶⁵

During the inquiry, claimants challenged Ms Moss to say if she believed Māori could take on the roles for which Oranga Tamariki is currently statutorily responsible. She replied that she could delegate and devolve but that she was still, in the framework of the current legislation, responsible and accountable as chief executive.⁶⁶ Ms Moss told the Tribunal that she was very committed to devolution.⁶⁷

The Crown submits that it sees 'the path forward to improving outcomes as lying in achieving the balance of kāwanatanga and rangatiratanga through partnership'. The Crown elaborates that this should enable the consequent shift of resources to iwi, hapū, and whānau so that they can support their tamariki Māori and whānau before any additional support from the Crown is needed.⁶⁸

The Crown points to changes in Oranga Tamariki's procurement and funding practices as an example of the Crown's commitment to transferring power and resources, and to 'building capacity in our partners, so that the State ultimately can have a reduced role in provision as those who are best-placed to work with

62. Document A51, p 13

63. Submission 3.3.34, p 18

64. Document A49(a), pp 5–6

65. Document A48, p 3

66. Transcript 4.1.5, p 142; doc A173(h), pp 20–21

67. Transcript 4.1.5, p 142

68. Submission 3.3.34, p 15

whānau are empowered to do so.⁶⁹ The Crown notes further that Oranga Tamariki has been working on new contracting frameworks and quality assurance processes to support ‘greater flexibility in the provision of care, the devolution of more responsibilities in care and iwi and Māori organisations to hold custody and guardianship.’⁷⁰

4.4.2 Legislative and policy coherence

4.4.2.1 *The claimants’ position*

The claimants broadly argue that Oranga Tamariki is Pākehā in its constructs and values, prioritises Pākehā worldviews (and thus places individualism over tikanga and community-based Māori values), continues to misunderstand – and fails to structurally implement – Māori worldviews concerning tamariki and whānau.⁷¹ They argue that this outlook perpetuates a structurally racist system and is a significant cause of disparity.⁷²

Dr Moana Eruera, an independent witness with whakapapa links to Ngāpuhi, Ngāti Ruanui, and Ngāti Rangiwewehi, tells us that care and protection systems have been ‘built on western knowledge, western approaches, western social and community work practices.’⁷³ Moe Milne, a claimant on behalf of Te Rūnanga o Ngāti Hine, considers that ‘the Crown’s approach to law and policy, as well as the way it is implemented, is flawed. Flawed because it is based on a Pakeha framework using Pakeha methodologies and knowledge. This kind of approach does not serve Maori.’⁷⁴ Rhonda Zielinski-Toki, who has previously worked within Oranga Tamariki and CYF, comments that, while Oranga Tamariki has attempted to change in certain superficial respects, she does not think the organisation understands tikanga Māori, nor does it have a Māori worldview:

What they have tried to do with their ‘new and improved’ policies is add them on to an institution that is, by its very nature, Pakeha and authoritarian. Western and Maori cultures are just so different, we think differently and do things differently. They have tried to rebrand the organisation with a Maori name and given it Maori policy documents, but I do not see it as being any different than CYFS was. In fact, in some ways, it is actually worse.⁷⁵

Claimants argue these Pākehā-centric policies and practices have been manifest in the care and protection system for a long time, most notably in Oranga Tamariki’s adoption of a highly individualised, child-focused policy and ‘child

69. Submission 3.3.34, p15

70. Document A49, p7

71. Submission 3.3.19, p3; submission 3.3.18, p7; submission 3.3.21, p10; submission 3.3.29, p2; doc A34, p15; doc A63, p4; doc A175(a), p16

72. Submission 3.3.19, p3; submission 3.3.18, p7; submission 3.3.21, p10; submission 3.3.29, p2; doc A34, p15; doc A63, p4; doc A175(a), p16

73. Transcript 4.1.7, p[67]

74. Document A63, p4

75. Document A65, p6

protection model' of practice. These orientations, the claimants argue, place 'the wellbeing and best interests of the relevant child as the first and paramount consideration' and regard the child as distinct, and able to be disconnected from the whānau – a viewpoint that is philosophically at odds with a Māori world view.⁷⁶ Claimants assert this paramountcy principle for 'child welfare' decontextualises and individualises tamariki, and is based on a western model of individual rights.⁷⁷

Denise Messiter says that the 'view upheld by the State is a child is an individual whose rights from a colonial perspective supersede tamariki ancestral roles, responsibilities, and accountability to whānau, hapu and iwi'.⁷⁸ Similarly, Amadonna Jakeman asserts 'The Oranga Tamariki system is founded on an ideology that taking tamariki away from their whanau who are deemed to be incapable of caring for them is the best solution. This is not our ideology'.⁷⁹

Claimants argue that Oranga Tamariki's lack of a deep nuanced understanding of the centrality of wider whānau and hapū networks to Māori well-being – as well as its structural ignorance and racism – lie at the heart of the problems that have prompted this inquiry.⁸⁰ As Moe Milne told us, Oranga Tamariki's continuing mono-cultural orientation has rendered its attempts to incorporate aspects of a Māori worldview tokenistic and ineffective:

Under the current approach, Māori concepts and kupu are dropped into the legislation, strategies, and practice manuals. It gives the impression that Māori principles are valued. But it is really just a process of 'Māorifying' Pākehā ideologies – attempts to adapt Māori values to fit within the paradigm of a society and system founded on Western philosophies. Oranga Tamariki is, quite literally, a Pākehā institution with a Māori name. The only people that benefit from this approach are Pākehā.⁸¹

Claimants endorse the view of *Puao-te-Ata-tu*, which they say remains pertinent to the challenges facing the care and protection system today. The report argued that the Māori child should not be viewed in isolation, or even as part of a nuclear family, but as a member of a wider kin group or hapū community that has traditionally exercised responsibility for the child's care and placement. The report said, 'at the heart of the issue is a profound misunderstanding or ignorance of the place of the child in Māori society and its relationship with whānau, hapū, iwi structures'.⁸²

Claimants echo the *Puao-te-Ata-tu* findings in their explanations of Māori understandings of the well-being of tamariki and their place within te ao Māori. In his evidence, Waihoroi Shortland says the starting point for the Māori worldview

76. Document A46, pp 15–16

77. Submission 3.3.25, p 8; submission 3.3.32, pp 29–30; doc A148, p 5

78. Transcript 4.1.7, p [111]

79. Document A66, p 5

80. Document A33, pp 7–10

81. Document A63, pp 4–5

82. Document A55, p 7

is ‘he tamaiti, he taonga’; every child is precious, every child is a taonga of their entire whānau, hapū, and iwi – and as such tamariki [are the] the responsibility of all of them.⁸³ He goes on to explain that whakapapa connects tamariki to their parents, to their tūpuna, to the atua, and to the spiritual world. Through whakapapa, tamariki are endowed with attributes fundamental to their cultural, physical, and spiritual well-being such as mana, tapu, wairua, and mauri. Further and importantly, as Mr Shortland notes, rangatiratanga is the inherent birthright of all tamariki Māori. Claimants widely share his conviction that, in order for tamariki Māori to thrive, whānau and hapū need to be involved in the life of the child, as ‘The physical, social and spiritual wellbeing of a Māori child is inextricably related to the sense of belonging to a wider whānau group.’⁸⁴

Claimants also argue that the history of State care, in particular the care and protection system’s predilection for institutionalising and otherwise removing children from their homes, has estranged tamariki from their whakapapa and Māori environments. This has left ‘a legacy of cultural disconnection which has created successive generations of young people damaged by the experience they endured.’⁸⁵ Claimants emphasise how drastically life outcomes can change if the Crown intervenes and tamariki are raised without connection to their culture, and the loss of identity that may result. In hearings, witness Helen Leahy, the chief executive of the Whānau Ora Commissioning Agency for the South Island, notes the comments of the Youth Advisory Panel to the 2015 Expert Panel:

[They] told us, ‘Identity is not just where the child comes from, it is not just what the culture is, it is everything that makes them who they are.’

So why is this so important? I think it cuts to the heart of this inquiry.

It represents the philosophical disjunct between what some may call the ‘child rescue aspect’ and mana tamaiti, w[h]akapapa and w[h]anaungatanga. It is that notion of challenging the fact that a child is placed with a mother or placed with a foster caregiver and then the Western philosophy of attachment and bonding prevents that child being reunited with their w[h]ānau.⁸⁶

Claimants say that the care and protection system must be governed and operated by Māori, and that it must not be a government department with a Māori name. They say it should be founded in a Māori worldview, in mātauranga and tikanga Māori, and indigenous and other knowledges and practices congruent with it.⁸⁷

83. Document A32, pp 2–4

84. Document A55, p 30; submission 3.3.7, pp 9–10

85. Document A33, p 7

86. Transcript 4.1.4, pp 104–105

87. Document A44, p 3; doc A45, p 4; transcript 4.1.4, p 13; transcript 4.1.7, p [661]; transcript 4.1.8, p [72]; submission 3.3.2, p 2; submission 3.3.31, p 59; submission 3.3.16, p 9; doc A44, p 3

4.4.2.2 The Crown's position

As discussed previously, the Crown accepts that it has an obligation to 'support, strengthen and assist whānau Māori to care for their tamaiti or tamariki to prevent the need for their removal from home if possible'.⁸⁸

The Crown concedes that, historically, Māori perspectives and solutions have been ignored across the care and protection system.⁸⁹ As part of this neglect, the Crown acknowledges it has failed to fully implement the recommendations of *Puao-te-Ata-tu* – which it agrees remain relevant – in a comprehensive and sustained manner. The Crown recognises this failure has adversely affected outcomes for tamariki Māori, whānau, hapū, and iwi, and also undermined Māori trust and confidence in the Crown and its willingness and ability to address disparities.⁹⁰

In her evidence, Ms Moss emphasises that '[a]gainst the intentions of *Puao Te Ata Tu*, it is clear that Oranga Tamariki has made some progress, though arguably not fast enough. There are a range of areas where significantly more progress is needed'.⁹¹

Other Oranga Tamariki senior officials also recognise that a deficit of cultural knowledge among its staff continues to hinder the organisation. However, Grant Bennett, chief social worker and deputy chief executive of professional practice at Oranga Tamariki, told us that work is underway in this area:

Oranga Tamariki has had the significant task of building a system which empowers and supports social workers to see the child in the context of whānau, hapū and iwi, to prioritise the relational, human aspects of social work and focus on both the existing issues which often drive interaction with the care and protection system and longer-term outcomes. Absolutely, we have more work to do. However, we are seeing some positive areas of change across country that we must build upon.⁹²

He also noted Oranga Tamariki's steps to integrate Māori concepts into its way of working:

For tamariki and whānau Maori, hapū and iwi, the trauma associated with the placement of a child into our custody may be linked to cultural alienation and discrimination and the impact of historical and inter-generational trauma. Our practice guidance identifies whānau, hapū and iwi as a source of resilience, recovery and wellbeing for tamariki Māori. The Oranga Tamariki Act 1989, our Māori cultural framework, our practice standards and practice guidance describe a way of working that is informed by the principles of mana tamaiti, whakapapa and whānaungatanga.⁹³

88. Submission 3.3.34, p 16

89. Document A184, pp 1–2

90. Submission 3.3.34, p 18

91. Document A195, p 3

92. Document A50, p 3

93. Document A10, p 3

4.4.3 Notify–investigate model

Oranga Tamariki, in common with care and protection systems across the western world, operates according to a notify–investigate model. This means the organisation receives reports of concern about children and families from professionals (such as police, medical staff, and teachers), as well as the general public. Under section 17 of the Oranga Tamariki Act 1989, Oranga Tamariki is then obligated to ‘commence an investigation . . . into the matters contained in the report to the extent that an investigation is necessary or desirable’. In the 12-month period from July 2019, Oranga Tamariki received over 80,000 reports of concern.⁹⁴ Chapter 3 of this report sets out more fully the process governing how Oranga Tamariki responds to such reports (see section 3.7.3).

4.4.3.1 The claimants’ position

Claimants broadly support the analysis of the Crown’s notify–investigate model for child protection put forward by witnesses to this inquiry, Associate Professor Emily Keddell and Kerri Cleaver. They told us:

The nature of the institutional arrangements we have in place to manage children protection are also implicated in disparities. A ‘notify–investigate’ system based on a ‘protectionist’ orientation, operationalised through a central statutory agency, reliant on surveillance of the population, and a need to both triage, then assess for risk, lends itself to the reproduction of social disparities. This was something noticed very early in the creation of similar ‘protectionist’ systems worldwide. This institutional structure creates both an extreme power differential, and a reliance on assessing for risk that draws the focus and resources of the system towards this task, and away from helping, support, or power sharing. As the populations in contact are disproportionately living in poverty and racialised, this process of assessing, which relies on making subjective judgements under poor conditions (of uncertainty, vague definitions, value conflicts, time pressure, often with poor information quality) is ripe for the expression of biases as described. This is especially the case in a colonised and neoliberal context where social inequities and racism remain structuring features.⁹⁵

Associate Professor Keddell and Ms Cleaver identify ‘instrumental’ biases as including:

- ▶ exposure bias (poorer neighbourhoods are more exposed to individuals and agencies who may choose to notify the child protection system);
- ▶ visibility bias (certain groups are targeted because they are a visible minority); and
- ▶ surveillance bias (heightened surveillance experienced by Māori in general, and for particular whānau who are well-known to care and protection staff).⁹⁶

94. Document A169, p 496

95. Document A90, p 19

96. Ibid, pp 10–15

Claimants support Associate Professor Keddell's arguments that the notify–investigate model reproduces social inequities and compounds societal racism and exposure bias at every decision point. Counsel for claimants submit that the Crown, in maintaining this model, despite evidence that it perpetuates and even worsens inequities, has breached its duty to actively protect Māori rangatiratanga over their kāinga. This breach, they say, is a cause of the significant and persistent disparity in the number of Māori and non-Māori tamariki in State care.⁹⁷ Counsel submit that a paradigm shift must be implemented to move from the notify–investigate model to a preventative model, with a genuine transfer of power and resources to a 'by Māori for Māori' approach being a prerequisite of any such model.⁹⁸

4.4.3.2 The Crown's position

The Crown submits Oranga Tamariki does not operate in isolation and that complex factors arising before children enter the care and protection system are major drivers of the disparity.⁹⁹

The Crown notes that existing structural racism within the care and protection system reflects broader society and means more tamariki Māori are reported to it than non-Māori children. At the same time, the Crown accepts the evident impact of structural racism on the outcomes and experiences of tamariki and their whānau means that the Crown should have identified the need to tackle structural racism head-on when it established Oranga Tamariki.¹⁰⁰ The Crown provides evidence on the strategies it has implemented to date in order to address structural racism; these will be discussed further in subsequent chapters on practice.

Acknowledging the broader context within which Oranga Tamariki sits, the Crown notes structural racism in the care and protection system can only be tackled through a broad cross-government approach. As such, in the Crown's account, Oranga Tamariki is working across government to drive collaboration and it will continue to push and support change beyond the care and protection system.¹⁰¹

4.4.4 Cultural competency

4.4.4.1 The claimants' position

Claimant counsel assert that there is a broad lack of cultural competency and poor understanding of tikanga Māori within Oranga Tamariki. Claimants say that this paucity of genuine cultural understanding reflects and perpetuates a structurally racist system, which contributes to poor practice and to the consistently disparate numbers of Māori and non-Māori tamariki being taken into care.¹⁰²

97. Submission 3.3.26, p 5

98. Ibid, p 56

99. Submission 3.3.34, p 21

100. Ibid, p 18

101. Ibid, pp 3, 28

102. Submission 3.3.3, p 4; submission 3.3.4, p 34

Some claimants consider that Oranga Tamariki's lack of cultural competency reflects a continued under-investment in cultural competency training for staff.¹⁰³ Some argue that cultural competency of the whole workforce is unattainable under the current Pākehā system and structure.¹⁰⁴

Counsel for Jayell Smith identify not only a lack of cultural competency but also allege a complete disregard of it by the Crown. Further, they argue that what little tikanga has been allowed to exist within Oranga Tamariki has been not only tokenistic, but so minimal and meaningless as to be condescending and belittling.¹⁰⁵ Likewise, claimant Paora Moyle undertook her own studies of Oranga Tamariki for her PhD; her interviewees described Oranga Tamariki social workers as 'inexperienced and culturally ignorant' and 'narcissistic gas-lighters'.¹⁰⁶

Rhonda Anne Tautari, a social worker from Ngāpuhi, Ngāti Hine, and Ngāti Maniapoto, says that in her view the disparate number of Māori and non-Māori tamariki being taken into care is due to a lack of cultural support, understanding, or sensitivity from the outset for whānau Māori. She notes that social workers often do not understand tikanga, mana, or how to engage in a respectful way with Māori, and observes that a lack of proper training given to social workers when dealing with young Māori mothers manifests in poor communication, and at times, racist remarks or behaviour. She also shares that in her view, Oranga Tamariki social work practice is through a western lens that does not fit 'our Māori mothers'; as a result, she says many mothers feel belittled, judged, and criticised.¹⁰⁷

The interim report *Modernising Child, Youth and Family* emphasises that cultural competency is the key to understanding that each child's identity is connected to their culture.¹⁰⁸ Where cultural competency is lacking, the safety needs of children are not being met, claimants say. In their joint brief of evidence, witnesses Brent and Huia Swann give evidence of their experiences as counsellors and supervisors supporting whānau Māori.¹⁰⁹ They identify cultural gaps in Oranga Tamariki's practices, and say that social service practitioners regularly fail to act in culturally appropriate ways. For example, they cite social workers' regular use of dismissive and marginalising expressions such as 'they're all the same' and '[t]hose kids, they've got no chance' as reflecting a negative and culturally insensitive mindframe within the organisation.¹¹⁰ They also draw attention to what they call '[p]ractices of diminishment'. These include writing the 'faults' of parents on the whiteboard during family group conferences for all to see. The Swanns note that Oranga Tamariki responds in such inappropriate ways because 'there are not enough people who are competent in this area to deliver the services needed by

103. Submission 3.3.24, pp 50–51

104. Submission 3.3.32, p 40

105. Submission 3.3.29, p 1

106. Document A38, pp 9–10

107. Document A43, pp 4–5

108. Document A181, p 140

109. Document A103, pp 4–6

110. Transcript 4.1.7, pp [30], [34]

Māori'. As long as the agency lacks such competency, claimants assert that Oranga Tamariki will be actively prevented from providing the best service for Māori.¹¹¹

Claimants further argue that Oranga Tamariki staff are unable to understand and implement tikanga Māori due to this general lack of cultural competence. The Swanns noted several situations where tikanga routinely fails to be observed, such as where social workers do not:

- acknowledge they are waewae tapu (someone who has not been to a particular marae or place before);
- acknowledge they are manuhiri (a guest);
- begin hui with mihimihi or karakia; and/or
- remove their shoes when entering whānau homes.¹¹²

In addition to these failures, Isobel Peihopa – a community worker, social worker, and lay advocate under the Oranga Tamariki Act 1989 – observed that 'tauiwi [social workers] are constantly trying to push their practices onto Māori, as well as telling Māori how to abide by their own tikanga'. She said rigid professional practices ran counter to the fluidity of tikanga, which cannot easily be confined to a cultural competency checklist. Indeed, tikanga is about the ability to 'adapt . . . to the circumstances to get the job done', she argued. Such adaptation is in contrast to the 'kaituhi who need process on paper to get something done'. As asserted by Peihopa, tikanga does not comprise a set of guidelines for Māori, but is a way of life. She went on to say that Oranga Tamariki teaches tikanga guidelines to its social workers as practitioners, not as people. This is problematic, she argued, because Māori do not separate their identity as social workers from their identity as people, stating that 'they are one in the same'. Peihopa suggests that the lack of knowledge of tikanga should be addressed by everyone at Oranga Tamariki, including the leadership team and providers, in order for the agency to become 'genuinely culturally competent'.¹¹³ Claimant counsel submit that adequate cultural training is integral to providing consistent practice, ensuring that children are safe and cared for in all respects.¹¹⁴

4.4.4.2 *The Crown's position*

The Crown acknowledges that a lack of previous investment in cultural competency has contributed to inconsistent and variable practice across staff. However, it says Oranga Tamariki is improving the organisation's cultural competency by increasing workforce training and recruiting more culturally competent staff.

Nicolette Dixon, a witness to the inquiry who gave evidence of her experiences as an Oranga Tamariki social worker, concedes historical under-functioning within Oranga Tamariki and its predecessors in the area of cultural competency training.¹¹⁵ However, she describes the agency's efforts to address this deficiency

111. Ibid, pp [30], [33]–[34]

112. Ibid, p [31]

113. Ibid, pp [65], [73]

114. Submission 3.3.31, p 31

115. Ibid, p 22

with a Māori cultural framework that aims to embed Māori-centred social work and administrative practice.¹¹⁶ As this framework was introduced in 2018, it will be discussed further in chapter 5 of this report, which addresses the extent to which legislative policy and practice changes since 2017 have affected the disparity between Māori and non-Māori tamariki entering care and also te Tiriti/the Treaty compliance of the Crown's care and the protection system.

4.4.5 Variable practice

4.4.5.1 *The claimants' position*

Claimants assert that the various sites (or field offices) within Oranga Tamariki are plagued by inconsistent culture, workload, site size, and social worker practice.¹¹⁷ Claimants say that this variability ultimately prejudices Māori, as it allows further scope for poor practice and inconsistent decision-making fueled by conscious or unconscious racism.¹¹⁸ They argue that these poor practices and inconsistent decisions further erode Māori trust in Oranga Tamariki, and perpetuate or compound the discrepant rate at which Māori and non-Māori tamariki are taken into care.¹¹⁹

4.4.5.1.1 *Site culture*

Claimants allege that the culture within Oranga Tamariki varies to a worrisome degree between sites. They say that this contributes to differences in practice, particularly in frontline decision-making, and produces (or has the potential to produce) inconsistent and prejudicial results for tamariki Māori.

Associate Professor Keddell considered the influence of site culture on social worker decision-making within Oranga Tamariki in her research article 'Networked Decisions: Decision-Making Thresholds in Child Protection'. Social workers in the study observed that some sites made more concerted efforts to keep tamariki with their whānau, or were more committed to engaging with whānau, than others.¹²⁰ Social workers said that site culture could be influenced by several factors, including whether social workers lived within the community they served. Where this was the case, Oranga Tamariki's role was perceived to be more about working with families to preserve them, rather than about trying to 'fix' families through uplifting children. Site workload was also identified as a driver of site culture. Where sites had heavy workloads, site managers and practice leaders exercised higher 'personal thresholds' as to whether marginal or low risk cases would be actioned further. This drove site culture.¹²¹ As one social worker observed:

from all across all three sites I've worked at I get to the same decision through the same pathway using the same set of things that have influenced me . . . [i]t's more about the different supervisors, different practice leaders, different managers, across

116. Document A174, p 22

117. Document A24, p 53; doc A43, pp 5, 7; submission 3.3.31, p 31

118. Submission 3.3.27, pp 19, 24

119. Document A38, p 10; doc A90, p 16

120. Document A95, p 13

121. Ibid, pp 13–14

the sites as to whether or not that's something they would accept within their site . . . down in the (different) office . . . some ongoing low-level family violence . . . the team down there would have more time and capacity . . . and it's just like okay let's have a family whānau agreement, or let's have an FGC [family group conference]. . . . That probably wouldn't be the decision that would be made here . . . Send it off to FGC here, okay why are you sending it to FGC, what [do] you think the outcome should be? It's just like why are you creating more work?¹²²

Claimants make clear, however, that irrespective of the causes, significant site culture differences do exist. Claimant counsel broadly submit that these differences interfere with decision-making consistency, and may compromise outcomes for tamariki and their whānau. Counsel conclude:

[t]he inconsistency in practice amongst Oranga Tamariki staff cannot be underestimated as it has a huge bearing on Māori tamariki . . . How one social worker may interpret a scenario compared to another social worker can determine whether action is taken to uplift a child.¹²³

However, some witnesses gave evidence of the benefits of culture variability across sites (or at least, the benefits of being able to make local variations to site culture). Katie Murray, the chief executive of Waitomo Papakāinga Services, gave evidence of her working relationship with three Māori organisations in the far north – Te Whare Ruruahu o Meri, Ngati Kahu Health and Social Services, and Te Rarawa Runanga – which had influenced site culture at their local Oranga Tamariki office in Kaitiaki.¹²⁴ This collaboration ('the collab') Ms Murray explains, was set up as a response to the organisations' collective concerns about Māori whānau within government systems. Over time, and in partnership with Oranga Tamariki, 'the collab' has developed an alternative model for working with whānau who have been referred to Oranga Tamariki and need support. Ms Murray describes how this involves a new approach to managing reports of concern. Each day, Oranga Tamariki holds a meeting with 'the collab' to identify any whakapapa links within the report of concern, to identify if any of the organisations have previously worked with the whānau, and to decide which organisation will approach, work with, and support that whānau moving forward. The new model, says Ms Murray, has had 'a positive impact' on how reports of concern are dealt with, and the overall outcomes for tamariki and whānau.¹²⁵

The three organisations also have an arrangement with the police, where they review the police's daily lists of family violence reports in which children were present, and 'triage' those reports. Ms Murray notes that, while Oranga Tamariki is not part of those daily hui, the foundation of trust and respect that the organisations

122. Ibid, p 14

123. Submission 3.3.31, p 31

124. Document A91, p 2

125. Ibid, pp 2–4

have built with both the police and Oranga Tamariki ‘has had a direct impact on the number of Maori children going into state care in the far North.’¹²⁶

Echoing Ms Murray’s evidence, some social workers in Associate Professor Keddell’s study also questioned whether consistent site cultures should be regarded as the ideal. Several noted that differences between sites were not only inevitable, but could reflect positive individualised decision-making, and tailored responses to the different priorities and landscapes of specific communities. As one social worker remarked:

on [the] one hand, having similar outcomes for families in a similar situation, that sounds like a good idea . . . but then you also have to think well how similar can two families really be . . . I don’t know if there’s anything that can be done about different sites making different decisions . . . sometimes that’s what we want to have[,] these different decisions coming from different sites because each area is different.¹²⁷

While claimants and witnesses may diverge in their views of the desirability of variable site cultures, they broadly agree on two matters; they recognise the variability of site culture across Oranga Tamariki, and acknowledge that these differing cultural norms and values can, and do, affect social-worker decision-making.¹²⁸ Moreover, apart from certain notable exceptions where claimants acknowledge site variability has benefited Māori, they submit that site variability is overall prejudicial to Māori and contributes to the disparate rates at which Māori and non-Māori are taken into care.

4.4.5.1.2 *Social worker caseloads and site size*

Claimants and witnesses to the inquiry argue that high caseload allocation and case complexity continue to ‘adversely affect the care and protection that Oranga Tamariki provides’ to tamariki Māori.¹²⁹ They say unacceptably high caseloads mean social workers have less time and mental capacity for making consistent, fully-informed decisions on each case. Claimants and witnesses also highlight that unacceptably high caseloads hinder the ability of social workers to establish meaningful relationships with whānau, understand the context of each case, and support and empower whānau to care for their own tamariki.¹³⁰ These factors, they say, contribute to the disparate rates at which Māori and non-Māori tamariki are taken into State care.

In our hearings, Children’s Commissioner Judge Becroft and Assistant Māori Commissioner for Children, Glenis Phillip-Barbara, shared claimant concerns regarding caseloads and advocated for caseload ‘caps’:

126. Document A91, p 4

127. Document A96, p 32

128. Document A90, p 15

129. Submission 3.3.20, p 52

130. Transcript 4.1.9, p [27]

when case loads aren't capped, when social workers are under pressure, when they get into a situation too late it is so easy to retreat to the Child Rescue Model where families are pathologized and assessed, urgent decisions are made, sometimes without notice and in the name of wellbeing safety is prioritised over all else without exploring other options and children are removed. And the assumption is with an early removal that there is no going back.¹³¹

The claimants also acknowledge their concerns have already been canvassed for years and in numerous reports, including the 2015 Expert Panel Review, the 2020 Whānau Ora report, the 2020 chief ombudsman's report, and a 2018 Public Service Association report on Oranga Tamariki casework.¹³²

In particular, counsel for claimants refer to the 2018 Public Service Association report and its finding of a potential correlation between high caseloads and negative care and protection outcomes:

high caseloads, complex cases, and constant crisis management meant they didn't have enough time to do the work to the quality that they would like. Many also reported that paper work and reporting systems were excessive and difficult and detracted from the time they would like to spend with children and families.¹³³

Associate Professor Keddell's evidence also supports claimant concerns about this correlation. In one of her research reports, respondents (comprising both statutory child welfare social workers and others from non-governmental organisations) commented that where workload was too intense, there was less opportunity to make consistent and clearly thought-through decisions. In such circumstances, the decision-making process was prone to becoming random and variable. In addition, decisions were 'less-discussed' with other people, meaning that it was unlikely quality information underpinned those decisions. With less discussion and less quality information, it also became less likely practitioners would have the opportunity to engage meaningfully with whānau, further affecting overall process.¹³⁴

In their evidence, Associate Professor Keddell and Ms Cleaver note that workload levels also affect the frequency of checks for bias (their views on the nature of bias are set out in more detail below). Where checks on bias are less frequent, the outcomes of decisions are more likely to be variable.¹³⁵ Ultimately, this shapes disparities for tamariki Māori.

131. Transcript 4.1.4, p 66; transcript 4.1.9, p [27]

132. Submission 3.3.20, p 55; doc A30, p 11; New Zealand Public Service Association, 'Oranga Tamariki Casework and Workload Survey' (Wellington: New Zealand Public Service Association, 2018), p 1

133. New Zealand Public Service Association, 'Oranga Tamariki Casework and Workload Survey', p 9; submission 3.3.20, p 54

134. Document A96, p 19

135. Document A90, p 15

4.4.5.1.3 Social worker power, discretion, and decision-making variability

Claimants say that social workers exercise wide discretion when wielding fundamentally intrusive legislative powers, such as section 78 orders to uplift tamariki.¹³⁶ They state that this wide discretion is highly subject to the effects of cognitive bias. Claimant counsel submit that the combination of significant powers, wide discretion, and potential bias results in highly variable decision-making. It also fuels a toxic power imbalance between social workers and whānau who come to Oranga Tamariki's attention. All these factors prejudice Māori and exacerbate the discrepant numbers of Māori and non-Māori being taken into care, claimant counsel argue.

Claimant counsel submit that under the Oranga Tamariki Act 1989, outcomes for tamariki Māori rely heavily on the discretion of frontline staff, particularly social workers.¹³⁷ The claimants express concern at the extent of this discretion and its potential consequences. They note, for example, that once Oranga Tamariki receives a report of concern, it is required to arrange an investigation if it appears 'necessary or desirable', but what constitutes 'necessary or desirable' is broadly discretionary.¹³⁸ Similarly, while Oranga Tamariki is obligated to progress an investigation if it 'reasonably believes that the child or young person is in need of care or protection', Oranga Tamariki social workers have discretion to form a 'reasonable belief' as to whether the child meets the definition of being in need of care and protection under the Act.¹³⁹ Moreover, claimants note that the Act's definition is extremely broad, encompassing actual or likely physical, emotional, or sexual harm where the child's development is impaired or neglected in a serious manner, and where the child's parents or guardians are unwilling or unable to care for them.¹⁴⁰ Claimants further note that the Act does not define standards of harm, ill-treatment, abuse, or neglect – adding a further element of subjectivity and variability to social workers' decision-making.

Claimants say that the wide discretion social workers have at several decision-making junctures again provides fertile ground for cognitive biases to exacerbate inconsistent decision-making.¹⁴¹ In Associate Professor Keddell's study of the causes of decision-making variability, she discusses how social workers' biases can influence decision-making in respect of whānau. She identifies three main forms of bias:

- *unconscious bias*: where unconscious or preconscious racial stereotyping may be automatically activated without the knowledge of the individual, even if it is contrary to that person's conscious belief systems;

136. For the agency's general guidance to notifiers on how to identify and respond to abuse in a family, see 'Identify Abuse', Oranga Tamariki, <https://perma.cc/EKR4-9ZB4>, last modified 25 June 2020.

137. Submission 3.3.26, p 25; submission 3.3.20, p 75

138. Oranga Tamariki Act 1989, s17

139. Ibid, ss17(2), 14

140. Ibid, s14; doc A69(b), p [10]

141. Document A17, p 10; doc A144(a), p 14; transcript 4.1.7, p [71]

- *confirmation bias*: where an initial assumption is used to direct and filter further searches for information, leading to the initial hypothesis being ‘confirmed’, despite other explanations being equally likely; and
- *cultural bias*: where dominant ways of understanding parenting, family life, and relationships are imposed onto people from non-dominant groups, pathologising alternative ways of parenting.¹⁴²

In her analysis, Associate Professor Keddell further notes that unconscious bias may result in tamariki Māori being considered inherently more at risk of abuse and neglect, and that confirmation bias may ‘lead practitioners to searching for factors to confirm their initial assumptions, further compounding the effects of ethnic bias’.¹⁴³ Claimant counsel therefore submit that the combined impacts of social workers’ wide discretion under the Act, and decision-making fallibilities arising out of bias, lead to highly variable decision-making. They point out that the Expert Advisory Panel Report of 2015 partly attributed the over-representation of Māori children in the system to ‘Māori children and young people [being] twice as likely to be notified to CYF compared to the total population. Potential causes of this over-representation include . . . conscious and unconscious bias in the system’.¹⁴⁴

Claimants acknowledge that the Crown has implemented several monitoring and accountability mechanisms to mitigate (in part) the joint impacts of wide discretion and bias in social worker decision-making. However, they argue that these measures (discussed further in section 4.4.7) are insufficient to curb these drivers of variable decision-making and thus reduce the disparate rates at which Māori and non-Māori are taken into care.

Finally, claimants say that the apparent acceptance of highly variable decision-making within Oranga Tamariki can, at times, create power imbalances between social workers and whānau who come to the agency’s attention. Rhonda Anne Tautari notes the effect of imbalanced power dynamics in the social worker and Māori client relationship. There is, she says:

a power imbalance that exists between social workers and young mothers . . . social workers instruct, dictate and judge often leaving young mothers left feeling they have little or no ability or strengths to make change. They often feel they have no voice. They do not actually understand what is happening to them and they feel overwhelmed and frustrated.¹⁴⁵

4.4.5.2 The Crown’s position

While the Crown does not use the term ‘site variability’, counsel did address to some degree many of the issues claimants raised about differences between sites and their effects on decision-making, culture, and workloads. The Crown agrees

142. Document A98, p 2

143. Ibid, p 2

144. Document A24, p 7

145. Document A43, pp 3–4

that consistency in decision-making and service delivery are integral to providing safe services to tamariki.

The Crown accepts that there is a ‘continuum’ from poor to excellent practice within Oranga Tamariki and submits that efforts are being made to ensure that best practice standards are consistently met.¹⁴⁶ Grant Bennett, chief social worker at the time of the inquiry, provided evidence on the mechanisms in place to strengthen core social work practice and to identify and reduce potential bias that may result in inconsistent practice. He says Oranga Tamariki introduced professional supervision standards in 2018 to supplement and build upon existing practice standards. He recognises these mechanisms are important for ensuring competent and capable practice when working with tamariki and whānau Māori.¹⁴⁷

As noted already, the Crown concedes there is institutional bias within Oranga Tamariki and that the culture of the organisation needs improvement.¹⁴⁸ Gráinne Moss, as part of her concessions on behalf of the Crown, states that Oranga Tamariki is currently improving its understanding of biases in the system.¹⁴⁹ The Core Practice Standards also address bias: practitioners are instructed to ‘understand [their] own biases when working with whānau and caregivers, and consider ways to adjust the power dynamic in these relationships so they are supportive rather than threatening’.¹⁵⁰

The Crown also accepts that social worker caseloads affect the consistency of good practice. Ms Moss acknowledged that social workers often have ‘far too much’ of a workload.¹⁵¹ Mr Bennett, in his evidence, accepted that larger workloads, coupled with increasingly complex cases and whānau needs, have made the practice environment more difficult for social workers: ‘Inevitably this has disproportionately affected Māori because of the over-representation of Māori’.¹⁵² Mr Lambert also echoed these points in hearings, and said that previously, Oranga Tamariki social workers have had ‘extremely high caseloads and that was impacting the quality of time that they were able to spend working with Māori families’.¹⁵³

The Crown also accepts historic underinvestment in social work has contributed to lack of consistent practice. Ms Moss described efforts to counter this historic underinvestment, stating Oranga Tamariki has:

- ▶ secured significantly more resourcing for social work, which means they have been able to reduce workloads, including caseloads, and improve technological support for the frontline;
- ▶ addressed decades of poor pay and the devaluing of social work;
- ▶ improved induction for new social workers and;

146. Submission 3.3.34, pp 19–20; doc A50, p 10; doc A195, p 6

147. Document A21, p 5

148. Document A49, p 10

149. Document A195, p 5

150. Document A174(a), p 93

151. Transcript 4.1.5, p 152

152. Document A50, p 11

153. Transcript 4.1.9, p [206]

- invested in better training for supervisors, so that they can continue to coach new social workers and provide consistent supervision across sites.¹⁵⁴

4.4.6 Family group conferences

As we explained in chapter 3, the family group conference process allows the child and members of their whānau, hapū, and iwi to meet with social workers and other involved professionals. They come together to discuss and create a legally binding plan to ensure the safety and well-being of the child.

4.4.6.1 *The claimants' position*

Claimants expressed concerns about what they describe as poor family group conference practices and processes. Counsel for claimants submit that conference processes perpetuate structural racism, lack tikanga, and do not assess Māori according to their own worldview. They say the conferences often elevate the position of Oranga Tamariki – as plans are often pre-determined beforehand – and whānau are left disempowered, uninformed of the process, and ‘manipulated’ into agreeing to processes and decisions.¹⁵⁵ Claimant counsel also assert that the outcomes of conferences are often contingent on the social worker overseeing the conference and the extent to which they are willing to listen to whānau through the decision-making processes, or instead doggedly pursue a pre-determined outcome.¹⁵⁶

Paora Moyle argues that ‘along with the lack of tikanga Māori, and the misuse of the FGC [family group conference] to forward the social worker’s agenda are all elements that disempower whānau and erode the quality of the FGC.’¹⁵⁷

Claimant Rhonda Anne Tautari also reflects on how family group conferences can be disempowering. She argues that Oranga Tamariki staff often fail to invest time into building relationships with whānau, and fail to invest time into informing whānau of the family group conference processes.¹⁵⁸ She says she has witnessed whānau become confused, frustrated, upset, and unwilling to cooperate due to these ‘fundamental deficiencies’. The best outcomes are achieved, she says, when Oranga Tamariki ‘take[s] the time and effort to hui with whānau before the FGC. In that way relationships are formed; whānau are fully briefed, and they know what to expect – they do not feel ambushed at the FGC.’¹⁵⁹

In hand with whānau being insufficiently informed, claimants also argue that Oranga Tamariki social workers often go into family group conference processes with pre-determined plans, which they expect whānau will eventually comply

154. Document A195, p 8

155. Document A144, p 9; submission 3.3.16, p 10; submission 3.3.20, pp 24–28; doc A42, p 6; submission 3.3.29, pp 5–8; submission 3.3.31, p 19; submission 3.3.32, pp 27, 43–44; submission 3.3.21, pp 40–41

156. Submission 3.3.32, p 27

157. Document A38, p 9

158. Document A43, p 9

159. Ibid

with. Denise Messiter, a claimant on behalf of Te Whāriki Manawāhine o Hauraki, argues this point and says that Oranga Tamariki staff make decisions about what is in the best interests of tamariki based on the information they have – accurate or not – prior to the family group conference. She continues:

whānau participate in these legislated processes without being fully briefed or aware of what their rights are. [N]onetheless they are expected to make life changing decisions for their tamariki based on what the State believes is dysfunctional and deficit in the life of the tamariki.

Whānau strengths knowledge, protective factors and lived experiences are given little if no credence.¹⁶⁰

Paora Moyle also adds that family group conferences are largely ‘rubber stamps’ for removal decisions of social workers, and that they are

NOT the wonderful ‘Māorified’ process that is currently being flouted across social work (nationally and internationally) as saving Māori children. . . . [They are] responsible for decimating many whānau who are forced to navigate anti-whānau child protection processes.¹⁶¹

Many claimants share their own personal experiences with family group conferences to highlight the poor and often manipulative practices of Oranga Tamariki, and the detrimental impacts these processes and practices have on their whānau.¹⁶²

Counsel for claimants submit that family group conference processes and practices perpetuate structural racism and Crown paternalism. They thus breach Tiriti/Treaty guarantees to Māori of tino rangatiratanga by taking away their decision-making powers over their tamariki and often diminishing their mana, claimants say. They request the Tribunal to recommend that all family group conferences involving Māori children are run by Māori.¹⁶³ As claimant Hera Clarke-Dancer explained:

FGCs can sometimes be problematic for whānau. The heavy hand really of a coordinator is a real thing. The heavy hand of law and in many cases do not serve the purpose for which they were intended. FGCs processes and execution are less focused on the mokopuna and more inclined to listen to the voices of the professional stakeholders, teachers, nurses, psychologists, et cetera et cetera, they cause whānau to feel whakamā and resist attending.

FGCs need a new direction and leadership. They need facilitators who do not have to be social workers or formal social workers but could work alongside OT workers to provide legislative requirements. This could be open to Māori community leaders

160. Transcript 4.1.7, p [114]

161. Document A38, p [8]

162. Document A168, p 9; doc A103, pp 4–5; transcript 4.1.7, pp [93]–[101]

163. Submission 3.3.20, p 28

who can communicate with the whānau in a way that whānau will understand. Māori should lead the FGC process, I believe this is practical and achievable in the short-term outcome.¹⁶⁴

Some claimants also call for the family group conference process to be completely ‘overhauled’ to ensure whānau are empowered to make decisions that reflect their own values and worldviews.¹⁶⁵

4.4.6.2 The Crown’s position

Crown witnesses Frana Chase and Uarnie-Jane More acknowledge that the conferences could be problematic. Ms Chase – a Pou Mana Whakahaere within Oranga Tamariki – notes that she attended ‘hundreds’ as an Oranga Tamariki social worker, and concedes that ‘they’re the most disempowering things that exist really . . . I think we just have to concede that family group conferences and the way that they are delivered historically and presently are not fit for purpose for Māori whānau and they’re not fit for purpose for hapū or iwi.’¹⁶⁶

When asked how they, as middle managers within the agency, have allowed racism to exist within family group conferences, Ms Chase and Ms More answered that ‘it’s bigger than [them]’ and that within the Oranga Tamariki structure they were not able to ‘reach across like [they] should.’¹⁶⁷

The Crown also explains that, since 2017, it has introduced several initiatives to improve the efficacy and outcomes of family group conferences. These are discussed further in chapter 5.

4.4.7 Section 78 (with and without notice uplift) practices

Section 78 of the Oranga Tamariki Act enables Oranga Tamariki to seek interim custody orders of children through the Family Court. Applications through this section can be made to uplift children without prior notice to the whānau, but only in limited circumstances. An order can be made if the court determines that ‘it is in the best interests of the child or young person that an interim custody order be made as a matter of urgency’ or ‘it is in the public interest that an interim custody order be made in respect of a child or young person and the grounds on which the order is sought relate to offending or alleged offending by the child or young person.’ Section 78(2) states:

- (2) . . . the court may make an order under that subsection in relation to a child or young person in the following cases:
 - (a) where the child or young person has been placed in the custody of the chief executive pursuant to section 39 or section 40 or section 42 and is brought before the court pursuant to section 45:

164. Transcript 4.1.7, pp [282]–[283]

165. Submission 3.3.33, p 28

166. Transcript 4.1.9, p [247]

167. Ibid, p [249]

4.4.7.1

- (b) where the court is satisfied that the child or young person is in need of care or protection for the period of the order:
- (c) in the case of an application for a care or protection order on the ground specified in section 14(1)(e), where—
 - (i) it is not possible to make suitable alternative arrangements for the custody of the child pending the determination of the application; or
 - (ii) it is in the public interest that the child be held in custody pending the determination of the application:
- (d) if an application has been made for a care or protection order and the court has adjourned the proceedings pending their disposition:
- (e) where an application for a variation or discharge of any order (or the variation or discharge of any condition of any order) is made to the court under section 125, at any time before such application is finally disposed of:
- (f) where a report is furnished to the court pursuant to section 135, at any time before the court has completed its consideration of the report and accompanying revised plan under section 137.

In 2020, the Ombudsman released an investigation report *He Take Kōhukihuki* that looked into Oranga Tamariki's policies, practices, and procedures for newborn child removal under section 78. This report noted that 94 per cent of section 78 'without notice' applications sought during 2017–18 and 2018–19 were granted by the court.¹⁶⁸ The report further noted:

The use of without notice section 78 applications for interim custody should be reserved for urgent cases where all other options to ensure the safety of pēpi have been considered, and the delay caused by making an on notice application would create a risk to the safety of pēpi.¹⁶⁹

4.4.7.1 *The claimants' position*

The claimants express strong dissatisfaction with Oranga Tamariki's use of section 78 and emphasise the Ombudsman's recent findings.¹⁷⁰ Claimants further argue that, although 'without notice' uplifts are supposed to be applied in 'limited circumstances,' they instead appear to be default practice when removing children.¹⁷¹

Claimants point out that when a section 78 order is made in relation to an unborn baby to be removed at birth, Oranga Tamariki typically has 60 days to explore and develop safety plans to ensure mother and pēpi remain together. However, they note the Ombudsman's finding that, despite this significant period

168. Submission 3.3.20, p 29

169. Document A54, p 13

170. Submission 3.3.27, pp 13–16

171. Submission 3.3.21, p 57

of time, Oranga Tamariki has consistently failed to adequately consider alternative arrangements.¹⁷²

The claimants also share the Ombudsman's concern with Oranga Tamariki's operating policies – which the report found lacked detail and specific operating guidance on the use of 'without notice' section 78 applications. The Ombudsman observed Oranga Tamariki had not 'sufficiently articulated clear criteria for how staff are meant to identify and assess the viability of other options to secure the safety of tamariki'.¹⁷³

Many claimants say they fear and mistrust Oranga Tamariki and its social workers, particularly in light of section 78 uplifts. They contend that Oranga Tamariki, through section 78 uplifts, wields extreme coercive powers which social workers have threatened to use against them.¹⁷⁴ These claimants say social workers may be making subjective interpretations, coupled with structural racism, they fear this could foster inconsistent practice standards. The claimants say pervasive structural racism within Oranga Tamariki is evidenced by the fact more 'without notice' applications were made for Māori children. Many claimants shared their own personal experiences with Oranga Tamariki and section 78 uplifts.

The claimants also criticise the judicial process whereby the Family Court determines whether a 'without notice' application can proceed. The claimants say Oranga Tamariki has the discretion to file a supplementary affidavit in support of its application. However, no such provision is provided for the whānau of the affected child. They say there is also a lack of detail concerning why Oranga Tamariki is pursuing a section 78 order itself. Further, in some documented cases, the evidence provided by Oranga Tamariki is false or incorrect. As a result, the claimants allege the Family Court cannot make an informed decision about the appropriateness of an uplift.¹⁷⁵

Ultimately, claimants contend that any order concerning the care and protection of a child does not comply with tikanga Māori if there is inadequate engagement with whānau. Moreover, the removal of a child from whānau on a 'without notice' basis is an affront to tino rangatiratanga, they assert. Jean Te Huia spoke to these points further:

The forcible removal of new-born babies today, mostly Māori babies, from their Māori mothers at their birth is the most inhumane method exhibited. This activity is enacted in complete contrast to the state's obligations to Māori under Article Two (Māori text) of Te Tiriti o Waitangi, that guarantees to Māori their Tino rangatiratanga over their homes and villages, and all their treasures (tāmāriki).¹⁷⁶

172. Submission 3.3.27, p14

173. Document A54, p11; submission 3.3.23, p30

174. Document A42, p6; transcript 4.1.8, p[150]; transcript 4.1.7, pp[202], [473], [562]; submission 3.3.20, p42

175. Submission 3.3.20, pp36–38; submission 3.3.32, p45

176. Document A69(a), p22; submission 3.3.20, p36

4.4.7.2 The Crown's position

The Crown did comment on the use of section 78 applications. However, in its closing submissions, Crown counsel noted the use of uplift orders (both with and 'without notice') had decreased significantly since 2017.¹⁷⁷

The Crown added that section 78 orders themselves are made by the Family Court, while the actual removals under warrant are conducted by relevant Crown agents. In other words, the Crown considers that, as many services are involved in executing section 78 uplifts, the solutions to the issues arising out of their use do not lie exclusively with Oranga Tamariki (or any other agency alone).¹⁷⁸

Moreover, the Crown argues that section 78 uplift practices have changed.¹⁷⁹ The changes were largely prompted by the uplift that happened in Hastings in 2019. We discuss these further, along with claimant and Crown position on the changes, in chapter 5.

4.4.8 Monitoring and accountability**4.4.8.1 The claimants' position**

The claimants describe accountability as the backbone of both te Tiriti/the Treaty partnership and democratic principles. They express general dissatisfaction with Oranga Tamariki's monitoring and accountability practices. Broadly, the claimants contend discretionary powers provided for by the Oranga Tamariki Act 1989 have resulted in a lack of independent oversight.¹⁸⁰ As a result, an administrative culture has developed that lacks reflection, challenge, accountability, and transparency.¹⁸¹

The claimants identify several deficiencies in Oranga Tamariki's accountability practices. They allege Oranga Tamariki's online complaint system is extremely complicated. As a result, users of Oranga Tamariki are reluctant to complain, and lose confidence. Additionally, the claimants say the follow-up process lacks transparency since no information on the outcome of the complaint is shared with the complainant. The claimants also allege guidelines prescribing timely responses to complaints are not being adhered to.¹⁸²

The claimants provide detailed evidence about Oranga Tamariki's monitoring practices, intended to ensure social worker competency. In particular, they criticise the operation of care and protection resource panels, constituted under section 428 of the Oranga Tamariki Act 1989. As discussed in section 3.7.3.3, these panels help inform a social worker's decision-making about whether a child should be brought into care, and whether any alternatives are possible to that outcome. While social workers are statutorily required to consult care and protection resource panels as soon as possible upon opening investigations,¹⁸³ the claimants cite the findings of the Ombudsman, who found:

177. Submission 3.3.34, p 7

178. Ibid, pp 11, 22

179. Ibid, p 29

180. Submission 3.3.20, p 75

181. Ibid, p 74

182. Ibid, pp 76, 83–85

183. Oranga Tamariki Act 1989, s18

there were unacceptable delays in cases being presented to the CPRP, some staff weren't bringing cases to the CPRP at all, staff were not prepared when appearing before the CPRP, not all of the relevant information was being provided and CPRP sittings were cancelled on a regular basis.¹⁸⁴

The claimants also take issue with the operation of the Social Workers Registration Board within Oranga Tamariki. Witness Lisa-Marie Francisca King says that '[t]he purpose of the Social Workers Registration Board is to protect the public, provide a framework for registration, promote the benefits of registration and enhance the professionalism of social workers'.¹⁸⁵

The claimants assert that Oranga Tamariki social workers receive insufficient supervision and training. They note this lack of professional supervision is well documented – Oranga Tamariki's guidelines prescribe an hour of supervision per week for social workers with less than a year's experience and an hour of supervision per fortnight for more experienced social workers. The claimants say that this is manifestly inadequate. They also note the 2020 Ombudsman report that found that approximately half of all social workers receive no supervision from their supervisors.¹⁸⁶ These realities, the claimants say, make Oranga Tamariki's oversight by a board – a Crown entity – somewhat redundant. The claimants say that, as a result of this lack of supervision, staff are left to navigate situations they are not adequately prepared for. Inevitably, this increases the incidence of situations, individuals, and whānau being mismanaged. Ultimately, this is to the detriment of tamariki Māori, who are taken into care at a higher rate than any of their other ethnic counterparts.

The claimants further allege that Oranga Tamariki staff do not consistently use the Child and Family Consult Tool, a key method for internal monitoring practices. We were told the tool can help social workers identify indicators of danger, harm, safety, and strengths during the assessment and intervention process; it also operates as an internal record-keeping system. However, the claimants again cite the chief ombudsman, who found that 30 per cent of cases did not utilise the tool.¹⁸⁷

The New Zealand Māori Council notes the lack of any explicit accountability measure to ensure Oranga Tamariki abides by section 7AA. Section 7AA places specific, statutory duties on the chief executive to recognise and provide practical commitment to the principles of te Tiriti/the Treaty of Waitangi. The claimants also cite Professor Paul Dalziel, who gave evidence that Oranga Tamariki employs no contractual measures to ensure its funded agencies adhere to its Tiriti/Treaty obligations.¹⁸⁸

184. Submission 3.3.20, p 77

185. Document A44, p 12

186. Submission 3.3.20, p 79

187. Ibid, p 83

188. Submission 3.3.18, pp 4, 8

4.4.8.2 The Crown's position

The Crown did not directly address Oranga Tamariki's monitoring and accountability practices in closing submissions. Grant Bennett did, however, provide evidence about Oranga Tamariki's existing monitoring practices. Mr Bennett acknowledges that removing a child from the care of their whānau is one of the most extraordinary powers the Crown possesses and, therefore, it requires the highest level of oversight. As he explains:

It is a complicated and traumatic decision-making process and both internal and external scrutiny of our work is critical to ensuring public confidence and mandate . . . Quality assurance happens at a number of levels, and includes both proactive and reactive monitoring of practice. This includes through supervision, systematic reviews of random case samples and robust assurance of a particular site and areas of practice.¹⁸⁹

On the complaints process, Mr Bennett notes that whānau can submit complaints about the actions of Oranga Tamariki social workers, and that the Ombudsman has the power to investigate individual complaints and to launch system-wide inquiries.¹⁹⁰

Mr Bennett also discusses a range of monitoring and accountability mechanisms which have been implemented since the introduction of section 7AA. These are canvassed more fully in chapter 5, where the report considers whether legislative policy and practice changes implemented since 2017 have reduced the disparate numbers of Māori and non-Māori entering into care.

4.5 WHĀNAU EXPERIENCES

Having reviewed the parties' positions on broader systemic features within the care and protection system, we now set out a selection of lived experiences of the current system presented to us. These highlight, in real terms, the operation of some of the systemic features described above. Regrettably, because we were proceeding under urgency with only limited hearing time, we were able to hear only a small number of the whānau who had placed onto our confidential record deeply personal and traumatic stories such as these. We have considered all this evidence, and we thank those whānau who came forward, and acknowledge with gratitude their courage.

On pages 81–86, we describe the experiences of three confidential claimants to this inquiry. Their experiences highlight the considerable power Oranga Tamariki wields in the lives of Māori whānau, and the consequences its actions can have when poorly or illegally executed.

On pages 86–91, a selection of non-confidential experiences from witnesses who appeared before us describe the experiences of Māori who – very early

189. Document A10, pp 13–14

190. Ibid, pp 4, 14

in their lives – were alienated from their whānau and whakapapa as a result of State care. This lack of cultural connection bore heavily on the lives of these tamariki – now grown old enough to share the mamae born from their experience.

The Impacts of Oranga Tamariki's Missteps

Mr and Mrs T

A married couple, Mr and Mrs T, who are claimants to this inquiry, gave confidential evidence of their experiences with, and the impacts of Oranga Tamariki's decision making on their whānau. Mr T is Māori. The events described took place within the last five years.

Mr and Mrs T live in a small provincial town and have one child of their own. They were approached by the family of a young pregnant woman and asked if they would agree to take the child into their care when it was born. After a good deal of thought they agreed and they took the newborn pēpi home on the day she was born. The biological mother wanted ongoing contact and Mr and Mrs T had agreed to this. Mr and Mrs T welcomed the newborn on the understanding that they would adopt the child and began the necessary process. Three months into this arrangement, however, the mother indicated that she was dissatisfied and would seek the return of the pēpi. One of the mother's relatives held a senior position in an Oranga Tamariki site in the district. The Crown in confidential evidence before us says the case was immediately made confidential and managed by another staff member with no conflicts of interest. Oranga Tamariki arranged a family group conference in response to concerns that the mother would take pēpi from Mr and Mrs T. The Crown evidence was that the family group conference was called to discuss the situation and ensure a transition plan was in place to assist pēpi returning to the mother's care. However, Mr and Mrs T gave evidence that the family group conference coordinator had phoned them and said the conference was being called because she wanted to finalise where pēpi was placed as the birth mother was not supposed to have her.

Mr and Mrs T advised the coordinator that they were not available on the proposed date and asked for the conference to be rescheduled. The coordinator replied that the date could not be shifted but assured them that their desire to maintain day-to-day care of the pēpi would be presented at the family group conference in their absence. This did not occur. Following the meeting, Mr and Mrs T learned it had been agreed in the family group conference that the pēpi would be uplifted from their care in three weeks and placed in the care of its maternal grandmother and her partner and that the care of the pēpi would be transitioned to the birth mother. The documents available to us show that this was on the basis that the birth mother would complete a rehabilitation programme for substance abuse, and complete a parenting programme.

While Mr and Mrs T sought legal advice, Oranga Tamariki uplifted the pēpi on the scheduled day, without supporting paperwork. Mr and Mrs T went through several complaint processes, and ultimately requested a formal review of their case. Over a year after the uplift, Oranga Tamariki conducted an investigation which ultimately upheld all of Mr and Mrs T's complaints. Oranga Tamariki accepted that there were no grounds for a family group conference in the first place, that the conference should not have proceeded without Mr and Mrs T; and that the coordinator did not make clear that the conference could result in a decision to uplift the pēpi from the their care. It was also acknowledged that the social worker had no legal authority to return the pēpi to the biological mother and doing so was a misuse of power. In a letter upholding the complaint, the regional manager acknowledged that the staff involved failed to recognise that there were no direct care and protection concerns with pēpi being in the care of Mr and Mrs T. In addition, staff failed to recognise the situation as a custody dispute in operation and became confused about the legislation related to the mother as natural guardian, and the appropriate legal pathway to manage the birth mother's wish to have pēpi returned to her. The regional manager acknowledged that Oranga Tamariki's actions were 'illegal, breached the principles and administration of the Oranga Tamariki Act 1989' and were 'in contravention of Oranga Tamariki's internal policies and procedures'.

Oranga Tamariki have since taken steps to work towards a remedy with Mr and Mrs T. Additionally, Oranga Tamariki in evidence advised that there has been an increased legal presence and guidance at this site, and further legal training.

Sources: documents A83(d), A83(e); transcripts 4.1.7(a), 4.1.10(b)

Ms A

The events described took place within the last five years.

Ms A is Māori and had worked at Oranga Tamariki as a social worker for approximately 16 years. She has experience in both youth justice and care and protection. Her grand-daughter, B, was uplifted by Oranga Tamariki from her parents at age one and placed with Ms A as an approved whānau home for life caregiver. She remained with Ms A for two years. During that time, B had access visits to her father, who resided in another city. The father is not Māori. When Ms A picked B up from her father's house one weekend, B, now aged three years and five months, disclosed to Ms A that her father had sexually abused her. In evidence, Ms A provided details of what B told her and the physical symptoms that corroborated what B said. She took photos and the next day she took B to a doctor, but the doctor declined to examine B as she was not a paediatrician. The doctor did report by telephone to police and Ms A also went to the police station to file a complaint. Ms A attempted to contact B's social worker, and then lodged a report of concern with Oranga Tamariki.

Five days after the report was filed, B was assigned a new social worker and a

paediatric appointment was arranged by Oranga Tamariki. Two weeks after the report of concern was lodged, B was seen by a registered psychologist contracted to Oranga Tamariki. B repeated what she had disclosed to Ms A, as well as expressing her desire to stay with her. The psychologist noted that the child had a 'secure attachment' to Ms A, calling her 'mama'.

About two weeks after the psychologist's assessment and without notice to A, Oranga Tamariki uplifted the child from Ms A's care. In her evidence, Ms A said she was informed on the day of the uplift. There was no prior discussion with her about any care and protection concerns. B was placed with non-whānau caregivers who reported that B was distressed after the uplift. The caregivers advised that they had to sleep with B for days after to get her to settle down, and she repeatedly asked for her 'mama' (Ms A). At no time did Oranga Tamariki raise any care and protection issues with Ms A, nor were there any reports of concern against Ms A as a caregiver.

Oranga Tamariki clarified to Ms A – in correspondence following the uplift – that the uplift occurred because there was a 'history of acrimony' between the maternal whānau and the paternal family. Crown evidence was that B was uplifted from Ms A's care following a psychologist's report and concerns that Ms A would adversely effect B and alienate B from the paternal family while the allegations of sexual abuse were being investigated.

Having had the day-to-day care of B for two years, Ms A did not see B for a month following the uplift. When she did obtain access, it was supervised for two hours per month. This, Ms A notes, was despite being a senior practitioner with Oranga Tamariki and dealing with other children on a daily basis. The same supervised access for two hours a month was also put in place for the father and the paternal side of the family. Crown evidence was that supervised access was necessary because there were concerns about Ms A's strong views and it was believed that not accepting the outcome of the investigation would have a long term impact on B's relationship with her father and grandfather. Eventually, Ms A resigned from Oranga Tamariki, saying she could not continue in good conscience after the harm they had caused her and her whānau.

The investigation into the allegation of sexual assault was inconclusive. The Crown advised the Tribunal that, while information had been gathered from sexual abuse specialists and others, ultimately there was insufficient evidence to substantiate whether or not the assault had occurred.

Some staff responsible for the decision to uplift B from Ms A's care had formed the belief that Ms A would alienate B from her father and paternal whānau and continue to foster the view of her father as a sexual abuser, and that alienation from B's father would have caused long-term psychological harm.

A review of practice was conducted by the Office of the Chief Social Worker after Ms A laid a complaint. The practice review described a history of tension between the paternal and maternal family that had been difficult to manage, as well as difficulties between staff and Ms A, given her employment with Oranga

Tamariki. Both sides of the whānau felt that Oranga Tamariki was biased towards the other side. The review found that the decision to uplift resulted in ‘severe traumatic consequences’ for B. It also found ‘the weight of evidence that would justify the emergency removal of a child from a caregiver they have a strong and positive attachment with’ was absent. Further, the review stated that the removal of B was contrary to her well-being and best interests and did not meet the ‘whakamana te tamaiti’ standard. The review found that the ‘ensure safety and well-being’ standard was also not met, given there was no evidence that B was in imminent danger or unsafe in Ms A’s care prior to being removed. The review also noted that Ms A has been the most stable, reliable, and consistent carer B has had, and B has a strong attachment to her. The review said this suggested an ‘unnecessary application of statutory power and authority’. The review also concluded that to prolong the separation would constitute an abuse of State power and authority, be inconsistent with the principles of the Oranga Tamariki Act 1989, and risk violating B’s rights under UNROC (United Nations Declaration of the Rights of the Child).

At the time of the practice review, social workers were considering transitioning B to her father’s care. The review noted that there was no record of abuse or indicators of risk for B while in Ms A’s care. B has a strong attachment to Ms A and both want to reunite. In contrast, there was an established history of risk to B when she was in the care of her father and there were unknowns about his journey to recovery from methamphetamine use. The review goes on to note that, while the father wants to have B returned to his care, there is conflicting information about B’s willingness to have contact with him. The review examined the rationale for Ms A’s monthly access visits considering B’s strong bond with her and no evidence of imminent risk. The review found that there was evidence of social workers wanting to be ‘fair’ to both sides of the family by staying neutral during cross allegations of abuse or neglect of B. As the review points out, this means that B is now being cared for by non-whānau, and the monthly two-hour supervised contact visits are the same for both sides, despite B’s much stronger attachment to her maternal whānau and their associated communities. The review found the ‘practice decision can be argued to be in favour of adult needs, including practitioners, but not fair to B’.

Finally, the review notes that the social worker who was newly assigned to B at the time Ms A lodged her report of concern about the father, had a caseload of 44 children. She was initially allocated to investigate and was then allocated intervention. Her supervisor had a caseload of 16 children, which the review notes is not recommended for that position. Nine of the 12 social workers at the site (excluding supervisors) had caseloads of between 38 and 51 children.

Notwithstanding these findings, a senior official from Oranga Tamariki who gave confidential evidence before us maintained that the decision to uplift was correct but that the execution of the uplift ‘could have been better’. We were told that Oranga Tamariki had ‘reflected on learnings from this case’ and implemented changes in an effort to ensure a similar situation does not happen in the future.

The practice review noted that staff involved in the decision to uplift B remained steadfast in their belief that their actions put B's welfare above all else. The review was critical of this perspective and it is concerning that, despite clear findings to the contrary in the practice review, some Oranga Tamariki staff still maintain they acted in the best interests of the child. The review itself notes that a number of staff continue to disagree with some of the findings.

Ms A told us that if someone like her, an experienced social worker at Oranga Tamariki, can be treated this way, then 'people out in the community, Māori whānau, they don't have a chance'.

Sources: documents A115, A115(b), A198, A198(a); transcripts 4.1.7(b), 4.1.10(a)

Ms C

The events described occurred in 2016, approximately a year before Oranga Tamariki was established in 2017. We did not direct the Crown to provide evidence in response from Oranga Tamariki to this case. Ms C, who as a child experienced trauma herself as a State ward, illustrated the intergenerational impact State care has had on her whānau – particularly recent events involving her daughter-in-law (Ms D) and the attempted uplift of Ms D's child, who we have renamed Nikau.

Ms D came to the attention of CYFS (Oranga Tamariki's predecessor) a month before Nikau was due to be born. Contrary to standard practice, CYFS did not contact the whānau to discuss the 'report of concern' that CYFS had received or to formulate a plan moving forward. Instead, the social worker arrived at the hospital the day after Nikau was born to discuss options. It was agreed that the social worker would visit Ms C's house – where Ms D and Nikau would be living – the next day to continue discussions with the whānau.

However, when the social worker arrived at Ms C's the following day, she asked that Nikau be handed over. She searched the house but could not find mother or baby. Immediately after the social worker left, Ms C informed Ms D that CYFS intended to take Nikau. They hurriedly grabbed anything they could and immediately left town. Ms C explains:

Going on the run with [Nikau] wasn't planned – I just didn't want them having my baby. They had made it clear at this point that they weren't going to listen to anything we said until they had the baby in their care. At this point, I was working on fight or flight mode – we have had 4 generations of children being wards of the state and I wasn't going to let another one of my mokopuna go through that.

Ms C, Ms D, and Nikau were on the run for five months. Ms C said that they were surrounded by a strong support network and Nikau was cared for collectively. He was a happy pēpi, clothed and well-fed, and they ensured he attended all his doctor's appointments.

While Ms C and Ms D continued to evade CYFS, the organisation gained a section 78 custody order over Nikau. After being informed of the order, Ms C attended a judicial conference in the Family Court where she explained what had transpired between their whānau and CYFS. The judge concluded that CYFS needed to stop its search for Nikau and a whānau hui should be held. Two weeks after this decision, a social worker visited the whānau and – Ms D said – threatened that, if she had another child, it would belong to the State.

Currently, Nikau remains safely in Ms C's care. Ms C asserts that 'whānau should make decisions about the next steps and the government should not have a say over anything that is directly our blood – their structure might work for them, but it does not work for us; it doesn't belong to us'.

Sources: document A89(f); transcripts (a), 4.1.10(a)

The Impacts of State Care on Life Outcomes for Tamariki

Mr Jarvis

Toni Jarvis, a claimant to this inquiry, gave evidence of his experiences in State care and the far-reaching impacts on his life.

Mr Jarvis said he was illegally adopted in 1961, at five weeks old. His mother – hoping to give him a safer and more secure childhood – placed him with a child welfare officer for adoption. Her only condition was that he be placed with a Presbyterian family. Child Welfare crossed out this requirement.

Mr Jarvis was placed with a Māori Mormon family, where he was subject to serious abuse at the hands of his adoptive parents. Child Welfare records reveal that it was aware of the abuse but did not intervene. Over the years, Mr Jarvis was passed between a number of State carers, institutions, and family friends, where he suffered further prolific abuse – physical, sexual, emotional, and mental. A friend of his adoptive father wrote that 'it is obvious that all of his [Mr Jarvis's] troubles stem from being not wanted'.

As an adult, Mr Jarvis learned that he was adopted. After he reconnected with his biological mother, she tried to become actively involved in his life. However, Mr Jarvis says that, because of all the abuse he had suffered, he did not know how to reconnect with her. He shares that his mother eventually learned of his abuse and neglect, and died carrying the guilt of that knowledge. Mr Jarvis says, 'she didn't have to die like that, knowing and telling me that she should have just kept me'.

Mr Jarvis describes how he had to fight to find out who he was, as Child Welfare kept his State ward records from him. It was not until 2001 that he got a court

order directing that his files be released. He was so distressed reading them that he ripped them up. When he requested another copy, the records concerning the severe bruising and injuries he received while in the care of his adoptive parents were not included.

Mr Jarvis identifies his illegal adoption and violent experience in State care as the reason behind a number of issues he has faced throughout his life. He states:

Because of my illegal adoption and subsequent State care, I have suffered from drug and alcohol addiction, problems with relationships, low self-esteem, anxiety, depression and post-traumatic stress disorder. I have lived a life of stress and now have a number of serious health issues that I am currently dealing with. I lacked a loving home and had no sense of what a home was.

He also describes how he was in prison when his first child was born, having committed fraud so that he could get necessities for her. He concedes that he has not been able to be the father he wanted to be, but he will continue to fight this guilt and attempt to play a role in breaking the cycle of intergenerational trauma.

Source: document A99

Mr Smale

Claimant Aaron Smale, while not a child of State care, grew up disconnected from his whakapapa and tūrangawaewae, like many other claimants to this inquiry. He tells us of his experiences.

Mr Smale was born in the early 1970s to a teenage mother and was adopted at birth. In keeping with the prevailing practices of the time, his adoption was closed and secretive, despite there being no legislative requirement for this. Mr Smale explains how such practices led him (and many other children) to become cut off from their whānau and biological families. He says this practice, premised in the 'clean break theory', ignores two fundamental realities. First, that children are bonded to their mother and that they can, and do, suffer trauma when separated from her and, secondly, that 'clean breaks' force children to grow up disconnected from the people they derive their identity from.

Mr Smale was adopted into a Pākehā family, and was well-loved. Despite this, he still recalls growing up 'with a pervasive sense of loss and confusion'. He also notes the 'potent irrational guilt' he felt when – after meeting his biological parents at 16 – he realised 'he didn't have the kind of connection with his adopted parents as he did with the strangers who had arrived back into his life'. Mr Smale also describes the moment his father told him his iwi: '[w]hen he said 'Ngati Porou' I felt almost a physical sensation of weightiness in my whole being, like my tipuna had put a cloak of mana on me. It was like they were giving back what was taken from me.'

While learning about his whakapapa and meeting his biological parents was a

profoundly important moment for Mr Smale, he notes that it did not alleviate the damage caused by the closed adoption.

The implications and permutations [of the closed adoption] carry on throughout not only my life but also in various ways for my children. Those within the state system who made decisions decades ago don't have to live with this – I do. And many others also carry these unintended but foreseeable consequences.

While closed adoptions shrouded in shame are largely considered a relic of the past, Mr Smale emphasises that the underlying assumptions remain alive. He notes that people still believe that you can take a child away from its mother and whānau and place it with strangers and that it will still grow up happy and adjusted as long as it is loved and cared for. In Mr Smale's view, such a belief fails to account for the importance of identity centred in whakapapa and tūrangawaewae.

Source: document A101

Dr Waretini-Karena

Claimant Dr Waretini-Karena spent 11 years as a ward of the State, being moved between social welfare homes, foster homes, and boys' homes and eventually serving 10 years and seven months of a life sentence in prison.

He describes the environment of his childhood as toxic and abusive. At only five years old, the Department of Social Welfare placed him in a social welfare home (which housed up to 30 children at a time). It was a year before his family came to get him. Despite being reunited, the family's situation quickly deteriorated.

Having been left alone to look after his 12-month-old brother, Dr Waretini-Karena went into the street to play in puddles with his friends. Placing the baby on the porch where he could hear and see him, he was unaware that it had begun to rain and the baby was getting wet. When he did hear the baby crying, he took him inside and dried him off, making him something to drink. Seven days later, his baby brother died of the flu.

His mother took to praying, while his father drank. One night, his father came home and started beating his mother, his older brother, and him. Three days later, still seething from the abuse of that night, Dr Waretini-Karena set fire to his father's bed while he was still sleeping in it. He was then passed through various welfare and foster homes, and started at a new school.

At 17, he shared his experience of abuse with friends, who also shared theirs. A mother of a five-year-old confessed that, at that very time, the same abuse was happening to her child at the hands of his father. Dr Waretini-Karena describes that, 'Although I did not realise it at the time, I was carrying psychological baggage from my past. It triggered a chain reaction that superimposed my history of abuse over the boy to such a degree, I killed his father.'

Dr Waretini-Karena later discovered at trial that everything he had been told about the child's father was untrue. The mother had just been trying to collect a life insurance policy. Upon entering Waikeria Prison, he knew two-thirds of the young men in there as they had all grown up together in social welfare homes, foster homes, and boys' homes.

The last 23 years have been spent healing two deficit legacies. The first was the pain caused to the family of the man he killed. The second was the shame he brought upon his own family. In healing the second, Dr Waretini-Karena turned to education. He obtained a bachelor's degree and became a lecturer at WINTEC teaching counselling, social work, and mental health. He gained a master's degree in counselling, a master's degree in commercial music, and a doctorate in philosophy. He did not do so because of what he suffered in State care, but despite it.

Source: document A5

Ms Cummings

Witness Lakeisha Cummings is a foster child who currently occupies a youth advocacy role within VOYCE National Youth Council, an organisation for children who have been or are currently in care. Prior to this, she interned at Oranga Tamariki. Cumulatively, her personal and professional experience has given her a high level of exposure to the organisation.

Born into a methamphetamine-dependent family, Child, Youth, and Family Services intervened when she was six weeks old and placed her in a 'home for life' with foster parents who legally adopted her. Life with her adoptive whānau was 'great,' despite having no contact with her birth whānau.

After a series of events, Ms Cummings returned to the care of Oranga Tamariki at 15. She describes her return-to-care experience as unprofessional and negative, because Oranga Tamariki:

- formed assumptions without sitting down and talking to her;
- told her she was borderline ADHD, when she was not. She also had such a fear of one of her social workers, that when she would run away if she knew she was coming;
- made her sleep in one of the offices alone overnight because they could not find her a placement; and
- sent her to houses where she believes the caregivers were not properly registered.

It was not until she was placed in a kaupapa Māori home in Tikipunga, that Ms Cummings felt her life was changed. She describes how she felt her identity was lost through Oranga Tamariki, and how Takehe Street Home helped her regain it. Only a day into her stay, her carers got her whakapapa for her and took her to her urupā. She states 'everything just transformed from there, and it transformed because they loved us'.

During her internship at Oranga Tamariki, Ms Cummings made the following observations:

- ▶ Oranga Tamariki staff would lie to children about going on holiday, when they were really being placed into care;
- ▶ there was a disconnect between social workers and managers; and
- ▶ social workers have too many cases to deal with so they cannot effectively prioritise children.

Ms Cummings eventually stopped the social work course through which she had gotten the internship with Oranga Tamariki, as the environment took her into a 'bad headspace'. The internship experience made her realise that she was still carrying trauma from her own experience with Oranga Tamariki.

Sources: document A142; transcript 4.1.7

Ms Batten

Witness Tanisha Batten is, at the time of this inquiry, 17 years old. She has been in and out of the State care system since the age of six. She says that Oranga Tamariki did nothing to support her relationship with her mother, siblings, or her Māori identity. Overall, she asserts that she never experienced the 'mana tamaiti' principle expressed under the Act while she was in the care of Oranga Tamariki.

Having little meaningful contact with her social workers, bar an earlier Māori social worker who had encouraged her siblings to disclose abuse, Ms Batten was left to her own devices. Over the period in which she was passed between her home and the care system (and even spent time on the streets), she attempted to make Oranga Tamariki aware of the abuse her siblings were still experiencing. But the agency did not act and, despite being aware she had left the care of her mother, did little to ensure she had a safe placement. As a result, Ms Batten couch-surfed and even slept in drains and other places in the streets.

Eventually, a school counsellor put her in contact with youth services and VOYCE, where she is now an intern. Through Youth Services, she was put on a 'family breakdown' benefit. (This is available through Work and Income – in various forms – for youths under 19 who cannot live with their parents or guardians.) While her whānau asserted there was no breakdown, Youth Services eventually accepted that there must have been, as she had been in the care of Oranga Tamariki originally.

Ms Batten notes that, while she is now in Oranga Tamariki's 'transition to adulthood' stage, she has barely been checked on. This continues a long history in which she has been left to navigate the world on her own. She observes:

I know that the new legislative provisions say that we are supposed to be looked after until we are 21, but in reality, Oranga Tamariki do the bare minimum. You need a strong advocate to help you get support because many of us young people do not know what our rights are under the Act.

Overall, Ms Batten considers that Oranga Tamariki continue to fail because they do not listen to the children they are charged with caring for.

Sources: document A143; 'Family Breakdown', Work and Income, <https://www.workandincome.govt.nz/eligibility/relationships/family-breakdown.html>, accessed 13 April 2021

4.6 TIRITI / TREATY ANALYSIS AND CONCLUSIONS

4.6.1 Commentary on whānau experiences

4.6.1.1 *The impacts of Oranga Tamariki's missteps*

We were privileged to hear in both open and closed sessions from individuals and whānau who had direct experience in the operation of the care and protection system. Many of these stories were difficult to hear and we again record our appreciation for the courage of those who came forward to share experiences that were both traumatic and personal. It is clear to us that all witnesses we heard and all those who placed their stories on our record, but we were unable to hear due to limited hearing time, wanted their stories to make a difference. Without exception they have come forward in the hope that lessons can be drawn from their painful experiences so that things will be better for tamariki Māori and the mokopuna to come.

The evidence we have recorded on pages 81 to 86 highlights not only aspects of the systemic problems we have been describing, but also brings into sharp focus just how harmful and prejudicial poor or illegal practice is.

The examples we include about the effects of disconnection from whakapapa are illustrations of a wider theme in claimant evidence, which can be summed up as the fundamental importance of restoring and maintaining whanaungatanga in order to secure the long-term health and well-being of tamariki Māori.

In terms of the harm arising from disconnection to culture, the following analogy given to us by claimant witness Kirsti Luke in her oral evidence describes it well:

Say you belong to a whānau of fishermen, that was your culture. You identify as a fisherperson; you are known as a fisherperson. In fact, everybody knows you're a fisherman, fisherperson, who happens to work as a plumber. You don't identify yourself as a plumber, you identify yourself as a fisherman. That's because you're good at it. You tend to know all the best spots. You kind of know when to go fishing. You kind of know when the fish are hungry, everything makes sense in this world of yours. You know when the sea is scary. You know when it's angry, you know when it's calm, when it's playful, when it's bountiful. You know how cold it gets and when you lose all sight of land you never feel lost. You're never going to go hungry. You're always going to be okay.

Then someone comes along and tells you, you can't do that anymore. Some thing or person, sometimes a law comes along and tells you 'You can't go there anymore. You can't do that anymore. You can't fish there anymore. You can't swim there anymore. You can't play there anymore'. And you watch as others are allowed to. Then you have children. You want them to know about the things you love. The things their Nan and Koro loved. The things that make your heart whole. But you're not allowed to. In fact, that way of life is now shunned. You are told about the shame in doing those things. You are told that if you stay there that will hold you back in life.

You begin to lose your fishing language. Without practising those things, the meanings of your words shift. Your diet changes. All of those experts called Aunties and Uncles, all of those experts now become displaced. You don't really understand the land, the lights, the smell, what's good, what's bad. You don't really get right and wrong easily and you don't really have anything in common with the people that live in your own house. Actually, we have nothing in common anymore. Your elders are irrelevant in this context. Your beliefs don't seem relevant or valued. You start to feel alone. Welcome to the disease of the 21st century – disconnection.

Nothing makes sense. You have no ease in life. There is no security. There is only anxiety. You know how desirable that left door looks when nothing around you makes sense and your Aunties and Uncles are using funny words. They still want to bang on about fishing spots. You don't even like fish anymore. Nothing, you have no go to, you have no place of security.

So, you know what's the answer to this problem as we stare over these last 20-odd years. Well the issue is this. The problem is disconnection. Surely then the answer is connection. Strengthening the connection of whānau with their whenua. It wasn't all that hard. The culture of being iwi, whakapapa to the whenua to each other, both. Obligations to each other, both. Consequences owed to both.¹⁹¹

4.6.1.2 *The impacts of State care on life outcomes for tamariki*

What we find striking about the cases set out on pages 86 to 91, is just how astonishing some of the undisputed facts are. These examples show in stark terms just how much power an individual social worker can have. These also highlight how little real accountability there is for poor or illegal use of this power. We record these few examples (there are many more on our confidential record) because stories such as these seldom see the light of day because of the operation of privacy principles and because of Family Court reporting restrictions.

4.6.2 Commentary on the disparity itself

The disparity between the number of tamariki Māori and non-Māori children entering State care has been evidenced in the plethora of alarming statistics presented to the Tribunal in this inquiry.

Thus, before turning to consider in greater detail some of the main systemic problems, it is important to emphasise just how bad this disparity is. While there

191. Transcript 4.1.9, pp [124]–[125]

are problems with data consistency from 1989 to the present, the Crown accepts that there has been a disparity throughout this period.

We heard from former government statistician Leonard Cook, that between 2001 and 2011, tamariki Māori were, on average, 3.6 times more likely than non-Māori to enter into State care. Since 2012, the entry of tamariki Māori into State care has averaged five times that of non-Māori. Mr Cook also notes that by 2019, the proportion of tamariki Māori *entering into* State care has halved compared to 2001, however, the proportion of tamariki Māori *being in* State care had increased 2.5 times over that same period.¹⁹² While fewer tamariki may be entering care, those in the system are staying longer.

Based on the data available from the Crown, we know that despite being only around 25 per cent of the total population of children, tamariki Māori accounted for over 60 per cent of the entries into care from 2015 to 2019 (with the exception of those aged 14 and over in 2015 and 2019, where the figures were 55.2 per cent and 57.7 per cent respectively). For the years 2016 to 2019, the total numbers of tamariki Māori being taken into State care were 1,667, 1,628, 1,533, and 1,248 respectively.¹⁹³

These statistics are rightly considered unacceptable by all parties. The consistent and significant nature of the disparate number of Māori and non-Māori tamariki entering care is a clear call, in and of itself, for essential and radical change to the care and protection system.

4.6.3 Colonisation and its impacts

All parties rightly acknowledge the significant role that historical injustice and dispossession have played in the disparities that are the subject of this inquiry.

Many issues associated with colonisation (including disease, land loss, cultural marginalisation, and the Crown's policies of assimilation, urbanisation, and economic restructuring) have had far-reaching negative implications for Māori and their interactions with the State. Indeed, the impacts of colonial inequity are increasingly well-documented, and parallels can be drawn with indigenous populations around the world. We note, for example, the alarming statistics set out in table 11.5 in appendix 11.¹⁹⁴ It sets out the percentages of indigenous children in State custody, of indigenous incarcerated youth, and of indigenous incarcerated adults – not only here but also in Australia, Canada, and three states in the United States. In *every metric* of this table, indigenous populations are disproportionately represented. Clearly, the ramifications of colonisation are profound, and much remains to be done to right the persistent inequities that stem from our shared colonial pasts.

We were also struck by the connections made by Nicola Dally-Paki, a claimant from Ngāpuhi and Tūwharetoa, between the current disparity in the number of

192. Document A17, pp 7–8

193. Document A18(a), p [8]

194. Document A5(a), p 5

Māori and non-Māori being taken into State care and the deep history of complex trauma that many whānau, hapū, and iwi have experienced.¹⁹⁵

We note that *Puao-te-Ata-tu*, as discussed in section 4.3.1 of this report, identified the racism of New Zealand society, and institutional racism within the care and protection system, as major systemic problems. All claimants accept the report's description and identification of structural and institutional racism. The report noted:

the presence of racism in the Department is a reflection of racism which exists generally within the community. Institutional racism exists within the Department as it does generally through our national institutional structures. Its effects in this case are monocultural laws and administration in child and family welfare, social security or other departmental responsibilities. Whether or not intended, it gives rise to practices which are discriminatory against Maori people.¹⁹⁶

Despite the clarity and strength of the recommendations of *Puao-te-Ata-tu*, we reiterate again that little has changed. The report's analysis, particularly of systemic failure, remains substantially true. We therefore welcome the Crown's acknowledgement that it has failed to implement the findings of that report.

It is also clear to us that the disparity cannot be considered simply the result of conditions 'external' to Oranga Tamariki and its predecessors, which the Crown's concession on the existence of 'structural racism', without admitting specific Tiriti/Treaty breaches, appears to suggest. On the contrary: we heard extensive evidence that Oranga Tamariki's policies, procedures, and practices have at times fuelled disparity within the State care and protection system and exacerbated negative social experiences of whānau. Thus, the disparity between the number of tamariki Māori and non-Māori children taken into State care – although attributable in part to the effects of colonisation – is also a result of the Crown's failure to honour the Māori right to cultural continuity embodied in the article 2 guarantee of tino rangatiratanga over their kāinga. As we noted in chapter 2, it is more than just a failure to honour or uphold that guarantee; it is also a breach born of hostility to the promise that Māori should exercise tino rangatiratanga over their homes. Since the 1850s, Crown policy has been dominated by efforts to assimilate Māori to Pākehā ways of thinking and living, including eurocentric conceptions of the ideal environments in which to raise children. We reiterate the view we expressed in that earlier chapter:

This is perhaps the most fundamental and pervasive breach of te Tiriti/the Treaty and its principles. It has also proved to be the most difficult to correct, in part due to the assumptions by the Crown about its power and authority, and in part because the disparities and dependencies arising from the breach are rationalised as a basis for ongoing Crown control.

195. Transcript 4.1.7, p [151]

196. Document A55, p 24

In light of the evidence we have heard, we find there has been a direct and sustained breach of the article 2 guarantee to Māori of tino rangatiratanga over their kāinga, which while it originates in the nineteenth century, has carried forward and continues in the operation of the contemporary care and protection system. We believe the persistence of the disparity we are considering is a direct consequence of the Crown's sustained intrusion into the rangatiratanga of Māori over kāinga.

4.6.4 Crown control

Claimants and interested parties to this inquiry say that Oranga Tamariki (and its predecessors) have been created, controlled, and led by the Crown. As a result, they say there is a 'fundamental power imbalance' at both structural and operational levels. They argue that this perpetuates a structurally racist system and is a significant cause of disparity.

The claimants also argue that the history of New Zealand since colonisation has been a history of institutional decisions being made for Māori. The claimants emphasise that 30 years ago, the *Puao-te-Ata-tu* report identified problems stemming from the Crown holding decision-making power and resources within the care and protection sphere, and express frustration at the Crown's ongoing failure to address the report's recommendations. The claimants assert that it is their right, as a Tiriti partner, to choose how to express their tino rangatiratanga. Until Māori can build and maintain their own system to care for tamariki, they contend that structural racism, and therefore the disparities between Māori and non-Māori tamariki entering care, will continue to be perpetuated.

The Crown says its duty of active protection requires it to support, strengthen, and assist whānau Māori to care for their tamaiti or tamariki, so that there is no need for tamariki to be uplifted into State care. Equally, the Crown contends that it has an ongoing role and responsibility to provide a care and protection system.¹⁹⁷ The Crown also recognises the importance of the findings in *Puao-te-Ata-tu* and concedes that it has not yet fully implemented the recommendations in a comprehensive and sustained manner – although it has made some attempts to do so since establishing Oranga Tamariki. We acknowledge the Crown's attempts, but consider that these attempts should have gone much further and more progress should have been achieved given the report was published over 30 years ago.

In considering the claimants' argument that te Tiriti/the Treaty conveys an enduring right to whānau founded on a Māori worldview, we turn to articles 1 and 2. These establish te Tiriti/the Treaty relationship through the fundamental exchange of kāwanatanga and tino rangatiratanga.

Particularly relevant here is the Māori text of article 2, which guarantees to Māori 'te tino Rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa'. The Tribunal in the Te Paparahi o te Raki Inquiry considered that this text makes clear that te Tiriti/the Treaty guaranteed Māori 'the unqualified exercise

197. Submission 3.3.34, p16

of their chieftainship over their lands, villages and all their treasures.¹⁹⁸ We adopt this view and note also *what* the article 2 guarantee extends to. Not only does it promise Māori chiefly authority over their lands and resources, but also to ‘o ratou kainga me o ratou taonga katoa’. The reference to ‘kainga’ – home, settlement, dwelling – means the guarantee also encompasses where and how Māori live. Thus, in guaranteeing Māori chiefly authority over their kāinga and their taonga, we consider article 2 is nothing less than a guarantee of the right of Māori to continue to organise and live as Māori. From this guarantee flows the fundamental right of Māori to care for and raise the next generation.

We echo *Te Mana Whatu Ahuru* in its characterisation of the relationship between rangatiratanga and the kāwanatanga of the Crown:

Our conclusion is that the Treaty guaranteed to Māori their tino rangatiratanga. . . . This, at a minimum, was the right to self-determination and autonomy or self-government in respect of their lands, forests, fisheries, and other taonga for so long as they wished to retain them. That authority or self-government included the right to work through their own institutions of governance, and apply their own tikanga or system of custom and laws.¹⁹⁹

Kāwanatanga, as they saw it, was a power to govern and make laws, but it was a power that particularly applied to settlers, settlement, and international relations, and – to the extent that it might apply to Māori – was to be used for the protection of Māori interests, and in a manner that was consistent with Māori views about what was beneficial to them. It was therefore not the supreme and unfettered power that the Crown believed it to be; rather, it was a power that was conditioned or qualified by the rights reserved to Māori.²⁰⁰

Te Mana Whatu Ahuru further elaborates that ‘[b]oth [Treaty] partners owe each other a duty to act honourably and in good faith. Neither partner can act in a manner that fundamentally affects the other’s sphere of influence without their consent, unless there are exceptional circumstances.’ *Te Tiriti*/the Treaty partnership would thus be subject to ongoing negotiation and dialogue, under which Māori and the Crown would work out the ‘practical details’ of how kāwanatanga and tino rangatiratanga would co-exist.²⁰¹ Importantly, that report notes, *te Tiriti*/the Treaty did not confer on the Crown a supreme and unilateral right to make and enforce laws over Māori.

We find that the Crown’s failure to honour the right of Māori to exert tino rangatiratanga over their kāinga and taonga in this respect is a breach of article 2 of *te Tiriti*/the Treaty. We acknowledge the claimants’ frustration that the *Puao-te-Ata-tu* recommendations have not yet been fully implemented, reflecting a long history of the Crown making ‘institutional decisions’ for Māori.

198. Waitangi Tribunal, *Whakaputanga me te Tiriti*, p 350

199. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 169

200. *Ibid*, p 158

201. *Ibid*, p 189

In chapter 3, we reviewed the development of Crown legislation and policy as it relates to Māori whānau and tamariki. What emerged from this overview is the unilateral way in which the Crown developed and implemented policy and legislation from the late nineteenth and early twentieth centuries onwards. Although these policies intrude into the most intimate aspects of whānau life, there is little evidence of Tiriti/Treaty partnership in their design or implementation.

The authors of *Puao-te-Ata-tu* observed that '[l]egal assimilation was finally perfected' in the form of the 1962 law under which jurisdiction over Māori customary adoptions (whāngai) passed from the Māori Land Court to the general courts:

Once again, decision-making and responsibility for the placement of children has been taken from close-knit Maori communities and the authority placed exclusively in courts and state agencies. The superiority of the Western preference for individual rights and duties is officially affirmed, and the Maori promotion of communal responsibilities is diminished, not least among social workers who are constrained to supply their services within the authority of the law and with due regard to the attitudes of judicial officers.²⁰²

As discussed, we find that the situation outlined in *Puao-te-Ata-tu* has remained substantially unchanged in the intervening years. Accordingly, we find compelling the claimants' argument that asymmetrical control of the care and protection system perpetuates structural racism and therefore causes significant disparity in the number of Māori and non-Māori tamariki entering care. We accept that this imbalance has caused, and continues to cause, prejudice to Māori tamariki, whānau, hapū, and iwi.

The first significant expression of a Māori point of view on the care and protection framework is not apparent until the *Puao-te-Ata-tu* report. We therefore find that in the design and implementation of the current legislation and policy concerning the care and protection of tamariki Māori, the Crown has breached the partnership principle. This is a failure of both process (insufficient engagement with Māori in the design of the legislation and policy), and substance (significant intrusion into the sphere of Māori rangatiratanga without consent). These failures breach the Crown's partnership obligations under te Tiriti/the Treaty, and cause significant prejudice to Māori.

Lastly, we argue that the principle of active protection requires the Crown to not only return power and control to Māori – as we discussed in section 4.6.3.3 – but to direct reliable and proportionate resources towards laying a durable foundation for whānau Māori to thrive as Māori. We find that the absence of such actions is also a breach of the Crown's obligations to actively protect Māori, and prejudicially impacts Māori.

Having found that the asymmetrical control and leadership of Oranga Tamariki breaches article 2 of te Tiriti/the Treaty and the principles of partnership and

202. Document A55, p 76

active protection, an important question remains to be answered: what changes would achieve a Tiriti/Treaty-compliant care and protection system? We set out our views in chapter 6.

4.6.5 Legislative and policy coherence

Claimants argue that Oranga Tamariki (and its predecessors) is Pākehā in its constructs and values, prioritises Pākehā worldviews, and continues to misunderstand – and fails to structurally implement – Māori worldviews of tamariki.²⁰³ They argue that this perpetuates a structurally racist system and is a significant cause of disparity.²⁰⁴ Claimants say that the care and protection system does not, and never has, genuinely incorporated or expressed these understandings. The only way it can is if the care and protection system is governed and operated by Māori.²⁰⁵

The Crown concedes that historically, Māori perspectives and solutions have been ignored across the care and protection system.²⁰⁶ The Crown highlights several changes to policies and practices it is currently implementing in order to better meet its Tiriti/Treaty obligations. These include the implementation of strategies to ensure Oranga Tamariki works in a more culturally appropriate and competent manner.

As previous Tribunal reports have emphasised, Māori also have the ‘right to choose their social and cultural path.’²⁰⁷ This right derives from te Tiriti’s/ the Treaty’s guarantee to Māori of both tino rangatiratanga and the rights and privileges of British citizenship under article 3. This is known as the principle of options, and protects the right of Māori ‘to continue their way of life according to their indigenous traditions and worldview’, while participating in British society and culture, as they wish.²⁰⁸

We accept the argument of claimant counsel that Oranga Tamariki and its predecessors are fundamentally Pākehā in their philosophies, values, and constructs. We consider that within this framework, Māori are unable to exercise their tino rangatiratanga and therefore unable to practically implement their right to options – and raise their tamariki according to their traditions and worldview. We find that the Crown’s failure to honour the rights it guaranteed Māori under te Tiriti/

203. Submission 3.3.19, p 3; submission 3.3.18, p 7; submission 3.3.21, p 10; submission 3.3.29, p 2; doc A34, p 15; doc A63, p 4; doc A175(a), p 16

204. Submission 3.3.19, p 3; submission 3.3.18, p 7; submission 3.3.21, p 10; submission 3.3.29, p 2; doc A34, p 15; doc A63, p 4; doc A175(a), p 16

205. Document A44, p 3

206. Document A184, pp 1–2

207. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 65

208. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996), p 195; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274; Waitangi Tribunal, *Napier Hospital and Health Services*, p 65; Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 28

the Treaty principles of partnership and options – causes prejudice to Māori. Until Māori are able to exercise these rights, we find that the Crown is in breach of its obligations under te Tiriti/the Treaty, and their duties flowing from the principles of partnership and options.

4.6.6 Notify–investigate model

We heard from claimants and witnesses that the notify–investigate model is structurally racist and compounds social inequities.²⁰⁹ Claimants and witnesses also argue that within the notify–investigate model, resources are overly focused on risk assessment of large populations, to the detriment of resources needed to address the needs of the majority of families who come to the attention of Oranga Tamariki.²¹⁰ The claimants argue that the Crown has therefore breached its duty of active protection by establishing and maintaining a notify–investigate model, despite its awareness that the model perpetuates a structurally racist system and compounds the disparity in Māori and non-Māori tamariki being taken into care.²¹¹

This compounding disparity is illustrated in section 11.4.2.5 of appendix 11. There, table 11.15 sets out the relative likelihood of tamariki Māori moving into each care and protection stage for the first time, relative to non-Māori children.²¹² The data illustrates that Māori are more likely to come to the attention of Oranga Tamariki as a result of a report of concern, both prior to the introduction of Oranga Tamariki and since. Over the three years to March 2017, tamariki Māori were 3.4 times more likely than non-Māori children to have a report of concern filed. Even after controlling for other factors, Māori were still 1.2 times more likely. As Oranga Tamariki notes, however, the drivers behind disparity are complex, and caution is needed in considering whether ‘the disparity experienced by tamariki Māori and their whānau is a direct result of the actions of the Crown or Oranga Tamariki and its predecessors’. In this case, it is clear that these figures also reflect wider societal issues, and cannot be solely attributed to Oranga Tamariki.²¹³ In the stage after the report of concern is filed, Māori are also more likely to be investigated. After controlling for other factors, these figures have fractionally increased in recent years, with Māori 1.05 times more likely to be investigated following a report of concern in the three years prior to 2017, and 1.14 times more likely since. Of these investigations, however, the trends reverse when we look at the likelihood that an investigation will result in a family group conference. After controlling for other factors, there is a decline in the relative likelihood that the cases of Māori children will proceed to a family group conference. Notwithstanding these figures, we note the limitations of this data; these are set out more fully in the appendix.

209. Document A90, p 19; submission 3.3.19, p 8; submission 3.3.26, p 5

210. Document A97, p 7; transcript 4.1.7, pp [691]–[692]

211. Submission 3.3.26, p 21

212. Document A56, p 9

213. Submission 3.3.34, p 21

The Crown did not specifically address the notify–investigate model. It does, however, acknowledge that structural racism exists within the care and protection system, reflecting broader society. It recognises that this has meant more tamariki Māori being reported to Oranga Tamariki, and has impacted the outcomes and experiences of tamariki and their whānau.²¹⁴ The Crown also recognises that it should have identified the need to tackle structural racism head-on when establishing Oranga Tamariki,²¹⁵ and notes several strategies it has since implemented to address this issue (strategies implemented since 2017 are discussed further in chapter 5.) Lastly, the Crown reiterates its position that broader cross-government support is required in order to reduce the disparate numbers of Māori and non-Māori tamariki being taken into care. The Crown submits that Oranga Tamariki is working across government to drive collaboration and that it will continue to push and support change beyond the care and protection system.²¹⁶

In considering the issue before us, we reflect again on the principle of active protection. This derives from te Tiriti/the Treaty principle of partnership, and imposes an obligation on the Crown to actively protect the rights and interests guaranteed to Māori. The Tribunal has also found on several occasions – including in the *Hauora* report – that the Crown’s duty of active protection is heightened where adverse disparities are persistent and marked.²¹⁷

We consider this finding of particular relevance here. It is clear from the evidence before us that a persistent and marked disparity exists between the number of Māori and non-Māori tamariki being taken into State care. The Crown therefore has an increased duty to address it. However, in respect of the notify–investigate model, it appears the Crown has contented itself with a model that – by its own acknowledgement – is structurally racist in reflecting broader societal structural racism. As a result, the model not only fails to reduce the disparity, but actively compounds it. On the balance of the evidence before us, we therefore find that the current notify–investigate model causes significant prejudice to Māori.

We also acknowledge, however, that in the short term and pending any wider system change, there is no easily identifiable alternative. Claimants call for a model which focuses more on prevention, rather than the ‘ambulance at the bottom of the cliff’ approach they associate with Oranga Tamariki.²¹⁸ We also believe in a holistic model focusing on preventing abuse and involving wider community networks to mitigate risk for whānau. However, in our view, any model – even a much more preventative model – may still require a notify–investigate mechanism. The issue is one of balance and emphasis. The present system, in our view, is too reactive.

Regarding the allocation of resources within the notify–investigate model, we note the findings of the Tribunal in the *Napier Hospital and Health Services Report*,

214. Submission 3.3.34, p 21

215. Ibid, p 18

216. Ibid, pp 3, 28

217. Waitangi Tribunal, *Hauora*, p 32; Waitangi Tribunal, *Napier Hospital and Health Services*, pp 53–54

218. Submission 3.3.22, p 3; submission 3.3.31, pp 55–56; doc A43, p 4; doc A60, p 3; doc A69, p 12

which found that active protection may compel the Crown to target more resources according to need, ‘in order to reduce structural or historical disadvantage’.²¹⁹ We found the evidence of Associate Professor Keddell helpful in this respect. In her analysis, which claimants cite, the notify–investigate system does not focus enough on preventative resources to meet the needs of the majority and instead diverts critical resources from this to mass surveillance – which amplifies the effects of over-surveillance that Māori face. Associate Professor Keddell considers, and claimant counsel argue, that this is a key factor contributing to the consistently and significantly disparate rates at which Māori and non-Māori tamariki are taken into care.²²⁰

We consider that the Crown’s obligations here are best viewed in light of its Tiriti/Treaty duties of partnership and active protection, and the Crown’s guarantee to Māori of tino rangatiratanga over their kāinga and taonga. As discussed earlier, this requires the Crown to not only return power and control to Māori, but also to ensure that reliable and proportionate resources are directed towards laying a durable foundation for whānau Māori to thrive as Māori. We expand on this in the following analysis sections, and in chapters 5 and 6.

4.6.7 Cultural competency

Claimant counsel say that there is a broad lack of cultural competency and poor understanding of tikanga Māori within Oranga Tamariki. They submit that this results in poor practice, perpetuates a structurally racist system, and contributes to the disparate numbers of Māori and non-Māori tamariki being taken into care. All claimants agree that where cultural competency is lacking, the safety of Māori children is not being met.

The Crown acknowledges it has historically failed to invest sufficiently in cultural competency training, and that this has contributed to inconsistent and poor practice. The Crown submits that it has implemented a Māori Cultural Framework in order to embed Māori-centred practice. In hand with this, it says, Oranga Tamariki is increasing the cultural competency of the organisation by increasing both the training of its workforce and the number of culturally competent staff. These measures are discussed further in chapter 5, where we consider Oranga Tamariki’s changes to policy and practice since 2017.

Oranga Tamariki’s ‘Staff Table 4’, reproduced as table 11.16 in appendix 11, notes that 25 per cent of social workers are Māori, a figure considerably lower than the consistently high proportion of children in care who identify as Māori.²²¹ Likewise, figure 11.20 in appendix 11 notes that the percentage of Māori tier three and four managers is similarly low, at 21.1 per cent and 27.6 per cent respectively.²²² On the

219. Waitangi Tribunal, *Napier Hospital and Health Services*, pp 53–54 ; see also Waitangi Tribunal, *Tū Mai te Rangī*, p 27

220. Transcript 4.1.7, p [703]

221. Document A57, p 17

222. Document A53, p 17

other hand, we are encouraged to see the introduction and increase of kairāanga roles (specialist positions requiring deep understanding of and experience within te ao Māori and tikanga-a-iwi values and practices).²²³ We have heard evidence as to the impact that these roles have on culturally competent practice within Oranga Tamariki, but we note that considerable variability remains across regions. For example, figure 11.22 in appendix 11 indicates that the Upper South and Canterbury regions have the highest level of access, with a ratio of 1:100–150. In contrast, Taranaki Manawatu, Te Tai Tokerau, and Auckland have the lowest levels of access with only 1:400–500 tamariki.²²⁴

We consider te Tiriti/the Treaty principles discussed in our previous sections – partnership, options, and active protection – are also relevant to our analysis here. As we set out in section 4.6.4, the Crown’s guarantee of tino rangatiratanga to Māori includes the right for Māori to live by their own tikanga. We have also considered the principle of options, and noted that this too includes the Crown’s duty to protect the right of Māori to continue their way of life according to their traditions and worldviews. The *Napier Hospital and Health Services* report considered that ‘the principle of options requires, at a minimum, respect for the most important facets of tikanga Māori within the practice of public hospitals and other State services.’²²⁵ We agree with the Tribunal’s position in that report: a failure to accommodate tikanga Māori, as well as a failure to ensure cultural responsiveness to Māori patients, breaches the principles of options and active protection.²²⁶

On the balance of the evidence before us, it is clear that the Crown has failed to ensure Oranga Tamariki’s workforce is adequately trained so as to be able to be consistently capable to engage with whānau Māori in ways that are culturally intelligent and competent. This is illustrated by the experiences claimants have shared with the Tribunal, and has also been conceded by the Crown – although it notes (and we acknowledge) that new frameworks and training have been implemented since 2017 to ensure cultural competency. Their impact is discussed further in chapter 5. We therefore find that, at least prior to 2017, the Crown has failed to meet its Tiriti/Treaty obligations in this regard.

4.6.8 Variable practice

Claimants state that, under the Oranga Tamariki Act, outcomes for tamariki Māori rely heavily on the discretion of frontline Oranga Tamariki workers, particularly social workers.²²⁷ Claimants express concern with the social workers’

223. Document A54, p 79; Dr Catherine Love, Shamia Makarini, Charles Waldegrave, Dr Giang Nguyen, and Wayne Makarini, *Enhancing Tamariki and Whānau Participation in Decision Making: External Evaluation Summary Report* (Lower Hutt: Family Centre Social Policy Research Unit, 2019), p 3

224. Document A169, p 397

225. Waitangi Tribunal, *Napier Hospital and Health Services*, p 65

226. Ibid, pp 174–175

227. Submission 3.3.26, p 25

level of discretion and the intrusive powers they wield (for example, through section 78 uplift orders). Claimants say that variation between Oranga Tamariki sites (site culture and site resourcing such as case loads) contributed to differences in practice (particularly individual frontline decision-making), and that in turn this, brought about differing and prejudicial results for tamariki Māori.

While the Crown does not use the term 'site variability', many of the issues that claimants raise concerning differences between sites such as culture, workload, decision-making, and size were identified to some degree. The Crown acknowledges there are improvements to be made with regard to the culture of Oranga Tamariki as a whole, that consistency in decision-making and service delivery are integral to providing safe services to tamariki, and that efforts are being made to alleviate the workload of Oranga Tamariki staff.

In appendix 11 at section 11.3.3.1, figure 11.14 illustrates the variability of social workers' perception of risk.²²⁸ Here, a random sample of social workers was questioned, having had the same situation described to them with only one difference – some were told the family was European, while others were told the family was Māori. As shown by the data, Māori were perceived to be more at risk than their Pākehā counterparts at each stage. In addition, nearly double the number of total decisions were made for Māori whānau. This variability in decision making can be seen as one of the factors contributing to the variable and prejudicial results that tamariki Māori experience. We thus consider that there is sufficient evidence to conclude the presence of concerning site variability encompassing culture, site size, social worker workloads, discretion, power, and decision-making. It is therefore our assessment that prior to 2017, Oranga Tamariki did not exhibit best practice in these areas, and this deficiency appears to have played an important role in the persistence of disparities in the rates of tamariki Māori taken into care.

4.6.9 Family group conferences

Claimants argue family group conferences fail Māori in that they are lacking in tikanga, are often pre-determined, manipulate whānau, and disempower them through the provision of inadequate information. They submit that in these respects family group conferences breach the right of Māori to tino rangatiratanga: they remove the decision-making power of Māori over their tamariki, and fail to uphold the mana of whānau, hapū, and iwi.

The Crown acknowledges that family group conferences could be 'disempowering'. The Crown submits that several initiatives have been introduced in the past three years to allow for iwi-led family group conferences, and to make family group conference processes more positive with higher participation from whānau. We assess these initiatives further in chapter 5.

We also note the data provided at section 11.4.2.7 of appendix 11. This shows that, consistently over the last 10 years, over 50 per cent of tamariki Māori with care and

228. Document A98, p 5

4.6.10

protection concerns were involved in a family group conference. Figure 11.17 at section 11.4.2.6 also shows that slightly less than half of the family group conference coordinators are Māori.

In considering the claimant arguments, we reflect again on the guarantees made to Māori under article 2 of Te Tiriti and the principle of active protection. In section 4.6.4, we explained that in our view Māori are guaranteed tino rangatiratanga over their kāinga and taonga, and that this includes the fundamental right to care for and raise their tamariki. We conclude that due to the evident deficiencies in Oranga Tamariki's family group conference process prior to 2017 – several of which the Crown has conceded – whānau, hapū, and iwi were not able to participate meaningfully in decision-making regarding their tamariki. In this respect, the Crown did not fulfill its obligations to protect rangatiratanga over kāinga.

4.6.10 Section 78 (with or without notice uplift) practices

The claimants express fears that social workers interpret section 78 subjectively and that this – coupled with structural racism – fosters inconsistent practice. Claimants also allege that section 78 is an extreme coercive power that social workers threaten to use against them.²²⁹ Claimants also emphasise and agree with the chief ombudsman's recent review and his adverse findings about the use of section 78.

The Crown emphasises that section 78 orders themselves are made through the Family Court, and that the actual removals under warrant are conducted by relevant Crown agents. The Crown also says the use of section 78 has decreased significantly since 2017; and further, that it has implemented changes in its section 78 uplift practices.

In considering the claimant arguments, we reflect again on the guarantees made to Māori under article 2 of Te Tiriti and the principle of active protection. In section 4.6.4, we explained that Māori are guaranteed tino rangatiratanga over their kāinga and taonga, and that this includes the fundamental right to care for and raise their tamariki. The Crown, under the principle of active protection, has a duty and obligation to use its powers to protect Māori rights to exercise their tino rangatiratanga.

We accept claimants' arguments that the use of section 78 by Oranga Tamariki against whānau is often unwarranted. Appendix 11 illustrates (in sections 11.3.4 and 11.4.1.2), the relative use of 'with notice' and 'without notice' section 78 uplift orders for Māori and non-Māori tamariki.²³⁰ From table 11.9, it is clear that uplift orders between the financial years 2004–05 and 2018–19, are predominantly filed 'without notice'. Only twice (in 2005 and 2011), has the percentage of 'without notice' uplifts fallen below 80 per cent for Māori. Moreover, in the last five recorded financial years, 'without notice' uplifts have increased further, with consistently over 90 per

229. Document A42, p 6; transcript 4.1.8, p [150]; transcript 4.1.7, pp [202], [473], [562]; submission 3.3.20, p 42

230. Document A19(b), p 1

cent of Māori uplifts being executed ‘without notice’. These statistics are noticeably higher than their non-Māori equivalents. We note that the percentage of ‘without notice’ uplifts of non-Māori tamariki over this period was lower across the vast majority of years canvassed.

Table 11.10 shows the percentages of section 78 orders granted.²³¹ The overarching theme that quickly emerges is that not only are more applications made for section 78 custody orders for Māori than non-Māori, they are also granted at a higher rate than applications for non-Māori tamariki. The cumulative impact is immediately apparent, and is a clear contributor to the disparate number of Māori and non-Māori tamariki in care.

We agree with claimants that the use of section 78 uplift orders, particularly ‘without notice’ uplift orders, has – at least up until 2017 – both demonstrated and perpetuated issues of structural racism, and contributed to the disparate rates of Māori and non-Māori tamariki being taken into care. We therefore find that the Crown – at least up until 2017 – has failed to meet its Tiriti/Treaty duties to protect Māori tino rangatiratanga. In chapter 5, we consider the use of section 78 uplift orders *since* 2017.

4.6.11 Monitoring and accountability

The claimants argue that the monitoring and accountability mechanisms and practices of Oranga Tamariki are inadequate, as demonstrated by the variation in practice and structural racism rife within the organisation. They say that the discretionary powers provided by the Oranga Tamariki Act 1989 have resulted in a lack of independent oversight, resulting in an administrative culture that lacks accountability and transparency. They argue that the absence of accountability and transparency perpetuates and compounds structural racism, and contributes to the significantly disparate rates of Māori and non-Māori tamariki being taken into State care.

In the Crown’s closing submissions, the Crown did not directly address the claimants’ concerns about monitoring and accountability mechanisms within Oranga Tamariki. Crown witness, Grant Bennett, did briefly explain that whānau can put in internal complaints and that the Ombudsman has the power to investigate individual complaints as well. As shown in figure 11.26 of appendix 11, complaints made directly to the Ombudsman are increasing. Bennett also discussed a range of monitoring and accountability mechanisms that have been implemented since the introduction of section 7AA of the Oranga Tamariki Act 1989. As these were implemented after 2017, they will be discussed further in chapter 5.

In considering the issue before us, we reflect on the principle of partnership. This is founded on mutual obligation and imposes a responsibility that both Tiriti/Treaty partners act in good faith towards each other. This principle also posits that neither partner can act in a manner that fundamentally affects the other’s sphere of influence without their consent. We share the claimants’ concern that the

231. Document A19, p1

significant discretionary powers afforded to Oranga Tamariki by the 1989 Act contribute to the undermining of meaningful monitoring and accountability. Internal and external monitoring processes, such as they are, appear weak. In practice, this has enabled Oranga Tamariki to normalise a unitary, eurocentric decision-making process to the detriment of the Māori sphere of influence.

With regard to the monitoring and accountability mechanisms intended to promote good social work that do exist, we were troubled by the apparent lack of oversight and inconsistent application of these mechanisms. The operation of Care and Protection Resource Panels and the Social Workers Registration Board appears to be ineffectual. Further, the variable use of the Child and Family Consult Tool by social workers will undoubtedly result in subjective perceptions of the danger, harm, and safety assessments when engaging with whānau. We also agree that a less complicated complaint pathway could increase overall Māori confidence in Oranga Tamariki.

4.7 CONCLUDING REMARKS AND SUMMARY OF FINDINGS

After the release of the *Puao-te-Ata-tu* report, there was a period in the late 1980s and early 1990s when genuine efforts were made to implement its recommendations. While available contemporary data is limited, it appears there was a significant reduction in the number of tamariki Māori been taken into State care during this period. The promise of *Puao-te-Ata-tu* and reinvigoration of the Maatua Whāngai programme was, however, allowed to ‘wither on the vine’ as a result of changing government policy and priorities. This, in itself, is a clear breach of te Tiriti/the Treaty principle of active protection. It is also an important indicator of a more fundamental challenge. If a report of the calibre of *Puao-te-Ata-tu* is left to wither, what does it take to convince the Crown that it must now relinquish a degree of power and control to Māori? How could the Crown be convinced that to do so is not separatism, but simply what was originally granted to Māori under the Treaty?

The disparities we have examined reflect decades of dispossession, alienation, and sustained attempts to suppress and assimilate, rather than respect, the Māori way of life. The combined effect of dispossession of land and resources to sustain the tribal base, combined with monocultural legal and policy settings, has progressively denied entitlement to tino rangatiratanga over kāinga. From this fundamental breach, disparities across education, health, justice, and child welfare flow; as do poverty and dependency. We find there has been a direct and sustained breach of the article 2 guarantee to Māori tino rangatiratanga over their kāinga. The disparities also represent a clear breach of the principles of active protection and options.

The damage to Māori tribal and kinship structures has been immense. Some progress has been made through Treaty of Waitangi settlements towards limited restoration of lands and physical assets, but maintenance and restoration of whanaungatanga links within whānau and hapū is an entirely different challenge. It is also not one that the Crown can (or should) attempt to lead. To

paraphrase Tamaki Kruger, what comes next, requires Māori leadership, not Crown leadership.²³²

As we pointed out in chapter 2, the Tribunal in its *Hauora* report stressed that the capacity of Māori to exercise authority over their own affairs, as far as practicable within the confines of the modern state, is key to the active protection of tino rangatiratanga. Furthermore, active protection includes an obligation on the Crown to focus specific attention on inequities experienced by Māori, and if need be, provide additional resources to address the causes of those inequities. This becomes a matter of particular urgency when Māori rights and interests derived from te Tiriti/the Treaty are under great threat. We also noted the findings of the Tribunal in its *Tū Mai te Rangi!* report, where it was held that the obligation to actively protect Māori interests is heightened in the knowledge of past historical wrongs done by the Crown, and any prejudice that has affected subsequent generations.

Nothing could be more fundamental to te Tiriti/the Treaty relationship and its future success than the right of Māori to raise their tamariki to be healthy, happy, and grounded in te ao Māori. This is also what the principle of options speaks to. As the Tribunal stressed in its *Hauora* report, Māori have the right to choose their social and cultural path. In its modern application, the principle of options requires the Crown to actively protect the availability and viability of kaupapa Māori solutions in the social sector and in mainstream services in such a way that Māori are not disadvantaged by their choice.

The breach of the principles of active protection and options arises out of and is connected with the sustained breach of the article 2 guarantee of tino rangatiratanga over kāinga, all of which combine to deny effective choice to Māori who seek to live and thrive as Māori.

Having considered the evidence before us, we therefore conclude that prior to 2017, the Crown – through Oranga Tamariki – breached its Treaty obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga in the following ways:

- ▶ by failing to implement the recommendations of *Puao-te-Ata-tu* to address systemic racism in the State care and protection system, and subsequently failing to support and enable Māori attempts to arrest and reverse the flow of tamariki Māori into State care;
- ▶ by maintaining a care and protection system characterised by asymmetrical control and leadership;
- ▶ by maintaining a care and protection system which in operation continues to reflect and prioritise eurocentric thinking, values, and practices;
- ▶ by failing to ensure that Oranga Tamariki's workforce is adequately trained to have a requisite level of cultural competency;
- ▶ by failing to monitor and regulate substantive and prejudicial differences in site culture and practice; and social worker practice, discretion, power, and decision-making;

232. Document A178, p 2

- by failing to address persistent problems inhibiting the decision-making ability of whānau in family group conferences;
- by using section 78 uplift powers in ways that perpetuate and compound issues of structural racism, and contribute to the disparate rates of Māori and non-Māori tamariki being taken into care; and
- by failing to oversee and consistently apply mechanisms for the monitoring and accountability of social work practice.

We turn now to consider the second of the issues set for this inquiry.

CHAPTER 5

CHANGES TO POLICY, PRACTICE, AND LEGISLATION SINCE 2017

Ki te kore e purua ngā kōhao o te whare, he kai nā te hau pūkerikeri

A house whose gaps are not filled properly is at the mercy of the raging and cold winds

5.1 INTRODUCTION

In the previous chapter, we outlined the nature of disparity between the number of Māori and non-Māori tamariki entering the care and protection system, and considered the reasons why such a significant and consistent disparity exists. We now turn to the second issue set out for consideration in this inquiry: to what extent will the legislative policy and practice changes introduced since 2017, and currently being implemented, change this disparity for the better? Once again, reflecting the nature of this inquiry and the expectation that it proceed with urgency, we have focused our attention – insofar as possible – on the period 2015 onwards.

We begin by examining, in section 5.2, key legislative amendments to the Oranga Tamariki Act 1989 – both those that have been enacted since 2017, and those currently planned. In section 5.3, we consider Oranga Tamariki's partnerships with external Māori organisations. A raft of other policy and practice changes are then assessed in section 5.4. On each topic, we set out the parties' positions, but reserve our own analysis and conclusions until section 5.5.

In this section, we consider the impact of the changes introduced since 2017, and whether these are sufficient to correct – either now or in the near future – the disparate number of Māori and non-Māori tamariki entering into care. We also consider whether Oranga Tamariki, in light of these changes, remains a source of prejudice to Māori, or whether it now constitutes a Tiriti/Treaty-compliant care and protection system. Our considerations on these matters have been greatly assisted by the detailed evidence provided to us in hearings. We thus include in our analysis four case studies which set out, in greater detail, the experiences of two Crown witnesses, a claimant, and a Tribunal-called witness. We include these to further illustrate the implications of legislation, policies, and practices on whānau and local communities, as such ground-level perspectives have helped us arrive at our views on the issues before us.

5.2 LEGISLATIVE AMENDMENTS

As noted in section 3.7 of this report, since 2017 an array of legislative changes have been introduced. These include:

- ▶ changing the purposes and principles of the Act to better ensure children and young people are at the centre of decision-making – while considering them within the context of their whānau, hapū, iwi, and broader community groups (section 11);
- ▶ strengthening provisions for government agencies to share information about children and young people (section 41);
- ▶ enhancing complaints processes (section 134);
- ▶ allowing young people to remain or return to living with a caregiver until the age of 21, with transition support and advice available until the age of 25 (sections 128–129);
- ▶ making a practical commitment to the principles of the Treaty of Waitangi (section 9);¹
- ▶ facilitating a more preventative approach to care and protection, and youth justice (section 101);
- ▶ creating national care standards and regulations to ensure consistent care for children and young people (section 134); and
- ▶ expanding the jurisdiction of the Youth Court (section 113).²

However, one 2017 amendment attempts to explicitly address the disparity between the number of Māori and non-Māori in care from a Tiriti/Treaty perspective – this is section 7AA, which we turn to next.

5.2.1 Important legislative amendments since 2017, including the introduction of section 7AA

Section 7AA of the Oranga Tamariki Act 1989 came into force on 1 July 2019. Crucially for this inquiry, the section sets out specific duties of the chief executive in order to ‘recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)’ as stipulated by section 4 of the Act. Its stated objective is to ‘reduc[e] disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department’. Section 7AA(2) thus requires the chief executive to:

- ▶ provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and their whānau who come to the attention of the department;
- ▶ set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department;

1. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 9; Oranga Tamariki Act 1989, s 4

2. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017

- enable the robust, regular, and genuine exchange of information between the department and those organisations;
- provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations; and
- provide, and regularly review, guidance to those discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce.

5.2.1.1 *The claimants' position*

The claimants maintain that, while section 7AA is a welcome legislative development, it does not go far enough to reduce the disparate number of Māori and non-Māori entering care. Witness for the Wai 2615 claimants, Isobel Peihopa, notes that

When I first got wind of a Māori specific section going into the Act, I was really excited because I thought that it was going to make Oranga Tamariki processes better. That section is now s7AA and I thought it was going to be a lot better and do a lot more than what it is currently doing. Currently, s7AA ensures policies and practice reduce disparities, that staff have regard for mana tamaiti, whakapapa and the whanaungatanga responsibilities of whānau hapū and iwi and allows for partnerships with Māori.

I thought this section was going to make it an obligation for the Chief Executive and social workers to act in accordance with Māoritanga, not just 'have regard to' a couple of our values, but to our worldview as a whole. I thought it was going to make Oranga Tamariki processes more 'tika and pono' by my definition and not theirs. Practice is still the same though, social workers still can't tell tika from teka reports of concerns because they don't whakawhanaungatanga properly and they still place a lot of weight on the history of whānau members when they make their assessments.³

Ms Peihopa's criticisms of section 7AA conclude with the observation that '[s]ection 7AA might help to reduce disparities but Māori want equity. It is not good enough to reduce disparities by 0.01% every year, we want equity.'⁴ Claimant Raewyn Bhana, a social worker with over 20 years of experience, says that '[s]ection 7AA was left at the door of the training we attended on it. Its introduction brought us real hope. However we have seen nothing since, except an increased burden on us to educate colleagues.'⁵

Te Hiwa Preston, a kaiaarahi (team leader) at VOYCE Whakarongo Mai, elaborates on this dissatisfaction with the tangible impacts of section 7AA, noting that:

3. Document A144, pp 14–15

4. Ibid, p 15

5. Document A79, p 3

5.2.1.2

Oranga Tamariki heavily relies on section 7AA in terms of policy alignment with Māori. If section 7AA is supposedly the power-play button for tamariki in care, then it is insufficient and ineffective. If it was effective, then I would not be saying that a vast majority on our database are Māori in the care system.⁶

Claimant counsel acknowledge that section 7AA – along with regulatory standards and processes such as the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 – aims to place stronger obligations on Oranga Tamariki to support tamariki in maintaining and strengthening their connections with their whānau, hapū, and iwi. However, counsel submit that the effectiveness of these measures ‘depends on the political landscape, resourcing, and Oranga Tamariki’s staff cultural competency’.⁷ In Mr Preston’s view, rhetoric that a transformation has occurred or is occurring within Oranga Tamariki is therefore ‘just smoke and mirrors’.⁸

Claimant counsel also identify another weakness in section 7AA: its requirement only that the chief executive ensures that Oranga Tamariki ‘seeks to develop strategic partnerships’.⁹ In the view of claimants, the effect of this non-committal wording is that the power to initiate partnerships continues to reside with Oranga Tamariki rather than Māori, the ministry being required to ‘attempt to develop’, rather than actually develop, strategic partnerships. This criticism is addressed further in the section 5.3.

5.2.1.2 *The Crown’s position*

The Crown argues that – amongst the raft of legislative reforms introduced over the last several years – the introduction and implementation of section 7AA represents a significant step forward for the Oranga Tamariki Act 1989, and for Oranga Tamariki.

The Crown recognises that section 7AA is not a complete answer to addressing the disparity between Māori and non-Māori in care, but says it nonetheless constitutes ‘a part of the picture, albeit an important one’. Section 7AA, the Crown notes, ‘does not sit alone, and nor does it fully describe te Tiriti/the Treaty relationship or exhaust the Crown’s Tiriti/Treaty responsibilities, including as to partnership’.¹⁰

Nevertheless, the Crown submits that section 7AA ‘is driving change’ as ‘a significant statutory lever’ for improvements in outcomes for tamariki Māori and their whānau. In particular, the Crown highlights two policy and practice changes Oranga Tamariki has instituted in order to meet its obligations under section 7AA – its mana tamaiti policy and its quality assurance standards. The Crown submits that the effect of both initiatives is already being reflected in promising

6. Document A141, p 2

7. Submission 3.3.18, p 5; doc A49(b), app A, p 26

8. Document A141, p 3

9. Submission 3.3.33, p 23

10. Submission 3.3.34, p 23

data indicating a decrease in the disparate numbers of tamariki Māori relative to non-Māori children being taken into care.¹¹

5.2.1.2.1 *Mana Tamaiti policy and objectives*

Section 4 of the Oranga Tamariki Act 1989 states that Oranga Tamariki must ‘promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups’ by recognising ‘mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department’. This objective is given further expression by section 7AA, and is echoed in the wording of Oranga Tamariki’s resultant mana tamaiti policy. The policy clarifies the need for the ministry to have regard to mana tamaiti (tamariki), whakapapa, and whanaungatanga in working with tamariki Māori and their whānau, and to embed these objectives throughout its policies, practices, and services. As outlined in section 3.7.4.1 of this report, the Mana Tamaiti objectives require Oranga Tamariki to:

- ensure the participation of tamariki Māori, rangatahi, whānau, hapū, and iwi in decisions affecting them at the earliest opportunity;
- support, strengthen, and assist whānau Māori to care for their tamariki and rangatahi to prevent the need for them to enter care or youth justice;
- support tamariki Māori to establish, maintain, and strengthen their sense of belonging through cultural identity and connections to whānau, hapū, and iwi;
- prioritise placement of tamariki Māori within their broader whānau, hapū, and iwi wherever possible; and
- support, strengthen, and assist tamariki Māori and rangatahi Māori and their whānau to prepare for their return home or transition into the community after a placement.¹²

Crown witness Oranga Tamariki chief social worker Grant Bennett notes that these objectives:

guide . . . [Oranga Tamariki’s] work to enable practice that empowers tamariki and whānau Māori. This includes embedding Te Ao Māori world views and principles within our practice design and giving preference to the design and delivery of practice in partnership with iwi and Māori groups.¹³

In July 2020, Oranga Tamariki released its first statutorily mandated report on section 7AA.¹⁴ The report measures the extent to which Oranga Tamariki’s services are achieving its mana tamaiti objectives. The metrics Oranga Tamariki uses to

11. Ibid, pp 20, 23

12. Document A20, p10; Oranga Tamariki, *Annual Report 2018/19* (Wellington: Oranga Tamariki, 2019), p 9

13. Document A21, p 2

14. Document A53

evaluate its services, and the conclusions the agency draws, are laid out in greater detail in section 11.4.2.1 of appendix 11.

Amongst the statistics highlighted, the report notes the results of Oranga Tamariki's recent Children's Experience Survey.¹⁵ The survey found that 79 per cent of tamariki Māori respondents between the ages of 10 and 17 feel they have a say in important decisions about their life. In Oranga Tamariki's assessment, this indicates the agency is partially fulfilling its first mana tamaiti objective – to ensure participation in decision-making.¹⁶ (See also section 11.4.2.1 of appendix 11.) The section 7AA report also notes that 80 per cent of tamariki Māori aged 10 and 17 feel they have the opportunity to learn their culture. This high percentage, the report records, illustrates that Oranga Tamariki's services are predominantly fulfilling the third mana tamaiti objective – supporting tamariki Māori to establish, strengthen, and maintain their sense of cultural identity.¹⁷ Lastly, the report notes Oranga Tamariki's creation of transition services in 2017 to provide increased support for young people as they move out of care. The section 7AA report shows that during the financial year 2019–20, rangatahi Māori made up 60.5 per cent of all referrals for transition support services.¹⁸ The report concludes that this data aligns with the fifth mana tamaiti objective – to support tamariki Māori and rangatahi Māori in their return home or transition into the community.¹⁹

Oranga Tamariki acknowledges limitations to the data these conclusions are drawn from.²⁰ Overall, however, Crown counsel and witnesses assert the data indicates section 7AA and the mana tamaiti objectives are beginning to reduce the disparate number of tamariki Māori being brought into care. Chief executive of Oranga Tamariki Gráinne Moss, for example, notes: 'From the changes we are making, we are seeing promising results start to emerge.'²¹

5.2.1.2.2 *Quality assurance standards*

Crown counsel note that section 7AA has also led to the introduction – in April 2017 – of quality assurance standards Oranga Tamariki must meet when developing operational policies, practices, or new services. Oranga Tamariki describes these standards as:

- ▶ Standard 1: We uphold and protect Māori rights and interests; . . .
- ▶ Standard 2: We hear and act on the voices of Māori; . . .

15. The Children's Experience Survey is an annual survey designed to collect, at population-level, representative data about the experiences of children and young people in the custody of the Oranga Tamariki chief executive. In this first survey, children and young people were offered the chance to voluntarily participate in the survey; if they were in the regions where the survey was rolled out, were aged 10 to 17 years (or had turned 18 since 31 January 2019), and were in the care and protection custody of the Oranga Tamariki chief executive for at least 30 days: doc A53, p 51.

16. Document A53, pp 23, 43, 51

17. Document A53, p 51

18. Ibid, p 53

19. Ibid

20. Ibid, p 23

21. Document A195, p 6

- Standard 3: We ensure equity by reducing disparities for tamariki Māori and their whānau; . . .
- Standard 4: We have regard to mana tamaiti, whakapapa and whanaungatanga; [and]
- Standard 5: We value the Māori evidence base.²²

Oranga Tamariki elaborates that these standards reflect the importance of articles 1 and 2 of te Tiriti/the Treaty, and various Tiriti/Treaty principles including kāwanatanga, tino rangatiratanga, active protection, equity, partnership, and reciprocity.²³ According to the Crown, the standards will

help shift the way we [Oranga Tamariki] develop our work from a monocultural lens to a Māori-centred approach which in turn, will improve the effectiveness of policies, practices and services for the majority of those impacted by our Ministry – tamariki Māori, their whānau, hapū and iwi.²⁴

Grant Bennett explains how this broadening of quality assurance tools and processes ensures a focus on mana tamaiti objectives, and has facilitated feedback from whānau, tamariki, caregivers, partners, iwi, and Māori providers:

practitioners now get regular face-to-face feedback about their practice as it applies to the mana tamaiti objectives. It also enables us to identify how our practice is changing over time, how practice varies between sites and what support sites need to continue to make practice improvements.²⁵

5.2.2 Planned partial repeal of the ‘subsequent child’ provisions

In July 2016, the Children, Young Persons, and Their Families (Vulnerable Children) Amendment Act introduced ‘subsequent child’ provisions to the Oranga Tamariki Act 1989, as part of a ‘package of reforms to address child abuse and neglect’.²⁶

The new provisions, under sections 18A–18D of the Oranga Tamariki Act 1989, apply where parents who have previously had a child removed from their care intend to care for, or are caring for, subsequent children. The provisions place the onus on those parents to ‘prove that they are unlikely to inflict or allow the same harm that resulted in the first child being removed from their care’.²⁷ They also apply where parents have previously been convicted of murder, manslaughter, or infanticide, and intend to care for any children they have subsequent to such a conviction.

22. Oranga Tamariki, *Section 7AA: Quality Assurance Standards* (Wellington: Oranga Tamariki, [2020]), pp 4–6

23. Ibid

24. Ibid, p 2

25. Document A21, p 4

26. Paula Bennett, 19 June 2014, NZPD, vol 699, p 18,739; Oranga Tamariki Act 1989, ss 18A–18D

27. Document A46, p 9

5.2.2.1

Once a parent meets the criteria for the subsequent child provisions, social workers have no discretion; they must conduct an assessment of that child's safety. The social worker must then apply for one of two orders from the Family Court:

- ▶ If *satisfied* the child will be safe, the social worker must apply for a 'Confirmation of Decision Not to Apply for a Care or Protection Order'. While such applications must be served on the parents, 'there is no requirement that the Family Court give anyone (parent/s, whānau) the opportunity to be heard'.²⁸
- ▶ If *not satisfied* the child will be safe, the social worker must apply for a care and protection order.²⁹

5.2.2.1 *The claimants' position*

From the outset of this inquiry, claimants broadly opposed the subsequent child provisions, arguing they contain harmful presumptions and cause disproportionate prejudice to Māori. In August 2020, however, then-Minister for Children Tracey Martin, announced that Cabinet would partially repeal these provisions. While claimants welcome this development, they say the provisions continue to cause prejudice to Māori and, until they are repealed, remain in breach of te Tiriti/ the Treaty.³⁰ For this reason – despite the pending repeal of the provisions – we do not omit the issue from this report.

Claimants consider the subsequent child provisions an egregious breach of te Tiriti/the Treaty. They support the views of the Children's Commissioner Judge Becroft who, during hearings, described the provisions as a 'pernicious' and 'totally unnecessary piece of legislation', which 'should be repealed tomorrow'.³¹

Judge Becroft considered that the introduction of the legislation had led to a culture shift within Oranga Tamariki that exceeded the actual application of the statute. Broadly, the onus of proof shifted to parents to prove their ability to safely care for subsequent children, rather than the earlier onus on Oranga Tamariki to prove a parent could not safely care for subsequent children. This was, in Judge Becroft's view, the most significant impact of the provisions:

I just need to be clear, from my point of view, the second and subsequent child legislation actually is a very complicated and difficult section or series of sections that only refers to a very small group of children. It's only been used in a handful of opportunities, or a handful of occasions, but this is the real problem: the assumptions in the shorthand second and subsequent child legislation . . . I think has significantly affected social work practice, so that it has become the default starting position that

28. Document A46, p 11

29. Transcript 4.1.4, pp 31–32

30. Tracey Martin, 'Subsequent Children Legislation to Change', media release, 6 August 2020, <https://www.beehive.govt.nz/release/subsequent-children-legislation-change>, accessed 13 April 2021; submission 3.3.20, pp 43–45

31. Transcript 4.1.4, p 65

when a previous child has been removed then it is up to the mother to demonstrate ability to love and safely provide for the child.³²

Ultimately, Judge Becroft concluded that the existence of the second and subsequent child legislation constituted ‘organisational racism’.³³

At contextual hearings for this inquiry in July 2020, Tribunal-called witness Tania Williams Blyth highlighted a further prejudicial aspect of the subsequent child provisions. She described the lengthy process of regaining a child once they had been uplifted under the provisions, and the effect on a parent’s ability to bond with their child:

So, when the baby is removed, the whānau then have to convince Oranga Tamariki that actually, ‘no-no, we are all good’. That process . . . could take six months, that could take a year, eight months, it could take a long time . . . the baby is with the caregiver. That baby is attaching to the caregiver.³⁴

Claimants also raise a raft of other concerns with the subsequent child provisions. Claimant Jean Te Huia, for example, notes that the legislation assumes mothers are unable to change.³⁵ Claimants Dr Rawiri Waretini-Karena, Dr Jane Green, and Kerri Nuku express concern that social workers may fail to properly conduct safety assessments under the provisions, and that they work from a mindset that the parent is likely to cause harm or allow harm to be caused.³⁶ Various other claimant groups also express concern with the subjective nature of the assessments and the assumptions behind the provisions – namely, as Judge Becroft noted, that the onus is now on the parent to prove that they can care for a child rather than on Oranga Tamariki to prove they cannot.³⁷ Finally, claimant counsel note:

the reality is that at key decision points such as Family Group Consult or Family Group Conferences, bias and underlying ideals of white saviourism continue to influence Oranga Tamariki legislation and assessment of risk of parents and whānau, despite the amendments to Home for Life. Nowhere is this more obvious than the subsequent children provisions and the alarming statistic that 48% of pregnant women whose pēpi Māori were taken into State Care before birth had been in State Care themselves.³⁸

32. Ibid

33. Ibid

34. Ibid, p 32

35. Claim 1.1.3, p 5

36. Claim 1.1.4, p 37

37. Claim 1.1.3(a), p 10; claim 1.1.4, p 37

38. Submission 3.3.26, p 47

In light of these myriad issues, claimants continue to call for the repeal of the subsequent child provisions, even once the Crown had announced its decision to repeal them.³⁹ Some claimants express frustration at the slow pace with which the repeal process has proceeded, saying that, while subsequent child provisions remain part of the legislation, ‘pēpi, tamariki and whānau are continuing to suffer significant trauma.’⁴⁰

5.2.2.2 *The Crown's position*

In response, the Crown cites its decision to partially repeal the subsequent child provisions. Following the repeal, subsequent child provisions will only apply ‘where a parent has a conviction relating to the murder, manslaughter or infanticide of a child in their care.’⁴¹ In the August 2020 announcement, the then-Minister for Children Tracey Martin advised that the decision followed a review into the outcomes of subsequent child provisions. In a media release, she said the review had found the provisions:

- ▶ are complex and confusing. The High Court has noted the highly technical language of the provisions and that they are easily misunderstood.
- ▶ . . . often involve a lengthy and drawn out Court process which is unsettling for older siblings in permanent care and sets up a hostile dynamic with parents and whānau in relation to their new child. This may increase the risk of parents avoiding engagement with services for fear of having a child removed.
- ▶ . . . pre-determine risk. This can encourage social workers to make decisions based on historical circumstances which do not recognise the change and progress parents make.
- ▶ . . . shift the onus of proof to parents and can be an added burden for parents who may be vulnerable themselves. It can be traumatic and bring up memories of their older child being removed, at a time when they are trying to demonstrate the positive progress they have made.⁴²

The Crown advises that it expects a Bill to partly repeal the subsequent child provisions (as described above) to be passed in 2022.⁴³

5.3 PARTNERSHIPS

As set out in its entirety in section 3.7.4 of this report, section 7AA(2)(c) makes clear that Oranga Tamariki must seek to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to:

39. Transcript 4.1.4, pp 30–32, 46; transcript 4.1.8, pp [60]–[61]

40. Submission 3.3.21, p 33

41. Submission 3.3.34, p 30

42. Martin, ‘Subsequent Children Legislation to Change’

43. Submission 3.3.34, p 30

- (i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and their whānau who come to the attention of the department:
- (ii) set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department:
- (iii) enable the robust, regular and genuine exchange of information between the department and those organisations:
- (iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations:
- (v) provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce:
- (vi) agree on any action both or all parties consider is appropriate.

In addition, where iwi or Māori organisations invite the chief executive to enter into a strategic partnership, the chief executive must consider and respond to such an invitation.⁴⁴

5.3.1 The claimants' position

Claimants assert that Oranga Tamariki is struggling to meet its obligations to develop strategic partnerships, and is thus failing to comply with te Tiriti/the Treaty principle of partnership. Claimants identify as particular problems of the strategic partnerships model:

- ▶ the imbalance of power between Oranga Tamariki and iwi/Māori organisations;
- ▶ the lack of resourcing available for iwi/Māori organisations; and
- ▶ the onus on iwi/Māori organisations to initiate partnership.

Together, these concerns form the basis of the claimants' critique of Oranga Tamariki's strategic partnership efforts. Evidence given by Children's Commissioner Judge Becroft – under the Children's Commissioner Act 2003 – observed that the legislative language mandated only that Oranga Tamariki attempt to form partnerships, but not that these partnerships actually manifest. In Judge Becroft's description,

s7AA is problematic and has some real limitations. While it points toward partnership, true partnership it is not. It is a pale imitation of the Treaty obligations imposed on the Crown, in this context, Oranga Tamariki. The obligation is that the department *seeks* to develop strategic partnerships. What is mandated is the effort not the outcome. [Emphasis in original.]⁴⁵

44. Oranga Tamariki Act 1989, ss 7AA(3)–(4)

45. Document A34, p 20

Further, claimant counsel note that, while Oranga Tamariki can enter into partnerships and memoranda of understanding, the organisation is only statutorily required to receive proposals from strategic partners.⁴⁶ It is not obligated to carefully consider them, nor accept them. Claimant Donna Huata said of strategic partnerships:

You know on the partnership issue, it's actually not a partnership it is a theatre and the theatre is the signing, the theatre is the document, it's the prop but in actual fact because the treasury function stays where it is, because the cart remains exactly as it is the cart doesn't change one little bit. All we have is Māori run alongside the cart trying to catch a few pennies as the cart goes by and for what they are expected to achieve it's impossible . . .⁴⁷

Claimant counsel thus submit that there is no evidence that these 'so-called strategic partnerships' – that perpetuate the 'master-servant dynamic' and allow the Crown to maintain its role as ultimate decision-maker and gatekeeper over resources – will lead to improvement in the care of tamariki Māori. Counsel allege that these models in fact go against the concept of true partnership.⁴⁸

This limitation was noted as early as 2017, when the Human Rights Commission criticised the scope of the provision in its submission on the Children, Young Persons and their Families (Oranga Tamariki) Amendment Bill. It, too, was critical that the proposed legislation only mandated effort without requiring tangible outcomes. The commission recommended that the wording be clarified and amended in an attempt to:

- ▶ create a duty to develop and implement strategic partnerships with iwi and Māori organisations;
- ▶ require Oranga Tamariki to ensure that any strategic partnership which was entered into with iwi or Māori organisations included Whānau Ora as part of its makeup; and
- ▶ establish a statutory board of representatives of iwi and Māori organisations to whom the chief executive should report to concerning the performance of his or her duties under section 7AA.⁴⁹

Claimants note that the Human Rights Commission's recommendations to amend the draft text of section 7AA(2) were not, in their view, incorporated. As such, they say the legislation does not require the chief executive to go further than making an attempt to form strategic partnerships. Claimant counsel submit that consequently the onus rests on iwi and Māori organisations to initiate partnerships with Oranga Tamariki.⁵⁰

46. Submission 3.3.21, pp 18–21

47. Transcript 4.1.8, p [229]

48. Submission 3.3.21, p 19

49. Submission 3.3.33, p 22

50. Ibid, p 23

Claimant counsel also argue that Oranga Tamariki's guidelines as to which iwi or Māori organisations it should form strategic partnerships with are flawed.⁵¹ First, because the (albeit temporary) guidelines have been developed by the Crown without collaboration with iwi and Māori organisations. These remain in effect while Oranga Tamariki undertakes collaboration with iwi and Māori organisations to develop a more permanent approach.⁵² Secondly, claimant counsel note the guidelines' criteria for Oranga Tamariki to consider when determining whether to form a strategic partnership:

- the mandate of the iwi or Māori organisation to the communities they represent;
- the potential impact of the partnership on improving outcomes for tamariki and rangatahi Māori; and
- the potential for Oranga Tamariki to work with the organisation to carry out activities set out in section 7AA(2)(c)(i)–(vi) of the Act.⁵³

Claimant counsel allege that the partnership guidelines, particularly the guideline on mandate, reserves to Oranga Tamariki the right to determine an iwi or Māori organisation's preparedness to partner with the ministry. 'Thus, the partnership guidelines become criteria that must be met as opposed to considerations.'⁵⁴

Furthermore, counsel submit that, as a consequence of these partnership guidelines, Oranga Tamariki only forms partnerships with iwi or large groups at the expense (and to the exclusion of) whānau, hapū, and small Māori organisations.⁵⁵ Claimant Moe Milne, a psychiatric nurse and teacher who has had 'various formal and informal engagements with Oranga Tamariki over the years',⁵⁶ notes that Oranga Tamariki prefers to engage with big providers or iwi for convenience, and that it avoids partnerships with hapū because they are seen as unmanageable in terms of time and cost.⁵⁷

Claimant counsel note that the current partnering approach does not acknowledge whānau, hapū, and iwi, and affirms that 'there appears to be little effort if any, by Oranga Tamariki to build working relationships with whānau, hapū and iwi in partnership in order to support whānau, hapū and iwi with regard to their tamariki'.⁵⁸

Professor Mark Henaghan, an expert witness to this inquiry, asserts that whānau, hapū, and iwi should be more than merely 'supported', arguing that children should fall within the guarantee of rangatiratanga over taonga contained

51. Ibid

52. Submission 3.3.20, p 60; Tracey Martin to Cabinet Social Wellbeing Committee, 'Enhancing the Wellbeing of Tamariki and Rangatahi Māori: Setting Measurable Outcomes and Developing Strategic Partnerships', report to Cabinet, [2019], pp 6–7

53. Submission 3.3.20, p 60

54. Ibid, p 60

55. Submission 3.3.33, pp 23–24

56. Document A63, p 1

57. Document A63(b), p 1; submission 3.3.20, p 61

58. Submission 3.3.33, p 24

in article 2 of te Tiriti/the Treaty. This means that Māori should have sovereignty over tamariki Māori in order to protect and support them in accordance with te ao Māori.⁵⁹ Until this recognition occurs, Professor Henaghan argues, the concepts in the Oranga Tamariki Act will continue to be interpreted through an inappropriate Pākehā and governmental lens and the practical outcomes of the legislation will fall well short of the principle of partnership. As cited in claimant submissions, the disconnect between principle and practice was noted in 2019 by the Oranga Tamariki general manager partnering for outcomes, Peter Galvin, who made clear that Oranga Tamariki was struggling to meet the challenges presented by their strategic partnerships. According to claimant counsel,

Mr Galvin describes how iwi partners with Oranga Tamariki have often challenged the assumptions made by Oranga Tamariki about the scope of work required to improve outcomes for Māori, as well as critiquing the decision-making process, and the control of resources and communications. Mr Galvin also states that the ability for Oranga Tamariki to commit and maintain strategic leadership on an expanding number of strategic partnerships is a 'key challenge'.⁶⁰

In her evidence, Lady Tureiti Moxon describes the notion of strategic partnership in different terms, noting that 'you have got to remember these are strategic partnerships. They are still a master-servant relationship. These are still a contract. They are not at all what it should be.'⁶¹ She also notes that the language of section 7AA does not mention terms such as *mana motuhake*, *rangatiratanga*, or any other terms relevant to Māori autonomy.⁶²

Lady Moxon makes clear that such interpretation is problematic because it occurs at the whim of Oranga Tamariki and the Government. She argues that interpretation issues will persist 'unless Māori are in charge'.⁶³ Claimant counsel generally support this position, arguing that a 'by Māori for Māori' organisation should be established, with resourcing and finance provided by the Crown.⁶⁴ Counsel suggest a transitional plan could be implemented to achieve such an organisation; the plan would provide the basis for the eventual transfer of statutory authority and resources concerning the care and protection of tamariki Māori to a governing Māori authority.⁶⁵ Furthermore, the particular dynamics and schedule of this transfer would be determined by hapū, iwi, and a collective of Māori leaders.⁶⁶

We discuss this further in chapter 6, where we consider what (if any) additional changes to Crown legislation, policy, or practice might be required in order to

59. Document A165(a), p [11]

60. Submission 3.3.7, p 15

61. Transcript 4.1.4, p 17

62. Ibid

63. Ibid

64. Submission 3.3.31, p 59

65. Submission 3.3.33, p 25

66. Ibid, pp 25–26

secure outcomes consistent with te Tiriti/the Treaty and its principles. We note here, however, that these recommendations align with the claimants' broad assertion that a transition of power from Oranga Tamariki to Māori will be a collective effort requiring collaboration of wider Māori social and political structures. Indeed, as claimant counsel told us, 'it will not be sufficient for Māori organisations to take on key roles. All Māori and particularly whānau, need to have a place and have some say in decisions moving forward.'⁶⁷ It would appear that the transitional plan is intended to provide the opportunity for input that many claimants assert Oranga Tamariki's overarching decision-making power takes from them.

5.3.2 The Crown's position

The Crown asserts that partnerships with iwi, hapū, and Māori organisations are key to addressing the disparate number of tamariki Māori being brought into care. For the Crown, being a partner entails a commitment to:

- ▶ deepening the sharing of power, decision-making and resources with iwi, hapū and Māori organisations; and
- ▶ developing the trust and flexibility needed to support the amount of time the process may take.⁶⁸

The Crown submits that joint work between Oranga Tamariki and strategic partners is showing positive results. In her brief of evidence, Whakatāne Oranga Tamariki site manager Melissa Pye describes several successes arising from her agency's involvement with Tūhoe Te Uru Taumatua (Tūhoe). These include:

- ▶ Children being delivered into the care of Tūhoe when 'Operation Notus' occurred (a large-scale police intervention against drug and gang interests in the region that occurred in late 2017). The Whakatāne Oranga Tamariki site followed up the next day and decided that they did not need to take any further action because affected children were safe with whānau. Staff were directed to close the case. Ms Pye describes how this was the beginning of a successful working relationship between Oranga Tamariki and Tūhoe, where up until that point Tūhoe had not had any 'faith and trust . . . in what Oranga Tamariki or its predecessors said or did'.
- ▶ The successful placement of a young person who had attacked a member of staff at the motel she was staying at. Today she remains with the caregivers she was introduced to at that point, alongside her siblings. This placement occurred after discussions between Ms Luke (chief executive officer of Tūhoe),⁶⁹ and Ms Pye; after which Ms Luke organised a meeting within Tūhoe, at which appropriate caregivers were identified. Ms Pye notes that 'trusting and supportive relationships between Tūhoe and Oranga Tamariki made this [situation] a success'; and
- ▶ The joint authorship of the partnership agreement, Matemateāone, by Ms Pye and Ms Luke. Ms Pye says that she eventually stepped aside so that

67. Submission 3.3.31, p 59

68. Submission 3.3.34, p 14

69. Document A178, p 4

Tūhoe could express their aspirations in the Tūhoe way. Ms Pye describes how the final document is not written in 'Crown' language; she also says Gráinne Moss expanded the agreement so that it was not just between Tūhoe and Oranga Tamariki in Whakatāne but with Oranga Tamariki as a whole organisation.⁷⁰

Ms Pye points to several examples of the progress made under Matemateāone. This includes Oranga Tamariki funding one staff member to manage the work being committed under the partnership and also paying the salary of a Tūhoe supervisor who is helping the iwi build their capability and capacity. Oranga Tamariki also convenes steering group meetings where Tūhoe leaders provide updates on how Matemateāone is progressing.⁷¹

In terms of addressing the number of tamariki Māori entering care, statistics from the He Whānau database show that, since the advent of the Matemateāone agreement with Tūhoe, the Whakatāne Oranga Tamariki site has collaborated with the iwi to support 28 whānau (with over 50 tamariki) at various stages within the care and protection system, including through reports of concern, whānau placements, and whānau support. Of those 28 whānau:

- ▶ eight found whānau solutions and avoided children being taken into custody (25 per cent);
- ▶ Tūhoe facilitated kin placements for 11 of the 13 already in custody; and
- ▶ only two of the 22 Tūhoe tamariki in care are in non-kin placements. It is hoped they will eventually transition to whānau placements facilitated by Tūhoe.⁷²

While Tūhoe and Oranga Tamariki have seen positive results under Matemateāone, partnerships are not always straightforward. Deanne McManus-Emery, Oranga Tamariki's Waikato regional manager of services to children and families, told us:

Building the partnership [between Waikato-Tainui and Oranga Tamariki] has been challenging and is an ever-evolving process. There is a mutual understanding of the intent and purpose of the partnership however at times it felt that there has been no trust and confidence, or commitment in our ability as an organisation to make the shifts it needed to make. . . .

There were many times when Waikato-Tainui wanted to exit the partnership, based on the delays in budget approval, and their lack in confidence of the Ministry's commitment. The partnership has evolved, and the process to engage kanohi ki te kanohi to address conflict, which sits separately outside of the project, has meant we have been able to address these challenges and continue moving forward.⁷³

70. Document A176, pp 4–5

71. Ibid, p 5

72. Ibid, p 7

73. Document A179, p 9

The Crown concedes that the level of change delivered through Oranga Tamariki has so far failed to address the full extent of the disparity between Māori and non-Māori entering care.⁷⁴ However, the Crown submits that sustainable change relies on partnership between Māori and Oranga Tamariki, and that productive partnership arrangements are in many cases already underway.⁷⁵ It argues that the Crown should retain a residual and ongoing role, consistent with its Tiriti/Treaty duties, in the care and protection system. The Crown describes such a role as providing a 'safety net' for tamariki Māori, covering situations where the needs of the child cannot otherwise be met, or where partners do not wish to assume statutory responsibilities for the full range of services that the State must provide.⁷⁶

5.4 POLICY AND PRACTICE CHANGES

5.4.1 Changes to procurement policies

5.4.1.1 *The claimants' position*

The claimants broadly assert that changes Oranga Tamariki has made to its procurement policies since 2017 are insufficient to reduce the disparity between Māori and non-Māori entering care. Witnesses they say that Oranga Tamariki's procurement arrangements remain inconsistent with te Tiriti/the Treaty and its principles.⁷⁷ They also state that this contravenes section 7AA(2)(c) of the Oranga Tamariki Act, which requires the ministry to work in partnership with iwi and Māori organisations to improve outcomes for tamariki and rangatahi Māori.⁷⁸

The claimants allege Oranga Tamariki's current procurement arrangements favour existing and largely Pākehā providers of social services.⁷⁹ In the claimants' view, this bias occurs because Oranga Tamariki strategically selects providers of social services, thereby controlling solutions and organisations. Similarly, Oranga Tamariki reserves the right to determine the preparedness of iwi or Māori organisations to become its partners. Consequently, they allege, Oranga Tamariki partners with iwi or large groups – at the expense of (and indeed to the exclusion of) whānau, hapū, and small Māori organisations.⁸⁰

The claimants criticise the generic contractual template Oranga Tamariki uses to engage external providers. They note it places no obligation on the contracted party to consider the whakapapa of Māori children in care, nor the whanaungatanga responsibilities of their whānau, hapū, and iwi. Furthermore, there is no requirement that a contracted organisation be Tiriti/Treaty-compliant, or promote

74. Submission 3.3.34, p 4

75. Ibid

76. Ibid, p 8

77. Document A90, p 27

78. Submission 3.3.20, pp 56–57

79. Document A140, p 2; doc A74, p 3

80. Submission 3.3.20, pp 60–61

and protect tikanga, te reo, and tāngata Māori.⁸¹ Claimants also submit that Oranga Tamariki's procurement of external service providers should reflect the ethnicity of children in State care. In other words, as 60 per cent of the tamariki in State care are Māori, approximately 60 per cent of the available funding should be granted to Māori organisations. Ultimately, counsel submit that '[w]ithout meaningful or direct mechanisms for Māori to hold Oranga Tamariki accountable to Te Tiriti, Oranga Tamariki continues to employ funding models that prioritise a Pākehā worldview'.⁸²

5.4.1.2 *The Crown's position*

Oranga Tamariki acknowledges that its external social service providers were historically contracted on an ad hoc basis. The procurement of these services frequently arose after a direct offer by a provider, as opposed to strategic commissioning. Ultimately, the agency admits this approach to procurement created an imbalance that undermined collaboration and successful partnership with some Māori organisations.⁸³ However, Crown counsel submit that since 2017 Oranga Tamariki has taken a different and more Tiriti/Treaty-compliant approach, prioritising partnering and procurement within the context of the ministry's section 7AA obligations.⁸⁴

The Crown argues that Oranga Tamariki's new procurement model, operative since April 2017, enables the ministry to engage more widely with iwi and Māori organisations. It embodies a Māori-centred practice framework that requires a high degree of partner engagement in the design and co-delivery of services.⁸⁵ According to the Crown, several changes have resulted in guaranteed funding and support for providers designing new kaupapa Māori models of care and support.⁸⁶ Similarly, Oranga Tamariki has also prioritised providers of social care that demonstrate cultural responsiveness.

In addition, and as identified in section 11.4.2.4 of appendix 11, the Crown cites changes to Oranga Tamariki's funding regime that have seen funding for iwi and Māori organisations increase by 65 per cent since 2017. This amount equates to approximately 24 per cent of total funding.⁸⁷ Further, the vast majority of Oranga Tamariki's procurements are now the result of direct approaches to partners identified as being well-placed to deliver social services. Moreover, the Crown says, most of the organisations that have secured new services identify as iwi/Māori, and that Oranga Tamariki is working to address remaining proportionality issues concerning the procurement of services from Māori organisations.⁸⁸

81. Document A186, pp 2–3

82. Submission 3.3.18, p 7

83. Document A169, pp 72–73, 76

84. Submission 3.3.34, pp 26–27

85. Document A172, pp 4–6, 11–12; doc A50, pp 8–10

86. Document A172, pp 5–8

87. Ibid, p 8

88. Ibid, pp 5–6

5.4.2 Changes to monitoring and accountability

5.4.2.1 *The claimants' position*

The claimants cite an internal Oranga Tamariki report, released in October 2019, where it was found that despite the 2017 changes, the organisation still lacked external accountability.⁸⁹ The claimants assert that independent oversight will improve Oranga Tamariki's practices and procedures. In the claimants' view, without such change, tamariki Māori and whānau will continue to experience negative outcomes.⁹⁰ The claimants acknowledge that the Crown is developing new legislation and regulations to improve Oranga Tamariki's monitoring and accountability mechanisms.⁹¹ The claimants argue, however, that Oranga Tamariki continues to monitor staff behaviour largely internally – leaving room for actual or potential conflicts of interest and reducing transparency. In their view, there is no provision in the Oranga Tamariki Act 1989 to make staff accountable to whānau.⁹²

Despite several amendments to Oranga Tamariki practices and policy in 2017 (which are set out in the Crown's position below), the claimants identify ongoing issues with accountability. The claimants say care and protection resource panels (CPRP), for instance, remain understaffed. In 2019, the Auckland CPRP noted it was not uncommon for scheduled panel meetings to be cancelled because quorum requirements could not be fulfilled. In addition, an annual report noted social workers were often unavailable to attend Papakura CPRP meetings.⁹³ Similarly, the chief ombudsman also found there were unacceptable delays in cases being presented to CPRPs. Moreover, not all of the relevant information was being provided to the panels.⁹⁴

As we have discussed previously, section 7AA places specific statutory duties on Oranga Tamariki's chief executive to recognise and provide practical commitment to the principles of te Tiriti/the Treaty. However, the claimants say there is no legislative requirement for an independent body to monitor and report on Oranga Tamariki compliance with section 7AA.⁹⁵ Nor are there any clearly defined standards for a judicial review. Further, the claimants say there is no mechanism within section 7AA for strategic partners to disagree or challenge Oranga Tamariki on any matter. Similarly, the claimants note there is no mandate mechanism to ensure whānau are appropriately engaged where the procurement of external care providers is concerned.⁹⁶

The chief executive is also obliged under section 7AA(2) to ensure practices and policies have the objective of reducing disparities between the number of Māori and non-Māori children in care. The claimants state there is no binding duty to ensure reduction in disparity occurs. Instead, the Crown only has to demonstrate

89. Submission 3.3.18, p 5; doc A49(b), app A

90. Submission 3.3.20, p 75

91. Ibid, p 74

92. Document A144, p 15

93. Submission 3.3.20, p 77

94. Ibid, p 79

95. Submission 3.3.18, p 6

96. Ibid, pp 6–7

its policies and practices align with the objective, without being responsible for actual outcomes.⁹⁷

5.4.2.2 *The Crown's position*

The Crown notes Oranga Tamariki has introduced new internal monitoring and oversight mechanisms to ensure the ministry responds appropriately when operational issues arise. Further, it argues Oranga Tamariki has strengthened its internal quality assurance system by increased supervision, systematic reviews of random case samples, and robust assurance of particular sites and areas of practice.⁹⁸ From 1 July 2019, an independent statutory body also began monitoring Oranga Tamariki's compliance with care standards.⁹⁹

Crown counsel notes that prior to the inclusion of section 7AA, the Oranga Tamariki Act 1989 expected the Crown to involve whānau, hapū, and iwi in decision-making. The Act also stipulated Oranga Tamariki should ensure that, wherever possible, the values, culture, and beliefs of Māori were taken into account in policies and services. The Crown concedes these duties were not sufficiently fulfilled.¹⁰⁰ Commenting on the new quality assurance standards tool recently developed to support section 7AA, the Crown notes it is intended to allow a bicultural lens to be applied to proposed policies, practices, and services, thereby promoting the Crown's commitment to te Tiriti/the Treaty and its principles. The Crown adds that Oranga Tamariki also monitors assessment and planning, the quality of its engagement with tamariki and whānau, its work with partners, and its work to ensure safety and well-being.¹⁰¹

Finally, Crown witness Nicolette Dickson notes the work Oranga Tamariki has undertaken to implement their Complaints, Compliments, and Suggestions (CCS) Operating Model. This model responds to the Act insofar as the organisation is required to have one or more complaint mechanisms,¹⁰² in order to:

- ▶ enable children, young people, their parents, whānau and caregivers to complain about actions, omissions, or regulations under the Act that the organisation has made in relation to tamariki and rangatahi, and;
- ▶ receive responses to those complaints that are timely, fair, and child-centred.¹⁰³

The Ministry of Social Development is developing draft legislation to encompass the mechanisms and functions for independent oversight of the Oranga Tamariki system and the changes that will need to occur in order to support this. The ministry notes that due to the scale and complexity of establishing the oversight functions, time will be needed to progress the required legislative changes. The oversight function involves three groups: the Independent Children's Monitor, the

97. Submission 3.3.2, p 11

98. Document A10, pp 13–14

99. Ibid, p 14

100. Submission 3.3.17, p 5

101. Submission 3.3.34, p 23

102. Oranga Tamariki Act 1989, s 7AA(bad)

103. Document A174(a), p 570

Office of the Children's Commissioner, and the Office of the Ombudsman.¹⁰⁴ The Bill's proposals include the requirement that Oranga Tamariki provide information to the Office of the Ombudsman on:

- complaints made to Oranga Tamariki;
- serious and critical incidents; and
- trends and data that identify patterns of complaints.¹⁰⁵

Section 11.4.2.8 of appendix 11 includes information on how Oranga Tamariki will manage complaints in a timely way in accordance with proposed policy changes. This section also includes the metrics proposed in order to measure the success of their implementation.

The Crown asserts that the agreement to develop the CCS and ensure appropriate internal and external feedback management will provide the opportunity for systematic and continuous learning and improvement.¹⁰⁶

5.4.3 Changes to permanent placement policies and practice

First introduced in 2010, the 'Home for Life' strategy was revitalised as 'Noho Ake Oranga' in 2016. Encouraging permanency and continuity in placements for vulnerable tamariki has particular prominence in 'Noho Ake Oranga', as implemented by Oranga Tamariki following its creation in 2017.¹⁰⁷ However, as of late February 2021, the 'Noho Ake Oranga' policy has been replaced by a policy titled '[e]nsuring a safe, stable and loving home for tamariki in care'.¹⁰⁸ With closing submissions for this urgent inquiry having been received in early February 2021, both claimants and the Crown refer to permanency policy issues in relation to 'Noho Ake Oranga'. The following section will canvas the parties' positions on the permanency policy, and the recent permanency policy changes.

5.4.3.1 *The claimants' position*

Claimants assert that the permanency policy, which they say predates and has continued substantively unchanged following the creation of Oranga Tamariki, contributes to high rates of removal of tamariki Māori from their whānau. When questioned on whether she saw similarities between home for life [permanency policy] and stranger adoption, Kerri Cleaver, a witness to the inquiry, responded that 'on [her] unkind days, [she] calls it baby trafficking'.¹⁰⁹

Claimant evidence regarding an alleged preoccupation of Oranga Tamariki staff with permanent placement echoes this strong assessment. In her brief of evidence, Jean Te Huia asserts that Māori mothers and whānau are sometimes

104. 'Whakapakari te Tirohanga Whānui – Strengthening Oversight', Te Mana Whakamaru Tamariki Motuhake, <https://www.icm.org.nz/strengthening-oversight>, accessed 20 April 2021

105. Document A174(a), p 570

106. Ibid

107. Document A171(c), p 8

108. 'Ensuring a Safe, Stable and Loving Home for Tamariki in Care', Oranga Tamariki, <https://practice.orangatamariki.govt.nz/policy/ensuring-a-safe-stable-and-loving-home-for-tamariki-in-care>, last modified 17 February 2021

109. Transcript 4.1.7, p [713]

‘tricked’ into signing ‘permanent placement orders’ and ‘home for life orders’ by social workers. They are led to believe they will be able to continue seeing their children, only later learning that their child has been adopted, is missing, or living in an unknown location. Ms Te Huia describes having a child taken by the care and protection system and not being told their whereabouts as a ‘crime against humanity’.¹¹⁰ Claimants characterised the ‘Hastings uplift’ as characteristic of social work practice which views permanent placement as a primary option when welfare concerns are present, as opposed to a last resort. It was noted that a report concerning the unborn baby in the ‘Hastings uplift’, made less than half-way through the mother’s pregnancy, had ‘attached comments from a supervisor, discussing how “permanency needs to be looked at” and how they will “roll baby into intervention”’.¹¹¹

Claimants assert that, absent communication with the mother or whānau, permanency decisions were made concerning this unborn baby, with further documentation showing Oranga Tamariki offered the child to non-whānau caregivers.¹¹² In the claimants’ assessment, Oranga Tamariki’s willingness to contemplate placement without first exhausting options involving whānau, is contrary to the stated goals of ‘Noho Ake Oranga’.¹¹³ This process is complicated by the wider ambitions of Oranga Tamariki to promote permanency. Chief ombudsman Peter Boshier observes:

the Ministry has permanency goals for all children; for pēpi, the aim is to find a *‘home for life’* within six months of coming into care. The rationale for this is that children need stable and continuous care, and this should be achieved in a timeframe appropriate for the child’s age and development. [Emphasis in original.]¹¹⁴

Claimants and witnesses say that this rationale concerning stability and continuity is shared by the Family Court. However, claimant Violet Nathan makes clear that the framework presents significant obstacles for whānau wanting to reconnect with tamariki in the care and protection system:

A crucial issue in all of this is that whānau are in a race against time because of the system’s ‘status quo’ threshold. What I mean by ‘status quo’ is that the Court is reluctant to disrupt the children’s ‘current arrangements’. So, whilst we were trying to navigate our way through an unfamiliar process, find lawyers and support systems, we needed to move swiftly because the children’s new routines and schedules would become the new priority. Hence, the idea of a temporary arrangement sways

110. Document A69, p 9

111. Document A122, p 5

112. Ibid

113. Ibid, pp 3–8; doc A33, p 12

114. Document A54, p 78

more toward permanency as time moves on, making it difficult to have our children returned. This is important to emphasise, because the length of the process biases itself toward a permanent separation of the children and their whānau.¹¹⁵

Claimants note that in December 2019, three years after the implementation of ‘Noho Oranga Ake’ and two years after the creation of Oranga Tamariki, the Māori Design Group commissioned analysis of whether permanent care settings were achieving their intent. The group found that:

- concepts of permanency may be misaligned with a te ao Māori worldview;
- there is tension between a focus on mana tamaiti, whakapapa, and whanau-ngatanga and Western theories of attachment and cultural identity;
- court orders granting day-to-day care are perceived as orders of ‘ownership’ by some Māori. Such orders of ‘ownership’ are at odds with the te ao Māori worldview; and
- special guardianship provisions are akin to ‘adoption by stealth’ and do not serve whakapapa connections nor the ability of whānau to exercise whanau-ngatanga. As a result, this form of guardianship is inconsistent with section 7AA.¹¹⁶

Overall, claimants assert that despite a number of internal reviews and ‘ample’ evidence recommending changes, permanency policy following the creation of Oranga Tamariki, has not been meaningfully reformed, and continues to fail whānau and tamariki Māori.¹¹⁷

5.4.3.2 The Crown’s position

Oranga Tamariki concedes that its permanency policy approach may not be fit for purpose in light of the changes made to the Oranga Tamariki Act 1989:

It [Noho Ake Oranga] may not adequately reflect the obligations under section 7AA and other new or enhanced purposes and principles in the Oranga Tamariki Act, as well as our new operating model and outcomes framework. In particular, the Māori Design Group (MDG) has raised concerns about permanent arrangements which are secured through special guardianship orders under the Oranga Tamariki Act.¹¹⁸

Oranga Tamariki also describes the over-representation of tamariki Māori in permanent care placements, noting:

As with all other areas of our care system, tamariki Māori are disproportionately represented in permanent care placements. Tamariki Māori and Māori/Pacific make

¹¹⁵. Document A132, p 2

¹¹⁶. Submission 3.3.27, pp 7, 9

¹¹⁷. Ibid, p10

¹¹⁸. Document A171(c), p 8

5.4.4

up approximately 70% of all permanent care placements each year, which is similar to their representation in the care and protection population generally. This has stayed consistent over the last three years.¹¹⁹

Oranga Tamariki further notes:

A number of tamariki Māori continue to be placed with non-whānau caregivers, and formalised contact arrangements with siblings and whānau often appear to be minimal. This raises questions about whether our permanent care arrangements always have sufficient regard for mana tamaiti, whakapapa and whanaungatanga and are appropriately balanced with considerations of safety and stability, as required by the Oranga Tamariki Act.¹²⁰

When questioned about whether the Tribunal can expect policy changes regarding permanency, deputy chief executive Hoani Lambert responded that Oranga Tamariki was thinking about what is needed in this area.¹²¹ Mr Lambert also pointed to a review of Noho Ake Oranga undertaken following amendments to the Act in 2019, to ensure permanent care settings were fully aligned with the obligations of Oranga Tamariki under section 7AA.¹²²

The Crown's subsequently revised policy, '[e]nsuring a safe, stable and loving home for tamariki in care', states that when planning for permanent care, Oranga Tamariki must recognise and have regard to:

- ▶ mana tamaiti;
- ▶ the whakapapa of tamariki Māori;
- ▶ the genealogical and family connections of tamariki; and
- ▶ the whanaungatanga responsibilities of whānau, hapū, iwi, and the family group.¹²³

In addition, tamariki will only be placed in non-whānau permanent care in exceptional circumstances. This type of placement now requires the approval of the site manager.

5.4.4 Changes to cultural competency

5.4.4.1 *The claimants' position*

Claimants recognise the changes Oranga Tamariki has implemented since 2017 to increase cultural competency within the ministry. Strategies and programs acknowledged by claimants include Oranga Tamariki's development of a Māori cultural framework, its introduction of hui-ā-whānau, the establishment of Māori specialist roles, iwi-led family group conferences, the development of Te Kete

119. Document A171(c), p 9

120. Ibid, p 10

121. Transcript 4.1.5, p 118

122. Ibid; doc A171(c), p 2

123. 'Ensuring a Safe, Stable and Loving Home for Tamariki in Care', Oranga Tamariki, <https://practice.orangatamariki.govt.nz/policy/ensuring-a-safe-stable-and-loving-home-for-tamariki-in-care>, last modified 17 February 2021

Ararau (a web-based app to build staff cultural competency), and the extolment of a wider shift to 'Māori-centred practice'. However, claimants note several issues both with specific strategies and the general orientation of the ministry's approach to increasing cultural capability and competency among staff.

Despite the devotion of money and effort in particular areas, claimants point to what they perceive as an ongoing lack of cultural competency, and awareness of tikanga and wairuatanga among Oranga Tamariki employees, as well as poor checks and balances in place to ensure staff are culturally competent.¹²⁴ They also raise questions over the extent to which Māori have been involved in the design and negotiation of these policies, and whether the policies themselves transcend rhetoric to empower Māori and enable them to exercise rangatiratanga in situations regarding the care and well-being of their tamariki.¹²⁵

In respect of the mobile application Te Kete Ararau, for example, claimant counsel observe that there is little information available on how this cultural based training app works, or whether it is effective in building cultural competency.¹²⁶ Witness Lisa-Marie King, having had the app for a number of years, relays that there are some great resources on it. However, she questions the sufficiency of the app in transforming social workers' understanding and application of mātauranga Māori, as well as its transformative relevance to social work practice. She also asserts that the lauded Māori Cultural Framework Oranga Tamariki is implementing has only been introduced to the organisation via the app.¹²⁷ Claimant counsel raise the following issues concerning Te Kete Ararau and the resources contained within it:

- ▶ te Tiriti/the Treaty is presented as a historical relic instead of a living document with continued relevance;
- ▶ the definitions for key terms like colonisation and racism are taken from the *Oxford English Dictionary*, overlooking leading Māori academics who could provide a more considered and effective approach to conversations concerning colonisation;
- ▶ the history (which is identified as important) reinforces the dominant education in Aotearoa – a system which has maintained bias and racism toward Māori; and
- ▶ te Tiriti/the Treaty summary implies that Māori ceded sovereignty.¹²⁸

Overall, claimant counsel submit that if information and knowledge being shared with the Oranga Tamariki workforce is provided incorrectly and without Māori at the table as a Tiriti/Treaty partner, then it is unlikely that the initiatives will lead to improved competency and practice. Claimant counsel say this means initiatives will not go on to achieve the better outcomes they are oriented toward, and will not reduce disparity.¹²⁹

124. Submission 3.3.9, p 2

125. Submission 3.3.8, p 42

126. Submission 3.3.24, p 54

127. Document A44, p 10

128. Submission 3.3.24, pp 59–63

129. Ibid, p 52

To broadly summarise the submissions of claimants, ‘genuine’ cultural capability and confidence are unlikely to be widely achieved within the current ministerial framework. Rather, a new ‘by Māori for Māori’ approach is necessary to instil in the care and protection system a te ao Māori worldview.

5.4.4.2 *The Crown’s position*

The Crown outlines various organisational and practice changes Oranga Tamariki has introduced since 2017. In particular, it points to several self-described improvements in the area of cultural competency.

The first is the introduction of a Māori Cultural Framework to ‘improve the base line of staff cultural capability’.¹³⁰ The Crown reports that work is currently underway to ensure all staff members know and understand Oranga Tamariki’s Māori Cultural Framework, and can apply it to their work.

The Crown also highlights the introduction of hui-ā-whānau: early-stage meetings of extended family and Oranga Tamariki to find a way forward following reports of concern. The Crown notes that these must be held at the ‘earliest opportunity’ after the assessment of the child has commenced. The Crown advises that this is so whānau ‘are able to understand the reported concerns and develop a response, with appropriate support’.¹³¹

The Crown also outlines the establishment of new Māori specialist roles within Oranga Tamariki. These include kairaranga-ā-whānau, senior regional advisors, and the partner roles of iwi family group conference coordinators.¹³² Crown witness Grant Bennett states that one of the functions of these roles is to support staff cultural competence.¹³³ The role of kairaranga-ā-whānau, in particular, assists tamariki and whānau in researching, navigating, and contacting their whakapapa connections, while also helping them to identify whānau for participation in decision-making and the issue of placement.¹³⁴ As Mr Bennett notes, this will build local cultural competency while also establishing relationships and connections with local iwi.¹³⁵

Kairaranga-ā-whānau are seen as pivotal in enabling Oranga Tamariki to work effectively with tamariki. The Crown states that these have a positive impact at family group conferences, increasing participation and attendance. The agency plans to increase the number of these roles from 42 to 62 across the country in 2021.¹³⁶

The Crown also refers to iwi-led family group conferences and the involvement of seven iwi in them. Oranga Tamariki was – at the time of this inquiry – in the process of completing the iwi-led family group conference ‘start-up package’, to support more iwi-led conferences. The Crown says this initiative is expanding as a

130. Submission 3.3.34, p 30

131. Ibid

132. Ibid

133. Document A21, p 3; doc A50, p 5

134. Submission 3.3.34, p 30

135. Document A21, p 3

136. Submission 3.3.34, pp 30–31

‘discrete community of practice with appropriate resources and support.’¹³⁷ Crown witness Anita West states that iwi-led family group conferences provide whānau with options that ‘support child safety and wellbeing, the maintaining of cultural identity and group decision making within a kaupapa-Māori setting’.¹³⁸

Lastly, the Crown submits that a ‘shift to Māori-centred practice’ is underway, which includes the development of ‘a mana enhancing paradigm’ that will underpin the Practice Framework, and serve as a key driver in several areas. The Crown asserts that this initiative will be central to the ‘development of systems, policy, practices, and services that will support the organisation to shift from a predominantly Eurocentric/western position to a Māori-centred basis’.¹³⁹ It will also support ‘consistent understanding of tamariki Māori as being intrinsically connected to their whānau and whakapapa’, and

lift the cultural competency of all staff in sites and regions (both practitioners and non-practitioners) to reflect understanding of Aotearoa New Zealand’s colonial history and how it has impacted the experiences of Tamariki and whānau Māori. Secondly, for all staff to learn how their work can be Māori-centred and mana enhancing. This will be supported by current and new resources (including existing and new specialist Māori roles). Additionally, there will be bespoke tangata whenua and bicultural support and development to lift the practice competency of practitioners.¹⁴⁰

While delivering the Crown’s concession on the existence of structural racism, Gráinne Moss, the-then chief executive of Oranga Tamariki, describes a commitment to addressing racism at all levels of the organisation. For example, she submits the agency is currently improving its understanding of bias in the system through the work of its Evidence Centre, which explores the factors associated with disparities experienced by tamariki Māori.¹⁴¹

The Crown also provides evidence about Oranga Tamariki’s Core Practice Standards. According to these standards, which likewise address issues of structural racism and bias, practitioners are instructed to ‘understand [their] own biases when working with whānau and caregivers, and consider ways to adjust the power dynamic in these relationships so they are supportive rather than threatening’.¹⁴² According to Grant Bennett, professional supervision standards were introduced in 2018 to supplement and build upon existing practice standards. He recognises these mechanisms are important for ensuring competent and capable practice when working with tamariki and whānau Māori.¹⁴³

To further illustrate Oranga Tamariki’s commitment to improving cultural competency, the Crown also refers to the introduction of section 7AA(2)(c). As

137. Ibid, p 31

138. Document A11, p [5]

139. Submission 3.3.34, p 31

140. Ibid, pp 31–32

141. Document A195, p 5

142. Document A174(a), p 93

143. Document A21, p 5

noted earlier, it requires the chief executive to ensure Oranga Tamariki will ‘provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department’s workforce.’¹⁴⁴

To this end, Oranga Tamariki launched the Māori Cultural Framework ahead of the introduction of section 7AA. This included the Te Kete Ararau mobile application (‘app’), a web-based tool to increase cultural competency within the workforce.¹⁴⁵ Te Kete Ararau provides information on

the Oranga Tamariki cultural framework, key Māori concepts and values, key events and effects on Māori, te reo Māori (language), tikanga (custom) and waiata (songs) to help staff understand more about our unique and shared cultural heritage and further express our Oranga Tamariki vision, purpose and values.

Interactive features within the app include pronunciation of Māori words, maps with Māori names and iwi groups, values (Ngā Mātāpono) and principles, mihimihi/pepeha (introductions), ngā mihi (greetings), poroporoaki (farewells), whakatauki (proverbs), and waiata (songs).¹⁴⁶

The Crown advises that the implementation of the Māori Cultural Framework and Te Kete Ararau was the starting point for better engagement with iwi and Māori partners, as well as tamariki and whānau Māori. The Crown maintains that work is underway to ensure all staff know and understand Oranga Tamariki’s Māori Cultural Framework and can apply it to their work.

Notwithstanding the efforts of Oranga Tamariki and predecessors to improve staff cultural competency over the last 20 years, Crown witness Elizabeth Marsden states that ‘legacies of institutional racism remain’. She goes on to say, however, that ‘younger social workers provide hope that entrenched thinking can be shifted to sit within a more positive cultural paradigm.’¹⁴⁷

5.4.5 Changes to section 78 uplift practices

As we acknowledge in the letter of transmittal, this inquiry stems from the experiences of the whānau at the centre of the ‘Hastings uplift’ and the national attention their story engendered.

While also confidential claimants to this inquiry, in light of the ongoing public scrutiny this whānau faces, and the sensitive matters of their case which remain before the Family Court, we do not set out in detail the nature of their confidential evidence. Instead we summarise it only briefly and to the extent necessary to provide context for the changes Oranga Tamariki introduced as a result.

144. Document A169, p 116

145. Document A173(a), p 18

146. Kiwa Digital Ltd, ‘Te Kete Ararau’, Google Play, https://play.google.com/store/apps/details?id=com.kiwamedia.android.qbook.ORT0001&hl=en_NZ&gl=US, last modified 3 March 2021

147. Document A52, p 7

5.4.5.1 The claimants' position**5.4.5.1.1 The 'Hastings uplift'**

Oranga Tamariki first became involved with 'L', the mother at the centre of the 'Hastings uplift', when she was pregnant with her first pēpi. Upon birth, this child was uplifted by Oranga Tamariki under a section 78 'without notice' uplift order.

The following year, while fighting to regain her first pēpi, 'L' became pregnant again. Oranga Tamariki raised a report of concern, premised on the circumstances surrounding the uplift of her first child and claims of ongoing family violence.

In 2019, Oranga Tamariki attempted to uplift the second pēpi under a 'without notice' section 78 uplift order. Oranga Tamariki had not held any prior whānau hui to discuss its concerns, and no reasons were given for the attempted uplift at the time. No care and protection issues presented could justify an urgent uplift. Nor was a report of concern or whānau caregiver investigation made by Oranga Tamariki in order to determine whether the child should be uplifted. Ultimately, the pēpi remained with the mother.¹⁴⁸

5.4-5.1.2 Commentary on the uplift and consequent changes to policy and practice

Following the 'Hastings uplift', Oranga Tamariki conducted a case review. Reflecting on its findings, Associate Professor Emily Keddell summarises:

it was clear that the decision to remove had already been made early in the timeline. This preferred decision shaped information search practices and how that information was perceived. Accordingly, there was limited inclusion of the family in decision processes and their perspective on the issues at hand was dismissed. There was exclusion of dis-confirming evidence provided by the NGO [non-government organisation] working with the family, and an over-reliance on negative historical information.¹⁴⁹

Associate Professor Keddell states that the review's findings reflect how information gathering and interpretation can be shaped by a pre-existing view. She notes that the decision made in the 'Hastings uplift' is a clear example of confirmation bias.

After the 2019 'Hastings uplift', Ngawihi Tomoana – chair of the Hawke's Bay group Ngāti Kahungunu Iwi Incorporated – called on the Government to divert funding from Oranga Tamariki to establish an independent group to monitor the agency's activities.

Witness Melanie Reid, a journalist and the investigations editor at *Newsroom*, produced the documentary *NZ's Own Taken Generation*, which covered the 'Hastings uplift'. Annexures to her brief of evidence include a *Newsroom* article which cites Ngahiwi Tomoana, the chair of iwi Ngāti Kahungunu. In the article, Mr Tomoana states: 'The sanctity of whakapapa is the essence of who we are as Māori and Oranga Tamariki is tearing at fabric of whakapapa. Our Kahungunutanga

148. Document A115, p 4

149. Document A97, p [4]

demands that we uphold and protect our mokopuna from State trafficking of our children.¹⁵⁰

Claimants acknowledge that, after the ‘Hastings uplift’, Oranga Tamariki made changes to its procedure for ‘without notice’ applications. The new practice standards state:

- A. Every without notice application must now be approved by the Regional Legal Manager, Site Manager and Practice Leader of each site before the application can be filed in the Family Court. The purpose of this is to ensure appropriate assessment and decision-making processes have been carried out before making the application and that all relevant information has been included in the application.
- B. All social workers must now complete an assessment based on known information, consult with their Practice Leader, complete child and family consultations or outline why this has not happened, get legal advice, prepare an affidavit that should include specific information, and then get the application and affidavit approved by a solicitor or state why they have not been approved by a solicitor.¹⁵¹

The claimants agree these new standards address some of the deficiencies existing before the ‘Hastings uplift’. In particular, they see merit in the collective assessment process required to approve a ‘without notice’ application. The claimants allege, however, that deficiencies remain. In particular, the claimants say the meaning of ‘critical’ has not been adequately defined.¹⁵²

Despite this change in practice, Ms Reid notes that ‘without notice’ uplifts continue to take place.¹⁵³ One newspaper article dated 8 May 2019 reports that documentation from Oranga Tamariki for the last three years shows, on average, three Māori babies were uplifted from hospitals within the first three months of their life (this is 100 per cent higher than ‘other’ babies).¹⁵⁴

Oranga Tamariki’s failure to follow appropriate section 78 uplift practices is also highlighted in the opening submissions of various confidential claimants. Counsel notes that ‘[s]ection 78 of the Act enables Oranga Tamariki to seek the interim custody of tamariki and the law permits an application to be made without notice in limited circumstances.’¹⁵⁵ The submission goes on to state:

However, as is clear from the evidence of [this] whānau, accountable practices are not always followed. In their circumstances, an assessment plan, describing the needs, strengths and risks of the tamariki and whānau, was made two weeks after a ROC was filed against [A], the mother of the tamaiti. Part of this written assessment plan

150. Document A128(a), p 99

151. Submission 3.3.20, pp 30–31

152. Ibid, pp 30–31

153. Document A128(a), p 51

154. Ibid, p 59

155. Submission 3.3.7, pp 6–7

was to speak with [A], prior to [the] birth. However, there was no discussion with the whānau until after the birth and instead Oranga Tamariki presented [A] with a safety plan for W the day after she had given birth to him, while she did not have the capacity to process the plan or give her consent to it. A decision to uplift the tamaiti was made two days later without speaking to the father's whānau, without evidence of any legal consultation having taken place or a Tuituia assessment being undertaken.¹⁵⁶

Claimants further assert that filing 'without notice' applications without any consultation with whānau is not consistent with tikanga and 'infringe[s] upon the principles of partnership and consultation'. For this reason, counsel argues, without notice applications and practices need to be reformed.¹⁵⁷

Ms Reid also points to the failure of the Family Court in processing 'without notice' applications. Again, the annexures to her brief of evidence highlight this deficiency. A 2018 Ministry of Justice report refers to interviews with applicants, lawyers, court staff, and judges that indicate staff continue to struggle with a 'swamped system'.¹⁵⁸ The report also identifies research showing under-resourcing of the Family Court, where 'without notice' applications are meant to be given top priority. With staff already managing between 110 and 130 case files each, and four to five without-notice applications being made each day, there is no time for any longer-term work, according to the Ministry of Justice report.¹⁵⁹ In some cases, urgent applications are put before judges late into the evening, which means 'serious harm could befall an applicant because the application was not seen in a timely manner'.¹⁶⁰

Ultimately, claimants contend that Oranga Tamariki continues to unjustifiably uplift tamariki Māori under section 78 'without notice' orders, despite the changes Oranga Tamariki made to its procedures and practice following the 'Hastings uplift'. Claimants further contend that these 'without notice' uplifts continue to disproportionately prejudice tamariki Māori and whānau, and continue to contribute to the ongoing disparate number of Māori and non-Māori tamariki in care.

5.4.5.2 The Crown's position

The Crown asserts uplift practices and procedures have changed since the 'Hastings uplift' and these changes are 'expected' to reduce the number of without notice section 78 applications.¹⁶¹ Based on her experience of working for Oranga Tamariki, Crown witness Ms Dickson describes changes to section 78 uplift practices after 1 July 2019 that she says were largely prompted by the 'Hastings uplift'. They include an approval process with additional checks and balances;

156. Ibid, p 8

157. Ibid, p16

158. Document A128(a), p 48

159. Ibid, p 49

160. Ibid

161. Document A169, p 247

the endorsement of a 'site manager, practice leader and regional legal manager' is required before an application can be made by a social worker.¹⁶² In addition, there is a clear expectation that social workers make interim custody applications 'on notice' unless 'there is a clear need for action to protect a child from immediate and imminent danger.'¹⁶³ The chief social worker is expected to raise awareness about this new approach through a practice note to 'leaders of practice' and managers. Ms Dickson says the new practices have been introduced as a way of confirming that there are no alternative ways of keeping the tamariki safe other than a section 78 uplift.¹⁶⁴

Another change outlined by the Crown includes the rollout of an 'intensive intervention function' relating to section 78 without notice applications. This is in its early stages, as funding was secured only in Budget 2019, and is being implemented in four sites for up to 150 whānau. The Crown submits that, over time, it is expected that the intensive intervention function will lead to a reduction in the number of children entering or re-entering State care:

[It] will focus on groups of children and young people who are believed to need care and protection or are at risk of harm but are not in Oranga Tamariki care, as well as children who are in care but are able to remain or return home with the right level of support. Its purpose is to intensively support families, whānau, hapū and iwi to ensure their child or young person remains at home in a safe, stable and loving environment.¹⁶⁵

The Crown submits that changes made to internal processes as a result of the Hastings case are designed to 'improve openness, transparency and early engagement with tamariki, parents and whānau'. It notes that the changes have in fact already resulted in a decrease in section 78 applications.¹⁶⁶ Ms Dickson's evidence supports this. She states that, in her experience, the introduction of additional protocols has meant that without notice applications 'are now only made if they are warranted to address an immediate risk and that all appropriate steps have been taken to engage parents and wider whānau about the concerns and to consider alternatives to a custody order.'¹⁶⁷ Data outlined in a 2019 Oranga Tamariki report shows that, from 2016 to 2019, a large proportion of the children subject to section 78 orders were 'last placed with their family or whānau members or at home immediately before they left care.'¹⁶⁸ Further, Ms Dickson observes that the number of section 78 without notice orders declined from 1,096 in the 2014–15

162. Document A174, p 15

163. Document A169, p 664

164. Ibid, p 525

165. Ibid, p 249

166. Ibid, p 247

167. Document A174, p 15

168. Document A169, p 247

financial year to 373 in 2019–20. Looking at the percentage of section 78 orders (with or without notice) that involve Māori, Mr Bennett notes that this has changed from 71 per cent of all section 78 orders in the financial year ending 2017 to 59 per cent in March 2020.¹⁶⁹

The Crown's closing submission also points to a decrease in uplift orders (both with and without notice): 'In 2017, a total of 1,105 section 78 orders were granted for tamariki Māori, whereas in 2018 it decreased to 1,019, in 2019 it decreased again to 798 and in 2020 it decreased to 370 (although it is noted the figure of 370 was based on data up to 14 August 2020).'¹⁷⁰

While the numbers may have decreased, the Crown asserts that certain situations warrant the use of section 78 applications. This is supported by Ms Dickson's evidence:

the Oranga Tamariki Act provides a range of mechanisms that are intended to be used with caution to protect tamariki from serious abuse, neglect and harm in a range of circumstances. It would not be appropriate for me to rule out any available protection within the current legislation that may be necessary in a specific circumstance to prevent the serious harm, injury or death of any infant or child.¹⁷¹

She notes further that, in this context, a section 78 without notice uplift is the 'most appropriate' order that exists, as it offers immediate and longer term protection where there is an urgent risk to safety.¹⁷²

However, Ms Dickson also recognises that in many circumstances, whether involving unborn or newborn infants, without notice applications can be avoided. She further states that where opportunities for social workers to work with whānau exist, alternatives to without notice section 78 applications can often be found.

In its closing submission, the Crown adds that section 78 orders are made by the Family Court, while the actual removals under warrant are conducted by relevant Crown agents. Therefore, the range of resources required to meet the complex needs of tamariki cannot be solved simply by Oranga Tamariki (or indeed any agency) alone.¹⁷³

5.4.6 Changes to family group conference practices

5.4.6.1 *The claimants' position*

As canvassed more fully in chapter 4 (section 4.4.6.1), claimants express their frustration that family group conferences with tamariki Māori and whānau perpetuate structural racism, lack tikanga, and do not assess Māori according to their worldview. Claimants assert that inconsistent practices at family group conferences have

169. Document A174, p 15; doc A50, pp 12–13

170. Submission 3.3.34, p 29

171. Document A174(h), p 15

172. Ibid

173. Submission 3.3.34, pp 11, 22

prejudiced Māori and contributed to the ongoing disparity between the numbers of Māori and non-Māori being taken into care. The situation, they say, has not materially improved since the raft of measures introduced by Oranga Tamariki post-2017.

5.4.6.2 *The Crown's position*

While the Crown accepts a 'continuum' of practice from poor to excellent exists within Oranga Tamariki, it reiterates efforts are being made to ensure best practice standards are consistently met.¹⁷⁴ In response to claimants' continued criticisms of the manner in which family group conferences are run, and their impact on tamariki Māori and whānau, the Crown notes again that it introduced professional supervision standards in 2018. These strengthen core social work practice – including family group conference practices – by identifying and reducing potential bias that may result in inconsistent practice.¹⁷⁵ The Crown also reiterates the steps Oranga Tamariki has taken to address inconsistent practice (which will also improve the quality of family group conferences), noting it has:

- ▶ secured significantly more resourcing for social work, which means they have been able to reduce workloads, including caseloads, and improve technological support for the frontline;
- ▶ addressed decades of poor pay and devaluing social work;
- ▶ improved induction for new social workers and;
- ▶ invested in better training for supervisors, so that they can continue to coach new social workers and provide consistent supervision across sites.¹⁷⁶

Finally, the Crown draws attention to its support for, and the growing practice of, iwi-led family group conferences. These provide whānau with options that 'support child safety and wellbeing, the maintaining of cultural identity and group decision making within a kaupapa-Māori setting.'¹⁷⁷

The Crown considers that these changes will contribute to a reduction in the disparate number of Māori and non-Māori being taken into care, and that their positive impacts will only become more discernible in time.

5.5 CASE STUDIES – CONSTRUCTIVE PRACTICE AND PROMISE

We now set out, in the form of case studies, the evidence and experiences of two Crown witnesses, a claimant, and a Tribunal-called witness. We consider that these case studies are noteworthy because they demonstrate what positive and constructive change could look like.

174. Submission 3.3.34, pp 19–20; doc A50, p 10; doc A195, p 6

175. Document A21, p 5

176. Document A195, p 8

177. Document A11, p [5]

The 'Blenheim model'

One example of a partnership model was provided to us by Kaye MacDonald and Margaret Bond in their joint brief of evidence. Ms MacDonald is a regional manager for Oranga Tamariki, with responsibility for the agency's Blenheim, Nelson, and West Coast sites. She has worked for Oranga Tamariki and its predecessors for over 30 years in a variety of roles, most recently as site manager of Blenheim since 2007. Ms Bond's role in the partnership is as the Omaka Marae chairperson of the Māori Women's Welfare League (mwwl) / Iwi Advisory Board. She has been a life member of Omaka Marae mwwl, having joined the league whānau at the age of 12.

Ms MacDonald brought about several significant changes to Oranga Tamariki in this latter role; including the establishment of the following positions: kaitakawaenga (who coordinate engagement with whānau), kaiārahi (who facilitate holistic wrap-around support for kaitiaki and are responsible for assigning tamariki to kaitiaki), kaiaatawhai and kaitiaki (Māori caregivers who care for Māori children), care and protection coordinators (Māori), and kairangahau-a-whānau (who explore whakapapa and make connections inter-regionally for the purpose of engaging with both paternal and maternal whānau).

Ms MacDonald has also played a key role in the establishment of the mwwl advisory board, which she now sits on. One of the board's key functions is to proactively identify, assess, endorse, and support members of the community with the capacity to act as kaitiaki for tamariki Māori in care. 'Capacity' in this context means that the prospective kaitiaki in question is supported by their own whānau, hapū, iwi, marae, and other community groups, and that the prospective kaitiaki brings with them expertise and experience in working with children and young people. Ms MacDonald notes that iwi and mwwl represented on the board were able to provide access to resources, training, hui and professional capacity. Examples provided include groups preparing kai and taking it to the home of kaitiaki while they care for tamariki. Ms MacDonald sees the role of Oranga Tamariki in the partnership as being to provide specialist roles, while the iwi / mwwl partners provide time and expertise.

The 'Blenheim model', and the partnership it is based on, has seen considerable success. Ms MacDonald notes that at the time her evidence was filed, there were only 19 mokopuna in the care of the Blenheim site, with 11 of those being Māori. Across the motu, the Blenheim site has continually had the lowest numbers of mokopuna entering care. In addition, Ms MacDonald stated that she is seeing a decline in the number of family group conferences. This is because, under the 'Blenheim model', whānau are guided to resolve matters by non-statutory meetings. Ultimately, the partnership wishes to see all mokopuna Māori outside of the care space. However, Ms MacDonald and Ms Bond put forward that where mokopuna Māori need care, it should be provided by an iwi or Māori service.

Sources: document A180; transcript 4.1.9

Eastern Bay of Plenty Provider Alliance

The Eastern Bay of Plenty Provider Alliance consists of four iwi provider services, which provide wrap-around services for the whānau of particular tamariki. The partnership between Oranga Tamariki and the alliance was entered into in accordance with section 7AA(2)(c) of the Oranga Tamariki Act 1989 in August 2020.

Melissa Pye, head of Oranga Tamariki's Whakatāne site, comments that the partnership with the Eastern Bay of Plenty Provider Alliance and Tūhoe illustrates how important it is to do what is possible in a given area, rather than follow directives from head office. She says the partnership is able to operate successfully through each party's awareness of their strengths, and the strengths of their partners. In this manner, these can be harnessed to achieve collective visions and goals.

Ms Pye acknowledges that it is crucial children are not taken into care just because risk factors are present. Instead, she attempts to address risk factors – such as homelessness or food poverty – by engaging the assistance of communities.

The Tūhoe Strategic Partnership was entered into in August 2019. In Ms Pye's words,

[the partnership] is about building capacity and capability of an Iwi to respond to and care for their own in regard to the needs of Ngai Tūhoe tamariki. This is not about building a Tūhoe social service, but rather Tūhoe caring for their people how they used to, going back to their natural whānau relationships and managing their issues/ problems from within Tūhoe.

Kirsti Luke, chief executive of Tūhoe, notes that the Crown's role in the partnership is to support Tūhoe to heal disconnection, and that the only sustainable way to rebuild connection is with whānau working as hapū, living and growing together and with other hapū.

Ms Luke's end vision is that neither Oranga Tamariki nor the Tūhoe iwi office need to be involved with tamariki at all. She sees a future where whānau have the necessary coping resilience themselves with no need for any bureaucratic intervention. Ms Luke states that at this time there are more Tūhoe tamariki under stress whose whānau have stepped in to look after the tamariki without Oranga Tamariki involvement, compared to those whānau where Oranga Tamariki is involved.

She says that a key factor in the success of the partnership has been that the Crown has accepted that it will not understand everything Tūhoe says and needs. Nevertheless, the Crown has not stopped its support of and confidence in the Tūhoe approach. Another success factor has been the Crown's acknowledgement that it will never be an expert on Tūhoe and tamariki Tūhoe.

Ms Luke explains that in cases concerning tamariki, there is the 'Crown's response' and the 'whānau response'. In all cases, the question for Tūhoe and the Crown to answer together is which of these responses is better for the tamariki and whānau.

Ms Luke says the level of violence and number of cases confronting the police and Oranga Tamariki at the frontline is getting much worse. Over the last five years, she has noticed a growing sense that the situation is getting ‘completely out of control’ and that no one person can respond. Ms Luke identified, however, that the number of Tūhoe coming into State care has halved over the last two years while reports of concern have remained the same. In Ms Luke’s view, this reflects Oranga Tamariki and the police realising they need help, and becoming more open to assisting, and being assisted by, people like Tamati Kruger and Ms Luke and the communities they represent.

Sources: document A176; transcript 4.1.9

Whetu Ariki

Claimant Owen Lloyd provided evidence in support of the claim by the New Zealand Māori Council, to suggest how Oranga Tamariki partnerships and funding might be structured to support people like himself and his wife to enable more whare like Whetu Ariki.

Whetu Ariki is a living marae, which houses Mr Lloyd, his wife and all those who arrive at the whare seeking refuge. This willingness to accept people, without discrimination, is the reason behind the name Ahuru Mowai (Safe Haven).

The whare nui has 24 bed spaces. The number of people who can live there depends on who they are and what kind of support they need. Mr Lloyd and his wife access other support services as required. However, the funds that allow Whetu Ariki to operate come straight out of their pocket. Mr Lloyd notes that ‘funding comes with strings, and will stop out home from being our home’. As such, they operate on a koha basis.

Mr Lloyd describes how Whetu Ariki has accommodated family groups and single men and women, all from various walks of life. They stay for different amounts of time – some days, some weeks, and others have stayed up to 14 months. One of the individuals who stayed 14 months got a job in town to be near their child (who had been placed there following a family group conference) and eventually bought the business from their employer. Following this, they bought a local shop and went on to lead a church. Such an example acts as evidence of the success that flows from Mr Lloyd’s approach to include whānau in the processes surrounding their children.

When questioned about what resources would be needed to recreate or support approaches such as Mr Lloyd’s, he stated:

- a) Firstly, that the relationship between pēpi and mother needs to be central. Any funding or support would have to revolve around supporting this relationship;
- b) Funding needs to come through a long-term relationship with high trust and low control;
- c) Māori organisations need to be held to a set of values that do not change. This comes from co-design and accountability. For any service provider, they need to be accountable within their community;
- d) Funding and connections with other support agencies need to be set up; and
- e) Māori whānau need to have equal resourcing to that of Pākehā providers.

Overall, Mr Lloyd's approach shows that care and protection services which adhere to a particular tikanga (in this case, the principles of Ngā Ao o ngā Ariki) are not only possible, but successful.

Source: document A76

Waitomo Papakāinga Incorporated

Katie Murray, a witness to this inquiry, gave evidence of serving her community in the far north. Beginning as a voluntary community worker in the mid-1980s, Ms Murray witnessed the Crown's removal of Māori children without the involvement of whānau, hapū, or iwi. In response, Ms Murray created Waitomo Papakāinga Incorporated (Waitomo) – a social service provider organisation in Kaitaia. She is its chief executive.

Following Waitomo's creation, Ms Murray worked with whānau and staff within Child, Youth and Family Services (CYFS) to challenge the organisation 'every step of the way' regarding its treatment of Māori whānau and tamariki.

From those early experiences, Ms Murray concluded that CYFS staff, who were largely non-Māori, lacked critical understanding of te ao Māori and tikanga – essential knowledge for engaging and working constructively with whānau. In her view, cultural education of CYFS staff would not resolve the issues and challenges facing Māori, as 'you can't change people's minds and hearts by educating them'. Rather, the system itself needed overhauling because it 'was built against Māori'. Social services for Māori instead needed to be 'by Māori for Māori'.

In the early years following Waitomo's formation, it was evident to Ms Murray that CYFS did not want to form a relationship with the organisation, seeing Waitomo as agitators. Eventually, after 'many years', Waitomo began to gain traction. This

period was marked by the increase of Māori staff in key positions within CYFS and Oranga Tamariki. Ms Murray describes having Māori in positions of responsibility as being 'really significant'.

Since the new legislation came into effect, Ms Murray reports a number of positive changes in the relationship between Oranga Tamariki and Waitomo. After many conflict-filled years, Waitomo has managed to create a 'more positive and open relationship with Oranga Tamariki at a local, regional and national level', and as at 28 January 2020, Waitomo are in a whānau care partnership with Oranga Tamariki.

Additionally, the Kaitaia Oranga Tamariki office now works daily with the four main Māori providers in the area, referred to as the 'collab'.

The 'collab' consists of four organisations: Waitomo, Te Whare Ruru hau o Meri, Ngāti Kahu Health and Social Services, and Te Rarawa Rūnanga. Together, they are called Te Kahu Oranga Whānau. They have been in collaboration for over 13 years, changing the way in which the Kaitaia Oranga Tamariki office operates and how social workers and managers deal with Māori. Examples include:

- social workers attending whānau hui in an observational role only;
- social workers and Waitomo visiting whānau homes together; and
- Te Kahu Oranga Whānau calling their own whānau hui – as opposed to an Oranga Tamariki family group conference, which is governed by statute – the moment a whānau comes to the attention of Oranga Tamariki. From there a plan is developed, concerns are addressed, accountability is prioritised and monitored, and whānau are supported.

Partnership between the 'collab' and Oranga Tamariki has changed the way in which Oranga Tamariki social workers deal with reports of concern, Ms Murray reported. Indeed, the 'collab' and Oranga Tamariki talk by phone every day to 'triage' reports of concern. Decisions are then made about who will follow up and work with the whānau concerned. In addition, the police provide a daily list of family violence reports which the 'collab' also triage, and decide who will work with and support the whānau involved.

Over time, Ms Murray says a truly collaborative relationship has grown, creating a 'foundation of trust and respect', which has resulted in a sharing of power in Kaitaia – something Oranga Tamariki once refused.

Moreover, over 170 Māori children from the Far North who might once have been placed into State care have not been, due to the changes in practice from September 2018 to June 2020. Ms Murray specifies that this success can be attributed to: honesty and trust between groups; consistency in leadership; an agreed purpose to support whānau; the identification of strengths within differing organisations; and the lack of contest for contracts.

Overall, she acknowledges there is still a 'way to go'. However, it is evident to Ms Murray that Oranga Tamariki is 'willing to go on that journey'; walking not in front

of, but beside Waitomo. Ms Murray believes that Te Kahu Oranga Whānau could be a transplantable kaupapa with the potential to achieve similar success in other regions. Because, as she notes, just as her own mokopuna will have the 'best life', so too should every child.

Source: documents A42, A91(b); transcript 4.1.4

5.6 TIRITI / TREATY ANALYSIS AND CONCLUSIONS

We now consider the above case studies, before presenting our analysis and conclusions on the issues canvassed in this chapter.

5.6.1 Commentary on case studies

We highlight these case studies because in various ways they demonstrate what constructive change and good practice could look like. They also highlight the effectiveness of genuine collaboration between Crown officials and Māori individuals or organisations who are connected to their communities. By and large, these examples have grown out of the persistent and committed work of key individuals in the community and in positions of responsibility within Oranga Tamariki.

While we were privileged to hear about a number of initiatives undertaken by various Māori organisations and communities who have worked tirelessly over the last several decades to help whānau in need and prevent uplift of tamariki, the underlying theme of this evidence is one of struggle. Where Crown resourcing or assistance is available, too often it comes with transaction costs and forms of accountability that act as a substantial drag on the ability of small community-based Māori initiatives to build and sustain the support networks whānau need. There are also reliability problems associated with Crown contracts and other issues such as disparities in workforce pay rates.

5.6.2 Introduction of section 7AA

In 2017, in response to the obligations set out for Oranga Tamariki in section 7AA and reflecting Oranga Tamariki's growing awareness that a Māori worldview of well-being is critically important within the care and protection system, Oranga Tamariki introduced the Mana Tamaiti principles. These seek to support tamariki Māori to establish, maintain, and strengthen their sense of belonging through cultural identity and connections to whānau, hapū, and iwi. In doing so, the Tribunal recognises that the Crown has sought to integrate Māori worldviews into its structure, and to reduce the more monocultural approach of its earlier frameworks.

We heard evidence that the legislative and practice changes introduced since 2017 will not alone address the disparities. Associate Professor Keddell concludes

that what is needed is policy to address social conditions, especially the causes and consequences of poverty and the provision of preventative services focused on sharing power and addressing both instrumental and direct biases. These, she says, are the solutions required, together with changing the structure of the system from a notify–investigate model to community capacity building and family support, both of which she sees as longer-term structural aims. In her view, the biggest opportunity for addressing some of the factors causing disparities remains section 7AA, which she believes could be expanded to ensure a greater level of power and resource sharing than it currently allows.

The Crown places particular weight on the legislative and policy reforms introduced in 2017. The Crown argues that changes such as section 7AA are having a significant impact but further time is needed for them to become embedded and achieve substantive reduction in the disparities between Māori and non-Māori children in care. The Crown also points to the section 7AA vision statement contained in Oranga Tamariki's first section 7AA report. That vision statement records: 'Our vision for tamariki Māori, supported by our partners, is that "no tamaiti Māori will need state care".'¹⁷⁸

While we endorse that vision statement as consistent with te Tiriti/the Treaty and its principles, we are not convinced that the legislative and policy changes introduced in 2017 will be sufficient to realise it.

Unfortunately, the Treaty-related provisions sit amongst, or in tension with, other principles, and in particular in potential tension with the well-being and best interests of the child which is required to be 'the first and paramount consideration'.¹⁷⁹ We say that this creates a potential tension with the Treaty provisions, not because the well-being of the child is not central in Treaty terms (it is fundamental), but because the gatekeepers of the decision about the best interests and well-being of the child are typically not Māori. Where Māori concepts and values are recognised or applied, the results are often inconsistent and unreliable and the disparity in the numbers of tamariki Māori being taken into State care continues. The data we have seen shows significant variability in the way Oranga Tamariki sites and regions operate. These variations do not appear to correlate in any clear way to data about risk or substantial harm to children.

Section 6 of the Children, Young Persons and their Families Act 1989 provided that where, in the administration of the Act with respect to children or young persons: 'any conflict of principles or interests arises, the welfare and interests of the child or young person shall be the deciding factor.' The section was substituted in 1994 with the following provision:

Welfare and interests of child or young person paramount . . . In all matters relating to the administration or application of this Act (other than Parts IV and V and sections 351 to 360), the welfare and interests of the child or young person shall be the first and

178. Document A53, p 22

179. Oranga Tamariki Act 1989, s 4A

paramount consideration, having regard to the principles set out in sections 5 and 13 of this Act.¹⁸⁰

From 1 July 2019, section 4A applies and reads as follows:

4A Well-being and best interests of child or young person

- (1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

A key issue is the tension that child-centric provisions such as section 4A set up with the more collective Māori worldview. An illustration of the operation of this tension is provided in the decision of the High Court in *B v Director-General of Social Welfare*.¹⁸¹ That case arose out of an appeal by a grandmother of a Family Court decision upholding her daughter's right to proceed with a closed adoption. The adoption would see the grand-daughter placed with another Māori whānau. Although distantly related, they did not have close whakapapa links to the whānau, hapū, and iwi of the pēpi. The Family Court had declined the grandmother's application for custody. In the High Court, responding to arguments about the importance of cultural connection affirmed by the provisions of the Treaty of Waitangi and the (then) draft Declaration on the Rights of Indigenous Peoples, it was accepted that the importance of those concepts apply as a starting point to all statutory provisions concerning the care, nurture, and upbringing of children. However, while they form a starting point, they are subsumed within the concept of the welfare of the child:

We emphasise therefore, that the child holds the central position within the context provided by the concepts of family to which reference has been made. That means that the child's interests will not be subordinated to the interests of any other member of the family or whanau, nor will the interests of the child be subordinated to those of the whanau as a whole. In addition, the ability of the whanau itself and the caregivers within that whanau, must be assessed with regard to the particular circumstances of the case and the needs of the child itself. It cannot be assumed that in all cases the standards and values accepted by the traditional society from which the child comes will be preserved or available within the whanau to which reference must be made.¹⁸²

Approximately 10 years before that decision, the authors of *Puao-te-Ata-tu* identified what they saw as the central problem: 'a profound misunderstanding

180. Children, Young Persons and the Families Amendment Act 1994, s3

181. *B v Director-General of Social Welfare* (1997) 15 FRNZ 501

182. *Ibid*, pp18–19

or ignorance of the place of the child in Maori society and its relationship with whānau, hapu, iwi structures.’¹⁸³ The authors of that report went on to note:

The Maori child is not to be viewed in isolation, or even as part of [a] nuclear family, but as a member of a wider kin group or hapu community that has traditionally exercised responsibility for the child’s care and placement. . . .

The physical, social and spiritual wellbeing of a Maori child is inextricably related to the sense of belonging to a wider whānau group.¹⁸⁴

and also:

The child is not the child of the birth parents, but of the family, and the family was not a nuclear unit in space, but an integral part of a tribal whole, bound by reciprocal obligations to all whose future was prescribed by the past fact of common descent.¹⁸⁵

and further:

The traditional policy of assimilation and one law for all has become so ingrained in national thinking that it is difficult for administrators to conceive of any other, or to appreciate that indigenous people have particular rights to a particular way of life.¹⁸⁶

The fundamental nature of the problem has changed little in the 30 years since the *Puao-te-Ata-tu* report was published. The authors of that report noted that throughout New Zealand’s colonial history, inappropriate structures and Pākehā involvement in issues critical for Māori worked to breakdown and weaken the whānau, hapū, and iwi basis of Māori society. As a result it has been ‘almost impossible for Maori to maintain tribal responsibility for their own people.’¹⁸⁷

The issue as we see it, lies not so much in the articulation of the principle of the well-being and best interests of the child, but the way in which the care and protection system allocates responsibility for that assessment. Simply put, the gatekeepers are no longer Māori, whānau, and hapū as envisaged under the Treaty, but statutory social workers, court-appointed lawyers, psychologists, and judges.

Once again, as the authors of *Puao-te-Ata-tu* pointed the way forward with such clarity when commenting on the 1974 legislation:

The technique, in the Committee’s opinion, must be to reaffirm the hapu bonds and capitalise on the traditional strengths of the wider group. This needs emphasis. The guiding principle in the current legislation is that the welfare of the child shall be

183. Document A55, p7

184. Ibid, pp 29–30

185. Ibid, p74

186. Ibid, p18

187. Ibid

regarded as the first and paramount consideration. There need be no inherent conflict between that and the customary preference for the maintenance of children within the hapu. The current principle is seen in practice as negating the right of the group to care for its own or to be heard in the proceedings.¹⁸⁸

The key problem identified in *Puao-te-Ata-tu* was a climate of ‘institutional racism’, which both reflected and itself contributed to wider marginalisation of Māori within New Zealand society. Institutional racism, the report noted, was

the outcome of monocultural institutions which simply ignore and freeze out the cultures of those who do not belong to the majority. National structures are evolved which are rooted in the values, systems and viewpoints of one culture only. Participation by minorities is conditional on their subjugating their own values and systems to those of ‘the system’ of the power culture.¹⁸⁹

Despite the clarity of this critique and the strength of the recommendations *Puao-te-Ata-tu* offered to remediate the situation, the evidence considered in this inquiry demonstrates that in the intervening years, attempts to change the care and protection system from within have been slow, partial, vulnerable to political currents of the day, and inadequate to meet the needs of whānau and tamariki Māori. The Crown itself has acknowledged its failing to substantively respond to the report. We welcome this concession, albeit not uncritically, given the many opportunities it has had to do so across three decades.

This failing notwithstanding, we also welcome evidence that Oranga Tamariki’s recent efforts to redress its strained relationship with tamariki, whānau, hapū, and iwi have had some limited success. Using the measures of efficacy specified in Oranga Tamariki’s ‘Mana Tamaiti Table’ (table 11.12 in appendix 11), available data appears to indicate that changes made to fulfill the mana tamaiti objectives of section 7AA have already reduced disparity in certain respects. These data figures are presented in full in section 11.4.2.1 of appendix 11.

Despite these welcome signs, the strength of any positive conclusions we may draw about the effects of Oranga Tamariki’s recent changes is limited by the nature of the data, principally in two main respects. First, the metrics have been constructed retrospectively to use pre-existing data. And, secondly, there is only one year of data to evaluate. This does not lend itself to longer-term analysis or take into account yearly fluctuations or micro-trends. Nonetheless, Oranga Tamariki speculates that over the coming years, as its data collection improves, its ability to assess the impact of the mana tamaiti objectives will also improve.¹⁹⁰

This is also true for any assessment of the impact of Oranga Tamariki’s quality assurance standards. Formal monitoring and reporting on how well these are

188. Document A55, p 29

189. Ibid, p 19

190. Document A169, p 520

applied only commenced in August 2020. Their impact and progress will be made available in the next section 7AA report.¹⁹¹ In light of this, it largely remains to be seen whether or not Oranga Tamariki's operational policies, practices, and services are in line with its five quality assurance standards, and whether these are contributing to a reduction in the disparate number of Māori and non-Māori being brought into care.

Finally we note, as the Crown does, that section 7AA is 'for all intents and purposes, Oranga Tamariki's Treaty clause'.¹⁹² We therefore consider our analysis of section 7AA an appropriate place to briefly pass comment on the Act's correlating Tiriti/Treaty clause, section 4.

Modelled on te Tiriti/the Treaty clause set out in the New Zealand Public Health and Disability Act 2000, it represents, for the first time in care and protection legislation, an explicit acknowledgement of the Tiriti/Treaty, calling on Oranga Tamariki to provide 'a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act'.¹⁹³ While we support this forward step in legislation governing care and protection for children, we note and echo the recommendation of the Children's Commissioner, that there is insufficient clarity as to how the various principles set out in the Act are understood and applied.¹⁹⁴ We agree that the Act could benefit from 'a simplification and harmonisation of the existing principles'.¹⁹⁵ Claimant counsel submit that the references to te Tiriti in sections 4 and 7AA are ultimately only tokenistic, and place 'no binding obligations on the Crown'.¹⁹⁶ We concur with counsel's submission that te Tiriti/the Treaty clause – which merely requires a 'practical commitment' – is not strong enough to require that the Crown comply with its Tiriti/Treaty obligations.

We believe the Treaty policy reflected in the Oranga Tamariki Act 1989 needs to be simplified and clarified. Currently, section 4(1)(f) provides that one of the purposes of the Act in promoting the well-being of children, young persons, and their families, whānau, hapū, and iwi is by 'providing a practical commitment to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) in the way described in this Act'.

We share the reservations expressed by the Tribunal in its *Hauora* report about Treaty provisions of this kind and their effectiveness in practice. That Tribunal, commenting on the Treaty provisions in the Health and Disability Act 2000 said:

In summary, the current Treaty clause does not provide for a wider vision that allows for Māori as Treaty partners to be fully involved in the co-design, control, or delivery of the primary health care system. It fails to recognise the principle of partnership and fails to provide for tino rangatiratanga or mana motuhake. In effect,

191. Ibid, p 521

192. Document A181, p 2260

193. Oranga Tamariki Act 1989, s 4

194. Ibid, ss 4, 4A, 5, 13

195. Document A183, p 91; transcript 4.1.10, p 131

196. Submission 3.3.11, pp 8–9

5.6.3

then, section 4 applies only to part of the health sector, not the whole sector, and is a narrow, reductionist version of the Treaty principles.¹⁹⁷

The Tribunal in the *Hauora* report went on to recommend the inclusion of a Treaty clause with more imperative wording based upon section 4 of the Conservation Act 1987. They recommend that section 4 of the New Zealand Public Health and Disability Act 2000 be amended to read:

4 Treaty of Waitangi and its Principles

This Act shall be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.¹⁹⁸

Most significantly, however, it is our conclusion that any attempts to broadly reform the philosophy and operations of Oranga Tamariki – within existing parameters – will not succeed. While ameliorative measures may succeed in reducing disparity in certain areas for periods of time, we consider that unless the core precepts of the care and protection system are realigned, with power and responsibility returned to Māori, disparity will be a persistent feature of the system – as it has been prior to and since the release of *Puao-te-Ata-tu*.

5.6.3 Planned partial repeal of the subsequent child provisions

We have already welcomed the Crown's initiative to partially repeal the subsequent child provisions contained in sections 18A–18D of the Oranga Tamariki Act 1989.¹⁹⁹ The Crown advises that it expects a Bill repealing the provisions to be passed in 2022.²⁰⁰

As noted, claimants and witnesses have told us of the negative impacts the subsequent child provisions have had on the operating culture of Oranga Tamariki. The data available to us shows that investigation and separation of children under these provisions has occurred consistently since 2016 on a small scale, having very direct implications for tamariki and whānau Māori affected. Between July 2016 and December 2019, 61 applications were made under sections 18A–18D. Of these applications, 19 resulted in declarations that the child was in need of care and protection due to the grounds for section 18 being met. Of 15 children to subsequently enter care, 10, or two-thirds, were Māori.²⁰¹ This is set out in more detail in section 11.4.1.4 of appendix 11. At the time of her announcement to repeal the provisions, then-Minister Martin conceded that misuse of the provisions had had devastating effects on some whānau, noting 'the best thing for children is that they are safe and loved at home. Interpretation of the current law has meant that some children may have been unnecessarily traumatised and kept apart from their parents.' She also

197. Waitangi Tribunal, *Hauora*, p 78

198. Ibid, pp 162–163

199. Memorandum 2.6.2, p 6

200. Submission 3.3.34, p 30

201. Document A47, p 2

stated however, that '[t]here are times when children need to go into care for their safety – the safety and care of children must always be paramount'.²⁰²

We endorse Judge Becroft's characterisation of the legislative provisions as an injustice requiring immediate repeal. Given the potential for ongoing prejudice, we are troubled with the apparent delay in plans to repeal these provisions. Until the Crown has completed this planned partial repeal of the subsequent child provisions, we find it to be in continuing breach of the duty to act in good faith central to the partnership principle and to actively protect Māori rangatiratanga over their kāinga.

5.6.4 Partnerships

We recognise that in certain instances, the combined work of Oranga Tamariki and its strategic partners is showing positive results. For instance, we note the collaboration between the Whakatāne Oranga Tamariki site and Tūhoe, and the evolving partnership Waikato-Tainui have established with Oranga Tamariki. In our assessment, it would be wrong, however, to assume that these pockets of productive cooperation reflect the entire partnership landscape. In fact, we have received ample evidence to the contrary. Claimant counsel note that, while section 7AA makes provision for partnerships, the system is slanted heavily in favour of larger, more organised groups, such as settled iwi, because the provision puts the onus on prospective partners to initiate relationships, while effectively allowing Oranga Tamariki to unilaterally decline, approve, and set the terms of those relationships. Claimant counsel further note that Oranga Tamariki is only statutorily required to *receive* proposals from strategic partners. It is not obligated to accept them.²⁰³ We appreciate that Oranga Tamariki needs to be able to assess the degree of readiness and capability of prospective partners. Nonetheless, in our view, the tentativeness of the legislative provisions under section 7AA is a real impediment to smaller Māori organisations, as well as whānau, hapū, and iwi, partnering effectively with the ministry. Despite some improvement, due to the asymmetrical shape of its partnership architecture, we consider that the Crown continues to fail to comply in this respect with te Tiriti/the Treaty principle of partnership. Partnership, as envisaged under te Tiriti/the Treaty, must be founded on mutual acceptance and recognition of the proper spheres of influence of each partner.

As we have discussed in chapter 2, we believe there is a fundamental misapprehension on the part of the Crown about its role in the care and protection of tamariki Māori. The Crown's true partnership responsibility is to support whānau and hapū in the maintenance and restoration of their capacity to care for their own. While there are signs this may be emerging in the way the strategic relationship with Tūhoe was explained to us, there were many other examples where this was not apparent and the Māori partner still felt they were in something of a 'master-servant' relationship.

202. Martin, 'Subsequent Children Legislation to Change'

203. Submission 3.3.31, p 38

5.6.5 Procurement model

Te Tiriti/the Treaty does not confer upon the Crown the unilateral right to make decisions. Nor should the Crown intrude into the sphere of Māori rangatiratanga without consent. The principle of partnership instead conveys upon the Crown a responsibility to engage Māori. The principle of active protection also obliges the Crown to defer reliable and proportionate resources to Māori.

In light of these principles, we are concerned by Oranga Tamariki's historical, and in some respects ongoing, prioritisation of non-Māori social service providers in its procurement practices. In our view, any procurement model should be equitable, unbiased, and culturally responsive to all children, Māori or otherwise, in the care of Oranga Tamariki. While we appreciate Oranga Tamariki's renewed commitment to a Māori-centred practice and procurement framework, we note the continuing lack of an explicit Tiriti/Treaty-compliance clause within Oranga Tamariki's generic contractual template. We agree with the claimants that Māori should play a more active role in determining who Oranga Tamariki contracts. We acknowledge the evidence of Mr Fowler, general manager commissioning at Oranga Tamariki, his evident understanding of a number of the structural barriers Māori providers have faced, and the steps underway to address them.

5.6.6 Changes to monitoring and accountability

The principle of partnership is founded on mutual obligation and imposes a responsibility on te Tiriti/the Treaty partners to act in good faith towards each other. This principle also requires that neither Tiriti/Treaty partner act in a manner fundamentally affecting the other's sphere of influence without their consent. We share the claimants' observation that the significant discretionary powers afforded to Oranga Tamariki by the 1989 Act enable the ministry, rather than external bodies or individuals, to largely scrutinise the propriety and cultural safety of its practise. This lack of effective outside oversight is, we think, one of the factors behind the inconsistency of practise available in the evidence and the data.

With regard to the monitoring and accountability mechanisms intended to promote good social work practise, we are troubled by the apparent lack of oversight and inconsistent application. Namely, the operation of care and protection resource panels and the Social Workers Registration Board appear to be flawed. Further, the variable use of the Child and Family Consult Tool by social workers will undoubtedly result in subjective perceptions of the danger, harm, and safety assessments when engaging with whānau. We also agree that a less complicated complaint pathway could increase overall Māori confidence in Oranga Tamariki.

We are encouraged to hear, however, of the various changes being implemented to support greater monitoring and accountability of Oranga Tamariki, including wider independent oversight and its new Complaints, Compliments and Suggestions Operating Model.²⁰⁴

204. 'Strengthening Independent Oversight of the Oranga Tamariki System', Ministry of Social Development, <https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/policy-development/oversight-for-children/index.html>, accessed 8 April 2021

We also acknowledge the Crown's attempts to improve its data collection, and the work that is currently underway to modernise and realign Oranga Tamariki's data in line with section 7AA standards. This is sorely needed. Mr Cook, in his expert evidence, advised the Tribunal that the government statistician publishes *Principles and Protocols for Official Statistics* – and that these are considered common statistical standards and practices in the public sector.²⁰⁵ The principles and protocols identify six critical dimensions for data quality: relevance, accuracy, timeliness, accessibility, coherence/consistency, and interpretability. Mr Cook makes clear that Oranga Tamariki's core statistics do not meet these basic requirements. He also notes: '[a]nalysis of trends by those outside Oranga Tamariki has been made more difficult by reduced access to information and the changing measurements and a departure from common statistical standards and practices'.²⁰⁶

We agree with Mr Cook's assessment that

Understanding long term trends in Māori/non-Māori disparities in child custody will be indicative of the discrimination in its various forms that has long been embedded in the wider child welfare system and which contributes to ongoing disparities in rates of state care. There is also a complex interconnection between state care, and later imprisonment as an adult, as well as the higher likelihood of those who have been imprisoned having children who are taken into state care in some way. Being able to compare trends in the state care of children with trends of Youth Court appearances and imprisonment rates, particularly in younger adults, can provide indicators of potential downstream effects of current policies and practices. It is then imperative that Oranga Tamariki meet the six critical dimensions of data quality so that this data can be assessed across agencies. As outlined above, the current practices of Oranga Tamariki fall well short of these standards.²⁰⁷

5.6.7 Changes to permanent placement policies and practice

Both the Crown and the claimants recognise that a preoccupation with permanent placement is in opposition to concepts of mana tamaiti, whakapapa, and whanaungatanga – contained in the Oranga Tamariki Act. We accept the argument of claimant counsel that the permanency policy 'Noho Ake Oranga', which was in place until February 2021, was incompatible with section 7AA responsibilities, contributed to the removal of tamariki Māori from their whānau, and in certain cases made it unduly difficult for whānau separated from tamariki to reconnect with them.

5.6.8 Changes to cultural competency

We recognise and welcome the various attempts Oranga Tamariki has made since 2017 to improve the cultural competency and responsiveness of its workforce. The

205. Document A17, p 11

206. Ibid

207. Ibid, p 16

establishment in 2018 of a Māori Cultural Framework and the Te Kete Ararau mobile application appear to be practical, good-faith initiatives to boost the capability of the ministry's staff at a broad level. We observe in relation to Te Kete Ararau, however, that it is critical the content is tailored to the situations most often encountered by staff. The introduction of hui ā whānau, meetings designed to empower whānau to find a way forward before a situation of concern may escalate, as well as iwi-led family group conferences, also appear in theory promising process developments. We note further that in recent years, Oranga Tamariki has established a relatively small number of Māori specialist roles, some at a senior level with access to the chief executive and senior management, and that it intends to increase the number and influence of these positions.

Finally, we note that Oranga Tamariki has conceptualised and is beginning to implement what it describes as 'a shift to Māori-centred practice'. In the words of Oranga Tamariki, this 'shift' comprises the development of 'a mana enhancing paradigm for practice', designed to recognise the intrinsic connection of tamariki Māori to their whānau, hapū, and iwi. Such a framework, the Crown asserts, has the potential to fundamentally disrupt the 'western/European' basis on which the work of Oranga Tamariki and its predecessors has been predicated. On this last point we are less sure. We heard repeatedly in this inquiry from whānau, hapū, iwi, and a broad array of figures associated with the care and protection system — including Oranga Tamariki's own social workers — that many of the ministry's staff fundamentally do not understand te ao Māori and are unable to apply it to the complex situations arising in their work.

These systemic issues can lead even Māori staff on occasion to act in ways that are damaging. Transforming the cultural capability of Oranga Tamariki is important, but it is not a long-term solution to the problem of Crown intrusion into the domain of rangatiratanga. At the same time, we acknowledge that a number of the Crown witnesses who appeared before us have insight into issues stemming from systemic racism and there is constructive policy work underway to try to effect change that would realise the vision the department has set itself: '[t]hat no tamaiti Māori will need State Care'. Whilst we acknowledge the changes Oranga Tamariki has introduced since 2017 to increase cultural competency, we do not consider there is sufficient evidence or data to offer a definitive conclusion on the extent to which this has improved. We therefore cannot say whether pre-2017 findings of Tiriti/Treaty non-compliance are applicable, but note the significant work remaining in this area.

5.6.9 Changes to section 78 uplift practices

We have heard a good deal of evidence in this inquiry that prior to the highly publicised 'Hastings uplift' in mid-2019, Oranga Tamariki routinely failed to follow its own policies and legal requirements for section 78 uplifts, often to the great detriment of whānau. This evidence was broadly consistent with the findings of the chief ombudsman.

Since the Hastings incident, the Crown has made substantive changes to its section 78 uplift practices, including the introduction of an 'intensive intervention'

function designed to preemptively identify and mitigate situations where uplifts may be considered necessary. The fact that this has occurred as a result of intense media scrutiny and public outcry, does not make it any less welcome.

We also appreciate that the rate at which section 78 uplift orders are made has declined since the ‘Hastings uplift’. This is positive, but we cannot overstate the breach of trust and good faith inherent in Oranga Tamariki’s inconsistent and often unnecessary application of ‘without notice’ uplift protocols across a number of cases prior to mid-2019, conduct which stands in clear breach of the partnership principle and the Crown’s obligation to actively protect Māori rangatiratanga over kāinga.

All parties before us accepted that, on occasions, urgent and, if necessary, coercive intervention may be necessary in order to protect a child. That principle is not at issue. What is at issue is how to manage such interventions in a way which is less harmful to the long-term interests of the Māori child and more consistent with what te Tiriti/the Treaty guaranteed.

For those at actual and potential risk of harm, timely and appropriate intervention is most likely to prove effective from people families know and trust. Unfortunately, from all that we have seen and heard during our inquiry, it is clear that there is a widespread and significant lack of trust in Oranga Tamariki amongst Māori communities. This is particularly the case for those who have had long-term or intergenerational contact with the ‘system’ and those from so called ‘hard to reach’ communities, including the gangs. We have found particularly troubling some of the evidence we have heard about vulnerable young mothers avoiding contact with services they need, including health services, for fear of potential involvement of Oranga Tamariki.

5.6.10 Changes to family group conference practices

Claimants remain unconvinced that changes to family group conferences since 2017 are sufficient to enable tamariki Māori and whānau to support child safety and well-being, and to reduce the consistent and significant disparate number of tamariki Māori in care. The Crown contends that it has made an array of changes – most notably perhaps its support, and introduction of, iwi-led family group conferences – which it asserts are addressing these criticisms, and will lead to more equitable numbers of Māori and non-Māori children in care.

While there appears to be a paucity of data on the impacts of family group conference changes since 2017, we note that the number of family group conferences involving tamariki Māori has remained relatively static over the last decade.²⁰⁸ As set out in section 11.4.2.7 of appendix 11, Oranga Tamariki’s changes to family group conferences have thus not, as of yet, materially impacted the number of conferences Oranga Tamariki convenes in respect of tamariki Māori. This is,

208. Oranga Tamariki, ‘Key Data Graphs’, [2020], <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Report-and-releases/data-about-how-we-work-with-children/Key-data-graphs.pdf>

however, only one metric by which to evaluate the impact of family group conference policy and practice changes since 2017.

We therefore acknowledge and commend the Crown for the steps it has taken to improve practise. These change, if implemented effectively, could make a real and impactful difference to the communities in which they have been introduced.

5.7 CONCLUDING REMARKS AND SUMMARY OF FINDINGS

The Crown argues that it now has in place legislation and policy that over time will address the disparity and ensure Oranga Tamariki operates consistently with te Tiriti/the Treaty and its principles. The claimants argue that nothing less than a transfer of control and resources for care and protection from Oranga Tamariki to a 'by Māori for Māori' system will suffice. The premise for the Crown's position is that it has an ongoing responsibility to provide a universal care and protection system, within which it can and will provide services for tamariki Māori in a Tiriti/Treaty-consistent way (including by way of delegation and partnership). The Crown argues that there will remain a residual but ongoing role for a State care and protection system as a safety net for tamariki Māori, and that not every iwi and Māori organisation wants to exercise care and protection powers, nor to assume responsibility for outcomes. The premise for the claimants' position is that the Crown has overreached and assumed for itself authority and control over whānau and tamariki far beyond that contemplated by te Tiriti/the Treaty.

It is our conclusion that the systemic problems inherent in the current system are too powerful for truly transformational change to emerge. The hierarchical structure of a central government department, coupled with staff who are required to react to and investigate numerous reports of concern and then implement any resulting court directions or orders, means that the scope for targeted sympathetic and comprehensive intervention is narrow, and too often a matter of chance. The current system leads almost inevitably to over surveillance and risk-averse intrusion into the lives of vulnerable whānau.

While we agree wholeheartedly with the vision of Oranga Tamariki that no tamaiti Māori will need State care, it is not a vision Oranga Tamariki alone can hope to achieve. Not only will it require sustained and significant whole-of-government attention and resourcing, but also action from the non-government sector and iwi, hapū, and Māori whānau themselves. It is also important to stress the ongoing relevance of issues identified in *Puao-te-Ata-tu* arising from the damage done to Māori whānau and social structures by monocultural law and policy. As the authors of the report observed: 'The reality is that our future is to be built on today's youth, many of whom are alienated from their culture and identity.' They continued:

We believe that the strength of the Maori family will return, but that this strength will take time to be restored. We also believe that the department's concern must be to take advantage now of the tremendous drive amongst Maoridom to improve its family strength. Therefore, immediate and and broader term problems have to be

addressed by departments and agencies working together to direct existing resources to best possible advantage.²⁰⁹

In summary, we find that, subsequent to 2017, the Crown has continued to breach its Tiriti/Treaty obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga in the following ways:

- by failing to partially repeal the subsequent child provisions;
- by continuing to operate an inequitable and asymmetrical model in respect of partnerships and procurement;
- by failing to oversee and consistently apply mechanisms for monitoring and accountability of social work practice, and by failing to apply best practices in terms of data collection and quality;
- by failing to meaningfully reform permanency policy;
- by failing to address persistent problems in the operation of family group conferences; and by inconsistent and unnecessary use of section 78 uplift protocols across a number of cases prior to mid-2019; and
- by failing to ensure that te Tiriti/the Treaty provisions in the Oranga Tamariki Act 1989 are effective and clear.

209. Document A55, pp 36, 42

CHAPTER 6

THE FUTURE – RECOMMENDATIONS FOR CHANGE

Ka mate kāinga tahi, ka ora kāinga rua

One house dies, the second house must live to provide life and shelter

6.1 INTRODUCTION

We turn now to the final question we set as the focus for this inquiry:

What (if any) additional changes to Crown legislation, policy or practice might be required in order to secure outcomes consistent with te Tiriti/the Treaty and its principles?

We first summarise the position of the parties on this question, before presenting our analysis. We conclude this chapter with our findings and recommendations.

6.2 THE CLAIMANTS' POSITION

All claimants and interested parties to this inquiry argue that current legislative and policy settings are inconsistent with the Treaty and its principles and that substantial reform is required. There are, however, differences in terms of the nature and extent of the changes considered necessary.

One view, most clearly articulated by claimant Lady Tureiti Moxon, was that Oranga Tamariki is broken beyond repair. Its functions should be transferred to Māori so that Māori can look after themselves and there should be no residual role for Oranga Tamariki in the lives of tamariki Māori.

Lady Tureiti seeks recommendations as follows:

- ▶ A holistic model of care for whānau is created through integration across sectors, breaking down the silos that exist between ministries and agencies. An example of this approach is Whānau Ora. Lady Moxon proposes that a Mokopuna Authority be created, along the lines of the Whānau Ora model, but existing as an independent entity with its own resourcing.
- ▶ Any 'by Māori for Māori' organisation needs to be allocated a level of resourcing proportionate to the number of tamariki Māori the organisation has responsibility for.

- ▶ Legislative reform is undertaken along the lines of the Canadian statute titled ‘An Act respecting First Nations, Inuit and Métis children, youth and families (First Nations Act)’. This Act creates a framework for self-determination and allows each indigenous group to develop capacity and capability at their own rate. Indigenous groups who wish to, can then design and deliver child and family services solutions that best suit their needs.

Lady Tureiti also seeks interim recommendations:

- ▶ addressing the power imbalance between whānau and Oranga Tamariki in family group conferences through whānau choosing the venue, time, attendees, and facilitator. The role of Oranga Tamariki staff should be restricted to supporting the whānau to make arrangements for the conference, including by providing resourcing, and to act only as observers and recorders;
- ▶ the Family Court adopting the model used by the Rangatahi Courts in respect of kaumātua-guided decision-making;
- ▶ Oranga Tamariki immediately stopping all permanent or long-term placements without notice; and
- ▶ an immediate end to section 78 applications in relation to Māori children.¹

Claimants Aaron Smale, Toni Jarvis, and Teresa Aporo argue for a transformational reform that would move away from the current notify–investigate model to a preventative model with a genuine transfer of power and resources to a ‘by Māori for Māori’ approach. They support the establishment of an independent central authority, protected by legislation to which the Crown would be required to relinquish both power and resources. They point to Whānau Ora as a good example and to the recommendation from the Tribunal hearing for stage 1 of the Health Services and Outcomes Kaupapa Inquiry, which recommended the establishment of a stand-alone Māori primary health authority.

They also argue for separation of the uplift and urgent intervention functions from provision of support to whānau. The same agency should not be charged with responsibility for both functions. They also seek more comprehensive social welfare services aimed at preventing the need for intervention and argue that State care and protection agencies must have more robust accountability mechanisms, including a requirement to publish statistics which meet minimum standards. This should be overseen by an independent body and the case management system redesigned by Māori, recognising that Māori data should be subject to Māori governance, ownership, and access.²

Claimant Jean Te Huia argues for fundamental change that would see devolution of real power to Māori, and a restructure of relevant Crown agencies and services. Ms Te Huia proposes a commission of inquiry be established to locate every child taken into care since 2015. She also suggests that affected mothers receive fully-funded counselling services and financial compensation, that a Māori midwifery workforce is developed, and that an independent audit function to review Oranga Tamariki services and current providers is set up. Ms Te Huia also proposes that

1. Submission 3.3.21, pp 50–59

2. Submission 3.3.26, pp 56–59

all children currently in State care be identified and have individual plans created to determine the services required to maintain their safety and establish a long-term whānau plan. Devolution of Oranga Tamariki powers, responsibilities, and resources should be discussed at hui to be attended by whānau, hapū, and iwi.³

Several claimants and interested parties proposed enhanced training of social work staff required to work with tamariki Māori and that there be greater review and accountability of Oranga Tamariki staff practice. They include Ms Te Huia, as well as Rex Timu, Ian Shadrock, Marilyn Stephens and Tyrone Marks, and Jayell Smith.⁴

Dame Aroha Reriti-Crofts, on behalf of the Māori Women's Welfare League, and Thomas Harris argued for the development of policy and legislative reforms, after appropriate consultation, which reflect tikanga Māori, and the importance of whakapapa and identification as Māori. They argue for an emphasis on intervention aimed at strengthening whānau and ensuring the provision of adequate support and education for them. They also seek the building of formal partnerships with Māori organisations and service providers, which would take place within a context of a full and comprehensive overhaul of the legislation policy and practices in relation to care and protection of tamariki Māori.⁵

Dr Rawiri Waretini-Karena, Dr Jane Greene, Kerri Nuku, Donna Awatere Huata, and Paora Moyle argue for a national Māori care and protection transition plan and an implementation process developed by Māori that will eventually relocate care and protection to whānau, hapū, and iwi collectives. The statutory authority and resources of Oranga Tamariki would be wound back and reallocated to the Māori authority with Oranga Tamariki remaining a care and protection service for non-Māori children and families.

These claimants argue that models for optimum care and protection are foreshadowed in the *Puao-te-Ata-tu* report and that subsequent models are being developed such as the 'Blenheim model'. In their assessment, substantial additional resourcing is required to scale up such initiatives.

Claimants say that in the short term, Oranga Tamariki must shift its focus from the child as an individual to the child as a member of whānau, hapū, and iwi. Immediate changes need to be made to ensure whānau are supported by skilled tikanga Māori advocates. The family group conference process needs to be overhauled to empower whānau decision-making. Also, they say that in the short term the Act should be amended to ensure that Oranga Tamariki provides adequate and culturally appropriate financial and social support to parents and whānau so as to avoid factors which lead to a child being considered in need of care and protection. Whānau Ora and other kaupapa Māori development agencies should be utilised by Oranga Tamariki in this prevention and early intervention stage.⁶

3. Submission 3.3.27, pp 27–30

4. Submission 3.3.31, p 62

5. Submission 3.3.32, pp 78–79

6. Submission 3.3.33, pp 26–29

The New Zealand Māori Council seeks changes based on the following four principles:

- Accountability to marae-based democracy is an essential component of the exercise of Treaty-compliant state powers over Māori children;
- The primary decision-makers in the life of any child must, wherever possible, be their whānau;
- The focus of the exercise of government powers over children needs to be on comprehending and actively developing the strengths of local communities to care for their children; and
- Legislation and policy need to ensure that the principles of Te Tiriti are followed by the Crown – it cannot be left to the discretion of Chief Executives or staff.⁷

The New Zealand Māori Council also seeks ‘functional’ recommendations as follows:

- A national Māori body bound to support whānau and accountable to them is much better placed to lead these changes than the current model of one ministry working with large Iwi groupings; and
- A national design hui must be called to ensure the legitimacy of any new model in the eyes of Māori communities: any changes must be developed in that light.⁸

The New Zealand Māori Council submits that the Tribunal’s recommendations for te Tiriti-compliant State intervention in the lives of children must ensure statutory provision for:

- All statutory powers and resources for the care of Māori children to be transferred to a single, national Māori organisation that exists on par with government ministries and bids for its own treasury vote;
- The single, national Māori body to be bound to the principle of hapū rangatira-tanga through marae and hapū-based election of its governance board through a revised Māori Community Development Act 1962.⁹

Claimants Te Enga Harris and Lee Harris, Mona Liza Vercoe, and Tasilofa Huirama seek a number of specific recommendations in relation to Oranga Tamariki practice, without notice applications, subsequent child provisions, training and case management, trauma-informed approaches, monitoring and accountability, and racism and bias.¹⁰

In addition, they seek:

7. Submission 3.3.18, p 2

8. Ibid

9. Ibid, p 9

10. Submission 3.3.20, pp 107–115

- A recommendation that the Crown and the claimants, as Treaty partners, investigate the operational parameters and requirements of a stand-alone care and protection kaupapa Māori entity.
- A recommendation that determination of the aforementioned requirements by the Crown and the claimants alone should not preclude participation by and the receipt of advice from other stakeholders involved in the care and protection of pēpi and tamariki Māori.
- A recommendation that the Crown and the claimants, as Treaty partners, conclude suitable terms of reference for the proposed investigation within 6 months of the date of issuance of the Waitangi Tribunal's report.
- A recommendation that the Crown and the claimants, as treaty partners, conclude the proposed investigation within 12 months of the date of issuance of the Waitangi Tribunal's report.¹¹

Claimants Nicola Dally-Paki, Denise Messiter, Vanessa Taupaki, and Carra Lindsay seek a recommendation that Oranga Tamariki be disestablished. In the event the panel does not recommend the disestablishment of Oranga Tamariki, the claimants seek recommendations that:

- The researching of a person's whakapapa must be agreed to by those caring for the child, if not whānau;
- There must be codes of practice, just like all other researchers must adhere to when research includes human subjects.
- The research must not be used against the whānau.
- The person conducting the research must be Māori and should have whakapapa to the region they work in.
- The whakapapa belongs to the child and their whānau. It must be returned to the whānau.¹²

Nicola Dally-Paki also had a number of particular ideas for transformation, arising out of her own traumatic experience. In her evidence, she describes herself as a staunchly proud wahine Māori and Māori mother. She was formerly in a relationship with a gang member and subject to domestic violence and abuse. As she describes:

Living in constant fear made me mis-trusting of all others, it made me paranoid and I rarely ventured into public. Asking for help was too risky. It clearly took a lot for me to reach out to these organisations like Māori Women's Refuge but they turned me away. I understand the fear that resulted in them turning my kids and I away, I mean we lived it everyday, but do not promote a service you cannot deliver. Being let down by a service did not just affect me. My children felt it and many of my family members

11. Ibid, p 115

12. Submission 3.3.22, p 14

knew how we had been treated too. This leads to strengthening the mis-trust our Māori people have of all Government Departments and the very organisations set up to help our people.¹³

She describes the aftermath of the murder of her son Moko and the uplift of her other two children by Oranga Tamariki. Ms Dally-Paki says that many of the answers the Tribunal is looking for lie in the process she eventually went through with Whānau Ora. ‘The answers for a Māori mother like me lay in a by Māori for Māori “one stop shot”’.¹⁴ For Ms Dally-Paki, a holistic Māori worldview is the answer. She argues strongly for earlier intervention but not through a siloed organisation. She argues for the establishment of ‘one stop holistic shot’ Māori organisations in communities where there are high populations of Māori, with a focus on areas of low social economic status. These entities, she argues, must be completely Māori and all the key organisations that currently provide Oranga Tamariki with reports of concern should be statutorily required to notify these local organisations and engage their services from the start.¹⁵ Ms Dally-Paki also invites us to have regard to the findings of the coroner following the inquest into the death of her son Moko Sayviah Rangitoheriri.¹⁶

Claimants Rewiti Paraone, Kevin Prime, Erima Henare (deceased), Pita Tipene, Waihoroi Shortland, Te Riwhi Whao Reti, Hau Hereora, Romana Tarau, Karen Herbert, Edward Cook, and Charlie Tawhiao argue that it is time to revisit the law and re-empower Māori to lead their own transformation. They seek recommendations that:

- ▶ the Crown formally apologise, acknowledging the nature and extent of trauma caused to tamariki Māori and their whānau at the hands of Oranga Tamariki and its predecessors;
- ▶ a negotiation and settlement framework is developed and implemented in order to compensate the claimants for the past and existing prejudice that tamariki Māori and their whānau are suffering;
- ▶ Oranga Tamariki commit to reducing disparity in a targeted and urgent manner. Agreement must be reached with Māori over any targeted and urgent commitment to reduce disparity. Any agreement must be Treaty-based and sufficient funding and resources must follow; and
- ▶ a parallel/dual workstream (alongside the Crown’s targeted and timely commitment to reducing disparity) where the Crown and Māori work together to develop an entirely new approach to the system for the care and well-being of Māori children.¹⁷

13. Document A150(c), p 3

14. Ibid

15. Ibid, p 4

16. Document A150(a)

17. Submission 3.3.24, pp 83–87

The claimants propose that the terms of reference for this dual workstream would need to be developed between the parties, but important aspects of the engagement would include the following:

- the Treaty underpins the transformation as a framework and foundation for change;
- the Crown and Māori are equal partners in the development of the new system model with authority and decision-making capacity over the outcomes;
- there are no parameters to the discussions, and it is not confined by the current child care and protection system;
- the parties agree on the role of the Crown and Māori within the new system model;
- the parties engage until agreement is reached on a new system model; and
- the Crown fund and commit resources to the engagement and development of a new system model.¹⁸

Claimant Rex Timu is president of the Hastings chapter of the Mongrel Mob. He seeks recommendations that the Crown engage with the Mongrel Mob to discuss how to stop the flow of Mongrel Mob-affiliated children into State care and prison and to address the various negative social ills that affect Māori gang members and their whānau. Johnny Apatu, also a member of the Mongrel Mob, gave evidence in support of Rex Timu. Both men reflect on their understandings of the inquiry's issues and discuss their experiences and the connection between State care, prison, and gangs. As Mr Timu comments: 'All my mates were put into Borstal, and I know that played a part in them joining the Mob. . . . All the prisons are training grounds for gangs. That includes the youth facilities too. Actually, that's where it all starts.'¹⁹

Both Mr Timu and Mr Apatu say they are trying to address drug, violence, educational, and employment issues within the Mongrel Mob. They emphasise that 'only the Mob can take care of the Mob'. Mr Apatu says: 'In order to address the issues confronting communities, you need to be from those communities. To have an understanding and awareness of their needs, you need to have walked in their shoes. Only then will we see results.'²⁰

Mr Apatu further argues that in order for change to happen:

Those who suffer the most must be at that table. Those who fill Maungaroa – and all the prisons, their representatives need to be there at the table. Not the bureaucrats, not the ones who haven't been on the inside, not the ones who haven't had their children taken, but the ones who need help the most. And like it or not, that includes us.²¹

18. Ibid, pp 85–86

19. Document A35, p 2

20. Document A70, p 6

21. Ibid, p 5

Both expand on how the Mongrel Mob, in their assessment, is changing and discuss strategies they are using to help members from within the gang. Mr Timu notes the new rules he has introduced into the gang, including ‘Whānau First’, which advocates for no violence within gang whānau. Mr Timu says their people need education and help and that this needs to come from within the Mongrel Mob because there is so much distrust towards the Crown.

Mr Timu argued strongly for the re-establishment of something like the Waka Moemoeā Trust. He Waka Moemoeā Trust was established by Deed of Trust in October 2011 and was incorporated as a charitable trust board in March 2012.²²

Mr Timu explained that it was an initiative supported by former Minister of Māori Affairs Dr Pita Sharples, with funding from Te Puni Kōkiri. The idea was that three Mongrel Mob leaders and three Black Power leaders would work together to address problems facing gang-affiliated communities, and to build relationships within communities.

When Mr Timu was contracted under the trust, he worked as a field worker and then a project manager. Mr Timu further explained:

the field workers mahi was to go back to their rohe, go back to their own whānau, pick 10 whānau and you work with them. And, I’m talking education, health, employment, housing and a few other things and I tell you, one of those kaupapa is hard. You can spend days and weeks, and months just working on the education side and then you got 10 families to work with.

So, when I was a field worker I had picked 10 families from my chapter and had all my programs all set out and whatever. I actually took some of them through the Whānau Ora when Te Puni Kōkiri ran it and I actually become – one of the . . . navigators. And, then helping navigate the families through the final kaupapa, which is really good.

Changed a lot of families around that time. But the thing was you know it’s not going to take one or two three years, it takes time . . .

They call us hard to reach. Well in fact we’re not hard to reach, they might be hard to work with, but they are easy if you are out amongst them all they’re actually easy to reach. But working with them is pretty difficult.²³

Mr Timu noted that another positive outcome from Waka Moemoeā was that, over the years, the relationship between Black Power and the Mongrel Mob leadership has improved, as well as their relationships with other gangs too.²⁴

The Crown provided further clarity about the nature of the trust’s work. The aim of He Waka Moemoeā was to ‘provide opportunities for Hard to Reach communities and their whānau to envisage, pursue and aspire to change for the better’. The work programme consisted of:

22. Memorandum 3.2.75, p 6

23. Transcript 4.1.8, pp [143]–[144]

24. Ibid, p [131]

- Providing services to hard to reach whānau across five locations to facilitate change and help broker relationships with relevant services, agencies and educational and employment opportunities within their communities;
- Ensuring staff have the appropriate support and supervision and access to training opportunities;
- Supporting to formalise the He Waka Moemoeā structure, governance, policies, guidelines and systems.²⁵

A summary of the key outcomes included:

- an increase in safety – the trust was able to gain agreements to cease inter-gang rivalry and conflict;
- shift in gender roles – increasing appreciation of the role of women within the whānau;
- crime reduction – leaders had created pro-social environments and actively discouraged criminal offending;
- education engagement – participants grew to understand the importance of engaging in their children’s education, and in some cases, their own adult education;
- employment – a high proportion of chapters’ members became employed full time; and
- improved housing and health.

Mr Timu said he believed that, as the funding got tighter, the Waka Moemoeā Trust ‘closed down’ after five years.²⁶

The Crown clarified, by way of memorandum, that He Waka Moemoeā remains a registered charitable trust but was removed from the Charities Register in November 2018 for ‘failure to file annual returns as is required by s 41 of the Charities Act’. The Crown was unable to provide further information as to any decision by the trust to cease to operate.²⁷

In terms of the future and what support Mr Timu wanted from the Tribunal, Mr Timu said:

The abuse that these young rangatahi were subject to while under State care all those many years ago, we are able to turn something negative into something positive and I am talking about starting this trust up. This is something negative that happened something years ago it is still happening today and just making something positive out of it all. Let me use my influence in helping our many whānau and having a better life.

Some of the concepts in Waka Moemoeā stood for needs to be implemented to this new trust that we can give it a name or whatever but we can’t really go back to Waka Moemoeā we need to move forward from that. But since – most of it with the same

25. Memorandum 3.2.75, pp 6–7

26. Transcript 4.1.8, pp [132]–[133]

27. Memorandum 3.2.75, p 6

concept and we introduce a lot of Whānau Ora staff with it which was really great because it tied us back to our families, more importantly our families and more so our wahine you know . . .

But the trust itself, I, you know, I can't stress enough how important this trust would be at the right governance running it and the right measurement team and the right field workers in place, I can tell you, we can do wonders in changing the culture in gangs, not just in the mob but all the gangs in New Zealand and I put my mark on it.²⁸

Piripi Gray, representing a claim on behalf of the children of Ngāti Toa, Ngāti Raukawa, and Ngāti Kauwhata who have been placed in State or faith-based care, seeks a full apology from the Crown for its actions in breach of te Tiriti/ the Treaty. This apology must also be followed by affirmative, remedial action that realigns Oranga Tamariki legislation, policy, and practice with a care and protection framework created in partnership with Māori. This framework must have a Māori-centred approach based in tikanga that addresses socio-economic issues of whānau and encourages meaningful and consistent participation by Māori. Mr Gray suggests an annual national wānanga with those involved in the State care system to give a voice to Māori concerns.²⁹ The development of a new framework compliant with te Tiriti/ the Treaty is also supported by claimants Violet Nathan and Maringi Broughton, who state that the Crown has failed to satisfactorily implement the recommendations of *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, and that Māori have been denied the right to exercise rangatiratanga during the care and protection process.³⁰

A number of claimants were represented by the same counsel in this inquiry. They include claimants Cletus Maanu Paul, Raymond Hall, and Titewhai Harawira, Desma Kemp Ratima, Diane Black, Rangi McLean, and Rihari Dargaville; claimants Louisa Collier on behalf of herself and various whānau and hapū members under a number of different claims, and David Potter, Andre Paterson (deceased), and Cletus Maanu Paul on behalf of hapū of Ngāti Rangitihi; Te Amohia McQueen and Albert McQueen, Henare O'Keefe, Raewyn Kapa, Jane Ruka Te Korako, and Te Rungapu (Ko) Ruka; and Titewhai Harawira, Benjamin Pittman, and Hinewhare Harawira on behalf of Ngāpuhi kuia and kaumātua. In addition, counsel also represented 20 claimants whose claims have been included on our confidential record and who provided evidence in relation to their particular experience with Oranga Tamariki and the care and protection system.

In reply submissions on behalf of these claimants, counsel argues that there is no reason for claimants who are Māori to trust the current reforms will be any different from the Crown's failure to implement the recommendations of the *Puao-te-Ata-tu* report. It is also argued that the statistics referred to by the Crown

28. Transcript 4.1.8, pp [133]–[139]

29. Submission 3.3.23, pp 31–32

30. Submission 3.3.25, pp 5, 13–14

as evidence of improvement arise from too short a period to be meaningful and are too limited in scope to support the Crown's assertions of a transformation underway.

It is also argued that despite acknowledging the existence of structural racism in theory, the Crown is reluctant to acknowledge that it underpins the vast majority of the causes of Māori over-representation in the care and protection system. It is argued that the Crown cannot retain 'care and protection' powers and simultaneously uphold the principle of rangatiratanga. Rather than transferring power, the Crown is currently using talk of 'partnership' as an opportunity for Oranga Tamariki to bolster its own capacity. The Crown's proposed transformation over a 10-year period is not durable, is cosmetic, and will be unable to persist through three election cycles. Therefore, in order to achieve lasting change and change that is Tiriti/Treaty-compliant, the State must transfer via legislative changes the power that it exercises in breach of te Tiriti/the Treaty over tamariki Māori, to Māori, along with the requisite resources.³¹

In an appendix to their reply submissions, counsel set out particulars of the relief sought. This includes findings that prior to 1840 Māori collectively exercised mana and tino rangatiratanga over their taonga, including tamariki Māori. This rangatiratanga included responsibility for ensuring the health and well-being of tamariki in accordance with tikanga Māori. This authority was never ceded under articles 1 and 2 of te Tiriti and consequently responsibility for ensuring the health and well-being of tamariki Māori resides with their mothers, supported by their fathers, whānau, hapū, and iwi.³²

Claimants seek a formal apology and transfer of the provision of tamariki Māori and wāhine services along with requisite funding and technical support to Māori. Also sought is a return of decision-making at local and national levels in relation to tamariki Māori to Māori mothers supported by their fathers, whānau, hapū, and iwi. Funding for counselling and compensation for loss suffered as a result of depriving Māori of their rangatiratanga responsibilities over tamariki Māori is also sought.³³

The following particular relief is also sought:

- ▶ provision of funding to a new group established collaboratively by the Whānau Ora Commissioning Agency and the Claimants ('the Tamariki Review Committee'). The Tamariki Review Committee is expected to consult with other Māori groups with an interest, and devise a Tikanga Māori Tamariki Regime ('the Tikanga Māori Tamariki Regime') with their own legislation, administration and policies for the care of Tamariki Māori, which gives due respect to the place and role of their mothers, fathers, and whānau, hapū and iwi;
- ▶ as part of the Tikanga Māori Tamariki Regime being finalised, that amendments are made to the Oranga Tamariki Act, and all other relevant legislation, to provide

31. Submission 3.3.37, pp 1–2

32. Submission 3.3.37(b), p 1

33. Ibid, p 2

that the State system of intervention, purportedly for the purposes of the care of children, does not apply to Tamariki Māori. It is expected that the work of the Tamariki Review Committee in devising the policies and the legislation for the Tikanga Māori Tamariki Regime will take two to three years;

- ▶ from now until when the new Tikanga Māori Tamariki Regime comes into force ('the Interim Period'), in relation to the care of Tamariki Māori in each geographical region, the powers and functions which MFC [Oranga Tamariki – Ministry for Children] currently exercise in relation to Tamariki Māori ('the Care and Protection Functions'), along with sufficient funding and resources, are to be transferred to Māori providers in that geographical region, including Whānau Ora providers, and/or Iwi providers. The Claimants seek a recommendation that discussions commence between the Tamariki Review Committee and MFC as soon possible, to ensure that the Care and Protection Functions are transferred to Māori providers as soon as is practicable. Such options for immediate transfer of the Care and Protection Functions, include the wholesale transfer of the Care and Protection Functions under s7AA of the Oranga Tamariki Act to a collective of Māori providers, such as the Whānau Ora Commissioning Agency, and/or custody of Tamariki Māori, or such other arrangements which MFC and any given Māori provider may agree on, and could involve ss 366, 139, and 140 of the Oranga Tamariki Act;
- ▶ that the practice of applying for w/N [without notice] Custody Orders is to be immediately stopped. In situations where a child is in imminent danger, the without notice process is to be restricted only to applications for POS [place of safety] Warrants and is strictly not to be used on other occasions;
- ▶ amendments to s104 of the Public Services Act 2020 to ensure that public servants are subject to the exact same standards as private sector operators. It is proposed that s104 should be amended to replace the words 'immune from liability in civil proceedings for good faith actors or omissions when carrying out or intending to carry out their responsibilities', to 'not immune from liability in civil proceedings for actions or omissions which are negligent and/or in bad faith when carrying';
- ▶ an options paper and recommendations for both an independent complaints system and a compensation regime, should be prepared jointly by the offices of the Children's Commission, the Human Rights Commission, and the Ombudsman, working collaboratively with the Tamariki Review Committee. The Office of the Children's Commission should be responsible for data collection, and for producing all reports and statistical analysis in relation to the Care and Protection Functions;
- ▶ as soon as any ROC [report of concern], in relation to Tamariki and pēpi Māori, is notified to the MFC, a Māori provider in the region is contacted, and resourced to take the lead on all Care and Protection Functions in relation to the relevant Tamariki and Pēpi Māori, and their mothers and whānau;
- ▶ all substance abuse and addiction issues in relation to the mother and/or father of any Tamariki and pēpi Māori, are to be viewed as a disability, and dealt with under a disabilities framework;
- ▶ options should be developed and applied so that where there are care and protection issues in relation to a mother, and her Tamariki and/or pēpi, the mother and her Tamariki and/or pēpi are not separated from each other;

- all policies and practices should be consistent with the right of a pēpi to have access to their mother's breastmilk and care.³⁴

The Tribunal also received recommendations from interested parties to this inquiry. Piki Te Ora Mitchell advocated for any reform to be led by Māori, for Māori, and that it be built on natural justice foundations, including the right to be heard, involve neutral decision makers, counsel, and expert advice available for whānau, and strict requirements attached to the permanent placements of tamariki. It was also submitted that a child welfare structure should incorporate a whāngai system, where children are raised with a relative, but their relationship with their natural parent is maintained. In circumstances where Oranga Tamariki decision-making has the effect of either terminating or interrupting the relationship between a parent and child, it must be able to be challenged by parents and whānau. Such determinations should not be permissible unless issued by a court.³⁵

6.3 THE CROWN'S POSITION

The Crown responds to the remedies sought by the claimants and also relies upon the following three concessions made by then-Oranga Tamariki chief executive Gráinne Moss on behalf of the Crown on 24 November 2020:

- The Crown has failed to fully implement the recommendations of Pūao Te Ata Tū in a comprehensive and sustained manner. This failure has impacted outcomes for tamariki Māori, whānau, hapū and iwi. It has undermined Māori trust and confidence in the Crown and undermined confidence in its willingness and ability to address disparities.
- Structural racism is a feature of the care and protection system which has had adverse effects for tamariki Māori, whānau, hapū and iwi. This has resulted from a series of legislative, policy and systems settings over time and has detrimentally affected the relationship between Māori and the Crown. The structural racism that exists in the care and protection system reflects broader society and has also meant more tamariki Māori being reported to it. The impact of structural racism on outcomes for and experiences of tamariki and their whānau, and on culture and trust more generally, means that the Crown should have identified the need to tackle structural racism head on in the establishment of Oranga Tamariki.
- Historically Māori perspectives and solutions have been ignored across the care and protection system. To address this, Oranga Tamariki needs to partner and engage with Māori so together Oranga Tamariki and Māori can deliver better outcomes for tamariki Māori.³⁶

34. Submission 3.3.37(b), pp 2–4

35. Submission 3.3.19, pp 2, 5, 7, 9

36. Document A184, pp 1–2

By way of response to the remedies sought by claimants, the Crown notes that many of the claimants seek recommendations outside of the scope of the inquiry, such as seeking an overhaul of all policies and practices of Oranga Tamariki more broadly or by reference to other Crown agencies.³⁷

Secondly, the Crown submits that given this is a contemporary, forward-looking inquiry, the Tribunal should not be in a position to recommend compensation for historical acts or omissions of the Crown.³⁸ This was not signalled in the chairperson's decision granting urgency nor has there been detailed testing of evidence by the Crown. Further, some aspects of the claims have been or are in the process of being settled in Treaty settlements and there has been no standard eligibility process. Jurisdiction would need to be considered if the Tribunal plans to consider recommending compensation.

The Crown acknowledges the disparity experienced by tamariki Māori and their whānau from the care and protection system is 'stark and unacceptable' and that transformation of the system is ongoing and more work and commitment is needed, though noting that transformation takes time.³⁹

In directions during the inquiry, we asked the Crown to clarify whether it accepts that the disproportionality shown by the data is inconsistent with te Tiriti/ the Treaty and its principles.⁴⁰ In response the Crown submitted:

- ▶ The Crown acknowledges the disproportionate number of tamariki Māori entering and remaining in care is undesirable and unacceptable. While the causes of this inequity are complex, it has been accepted that a significant contributing factor has been the ongoing effect of historical injustices on iwi, hapū and whānau.
- ▶ The Crown accepts Te Tiriti o Waitangi/ The Treaty of Waitangi requires the Crown to take all reasonable steps to address this inequity.⁴¹

In response to the recommendation sought that Oranga Tamariki engage positively with whānau, hapū, and iwi to enable greater participation in child protection processes, the Crown responds that there are steps already in place to do this and 'early assessments of these initiatives have shown that such participation has increased.'⁴²

Responding to the strong call for either the complete disestablishment of Oranga Tamariki or the creation of a new agency that will take over the care and protection of tamariki Māori, the Crown submits that a role for the State is required to provide a safety net for the most vulnerable tamariki who need care and protection.⁴³ This, the Crown argues, is consistent with Treaty principles and good governance.

37. Submission 3.3.34, p 33

38. Ibid, p 34

39. Ibid

40. Memorandum 2.5.17, p 2

41. Submission 3.1.89, p 3

42. Submission 3.3.34(b), p 2

43. Submission 3.3.34, p 8

In relation to elevating cultural competency, the Crown indicates that they are introducing a number of new strategies to improve cultural competencies. Oranga Tamariki will provide training, coaching, and mentoring of site and regional staff in their application of Māori-centred practice. Oranga Tamariki is ensuring all staff know and understand its Māori cultural framework, and can apply it in their work.⁴⁴

The Crown asserts that it is actively encouraging Māori participation and is developing partnerships. In relation to whānau, hapū, and iwi engagement, the Crown notes that it has introduced Māori specialist roles and iwi-led family group conferences.⁴⁵

The Crown acknowledges the significant disparity between the number of tamariki Māori and non-Māori being taken into State care, and that this is unacceptable.⁴⁶

The Crown submits that since Oranga Tamariki's inception this 'disparity may be reducing'. It draws attention to recent data indicating 'promising progress' – in particular, that fewer Māori children are entering care than in previous years.⁴⁷

The Crown therefore urges caution in assuming the disparity tamariki Māori and their whānau experience is solely and directly due to the actions of the Crown or to actions by Oranga Tamariki (or its predecessors).⁴⁸

Turning to the care and protection system, the Crown concedes that structural racism is a feature of Oranga Tamariki and its predecessors, and has resulted from various legislative, policy, and systems settings over time. The Crown acknowledges that this has had adverse effects for tamariki Māori, whānau, hapū, and iwi, and has detrimentally affected the relationship between Māori and the Crown.⁴⁹ Further, the Crown acknowledges the role that poor practice, lack of engagement, and poor cultural understanding have played to create distrust throughout the care and protection system.⁵⁰

As to the Crown's role in the care and protection system, the Crown accepts that tamariki Māori and the whānau unit are taonga requiring protection, and that from this flows Treaty obligations on the Crown to the individual tamaiti, whānau, hapū, and iwi. This includes an obligation on the Crown to 'support, strengthen and assist whānau Māori to care for their tamaiti or tamariki to prevent the need for their removal from home if possible'.⁵¹ Equally, however, the Crown states that – consistent with its Treaty obligations – it has an ongoing role and responsibility to provide a care and protection system for tamariki.⁵² Looking forward, the Crown says that it understands and accepts that the system has to continue to

44. Ibid, pp 30–32

45. Ibid, p 32

46. Ibid, p 13

47. Ibid, p 20

48. Ibid, p 21

49. Ibid, p 18

50. Submission 3.3.17, p 4

51. Submission 3.3.34, p 16

52. Ibid

change; and the role of Māori, hapū, and iwi organisations must continue to grow. Otherwise, the challenges that the State care and protection system has struggled with for decades will continue regardless of who is making the decisions.⁵³

The Crown also concedes that historically, Māori perspectives and solutions have been ignored across the care and protection system.⁵⁴ As part of this, the Crown also acknowledged that it had failed to fully implement the recommendations of *Puao-te-Ata-tu* in a comprehensive or sustained manner, which has impacted outcomes for tamariki Māori, whānau, hapū, and iwi, and undermined Māori trust and confidence in the Crown and its willingness and ability to address disparities.⁵⁵ To address this, the Crown acknowledges that it must ‘partner and engage with Māori so together Oranga Tamariki and Māori can deliver better outcomes for tamariki Māori’.⁵⁶

6.4 THE TRIBUNAL’S ANALYSIS

In this section, we consider the consistency of Crown policy and legislation with te Tiriti/the Treaty and its principles.

As set out in chapters 4 and 5 of this report, we find that there have been a number of serious breaches of both the terms of te Tiriti/the Treaty and its principles, and that this has resulted in significant and ongoing prejudice to Māori. Furthermore, as chapter 5 establishes, we do not think the legislative policy and practice changes introduced since 2017 are sufficient to secure outcomes consistent with te Tiriti/the Treaty and its principles.

In light of these findings we make a number of recommendations directed towards removing prejudice and achieving Treaty-consistent policy and legislation.

Our primary and overarching recommendation, however, concerns the process by which a Treaty-consistent transformation may be achieved. We focus on this because, of all the factors that underpin the disparities we examine, none is more enduring and pernicious than the effects of alienation and disconnection from culture. The primary cause of this disconnection is decades of Crown resistance and hostility to the guarantee to Māori of the right to cultural continuity – embodied in the article 2 guarantee of tino rangatiratanga over kāinga. Poverty and disparities in health, education, and the criminal justice system are all linked to this, and compound the prejudice. It is clear to us that Māori must lead and direct the transformation now required. This is because the essential long-term solution lies in strengthening and restoring whanaungatanga. While the Crown has a significant ongoing role, this is not something that it can or should lead. Our primary recommendation therefore focuses on the formation of a ‘Māori Transition Authority’ that can lay the foundations, and then guide and implement the change.

53. Submission 3.3.34, p17

54. Document A184, pp1–2

55. Ibid, pp1–2

56. Submission 3.3.34, p18

We conclude our report with some observations concerning the ‘Hastings uplift’. This attempt in 2019 by Oranga Tamariki to uplift a newborn pēpi pursuant to a ‘without notice’ section 78 custody order was the subject of a well-publicised *Newsroom* documentary. It led to a practice review commissioned by the chief executive of Oranga Tamariki, to a Māori-led inquiry, to inquiries and reports by both the Children’s Commissioner and the Ombudsman, and was instrumental in the commencement of our inquiry. We heard confidential evidence from a number of those involved in this case.

It is important to once again re-emphasise just what was guaranteed to Māori under te Tiriti/the Treaty. We take as the starting point the Treaty text, and in particular, the guarantee to Māori of tino rangatiratanga over kāinga in article 2 of the Māori text. The continuity of chiefly authority over the village, over the home, is a guarantee of the right to continue to organise and live as Māori. Put another way, it is a guarantee of the right to cultural continuity. Fundamental to that is the right to care for and raise the next generation. The guarantee was Māori control over kāinga and the people within. The signatories to the Treaty did not envisage any role for the Crown as a parent for tamariki Māori, let alone a situation where tamariki Māori would be forcefully taken into State care – in numbers vastly disproportionate to the numbers of non-Māori children being taken into care.

We find ourselves therefore in agreement with the Māori-led inquiry in its 2020 report *Ko Te Wā Whakawhiti/It’s Time for Change*: ‘the overwhelming conclusion from this Inquiry is that the State care of tamariki and pēpi Māori, and in particular the uplift practices used by the State, are *never appropriate for the long-term wellbeing of Māori*’ (emphasis in original).⁵⁷ We also agree with the central conclusion of the Children’s Commissioner that: ‘*To keep pēpi in the care of their whānau, Māori must be recognised as best placed to care for their own: this involves by Māori, for Māori approaches that are enabled by the transfer of power and resources from government to Māori*’ (emphasis in original).⁵⁸

Whilst truly transformational change towards a Treaty-consistent care and protection system must start with this important conceptual shift, it will not, of itself, be sufficient. Change to genuinely move towards Treaty-consistent outcomes will also require a sustained focus on addressing what Associate Professor Emily Keddell describes as the ‘intersecting inequalities’ that cause Māori to come into contact with the ‘system’ in vastly disproportionate numbers. These factors include poverty, alienation, transience, income and housing insecurity, health and education disparities, involvement with the criminal justice system, and drug and alcohol dependency.⁵⁹ Addressing these issues will require a bold and comprehensive all-of-government approach. Piecemeal reform of Oranga Tamariki, no matter how well designed, will ultimately fail another generation of children (Māori and

57. Hector Kaiwai, Tanya Allport, Ruth Herd, Jo Mane, Katrina Ford, Helen Leahy, Golda Varona, and Maire Kipa, *Ko Te Wā Whakawhiti/It’s Time for Change: A Māori Inquiry into Oranga Tamariki* (Wellington: Whānau Ora Commissioning Agency, 2020), p 74

58. Document A183, p 13

59. Document A90, p 3

6.4.1

non-Māori), if the same factors placing inhumane stress on families continue unabated.

In this regard, we find ourselves substantially in agreement with submissions made by Crown counsel in closing. Crown counsel urged us to be cautious in assuming that the disparity experienced by tamariki Māori and their whānau is solely and directly due to the actions of the Crown or the actions of Oranga Tamariki and its predecessors. Crown counsel argue that the picture is significantly more complicated, and goes on to say:

The Crown's analysis is that major drivers of disparity in presentation to the care and protection system include socio-economic factors that exist prior to children entering the care and protection system, including over-representation in family violence, methamphetamine and other drug and alcohol misuse and dependency, and stark material deprivation, including in health, education and housing. Additionally, the Crown accepts that broader forces of colonisation and structural racism and the ongoing effect of historical injustices on iwi, hapū and whānau have been significant contributing factors.⁶⁰

Crown counsel argue that, because this is an urgent inquiry with a focus on the contemporary period from 2015 onwards, we do not have before us the broader range of research or analysis to support findings about the historical period. In addition, it is argued that findings that blame Oranga Tamariki or its predecessors alone for the inequitable outcomes experienced historically and currently by tamariki Māori and their whānau will not address what is at the heart of the cause of disparity, and neither will it assist in finding the practical solutions and recommendations that are urgently needed to address it.⁶¹

We substantially agree, save for one important point. The practical solutions and recommendations that we consider are urgently needed to address the causes of disparity require systemic change and transformation well beyond that embodied in the 2017 legislative and policy changes, and indeed, well beyond the operations of Oranga Tamariki itself. While we accept that Oranga Tamariki and its predecessors are not solely responsible for the inequitable outcomes experienced by tamariki Māori and their whānau, we do not accept that the urgent nature of our inquiry and its contemporary focus prevents us from considering, and if appropriate making recommendations, that may have implications beyond the legislation and policy settings affecting Oranga Tamariki.

6.4.1 Transformation and change

We believe the case for transformational change of Oranga Tamariki is clear, both as a matter of Treaty obligation and also in order to mitigate harm and improve outcomes for tamariki Māori. We are not, however, confident that we can, or should, attempt to prescribe what the final form of that change should be.

60. Submission 3.3.34, p 21

61. Ibid

We are mindful of the limits of the evidence before us, and our expertise. We are also mindful of the fact that the data around disparities can obscure the fact that each of the approximately 4,000 tamariki Māori currently in State care, and each of the thousands of whānau Māori who may be the subject of a report of concern in the past calendar year, represent distinct children and families with a wide range of sometimes complex needs. Furthermore, the needs of those tamariki already in the system differ from the needs of tamariki in contact with the system and at risk of being taken into care. The present capacity of Māori communities and organisations to meet those needs is not something that we have comprehensive insight into. From the evidence before us, however, it is clear that Māori capacity and infrastructure varies, and that different communities have different present needs, and differing capacity to meet them.

We also have relatively limited evidence before us as to Oranga Tamariki's capacity and service delivery nationwide. From the evidence before us, it appears that its capacity and capability is also variable. We heard evidence concerning the operation of the Blenheim and Eastern Bay of Plenty Oranga Tamariki sites, both of which demonstrate promise, and show constructive ways of engaging with and supporting local Māori communities. Nonetheless, the overwhelming weight of evidence points to a very substantial and sustained breakdown of trust in Oranga Tamariki. Whilst we were only able to hear from a relatively limited sample of case studies, they included alarming examples of poor practice, and of the unaccountable and arbitrary use of coercive power against vulnerable whānau and tamariki.

At the same time, we had been struck by the resilient and creative responses apparent in so much of the evidence claimants have provided to us, and which we have detailed in the earlier parts of this report.

Particularly striking is the strength of the call for truly transformative change. These are the same calls reflected in the evidence recorded in the reports of the Māori-led inquiry and of the Children's Commissioner. Those reports both forcefully make a strong case for transformational change after decades of reviews, reports, and changes to legislation which have failed to make any material difference to the disparities we are considering. The following passage from the report of the Māori-led inquiry into Oranga Tamariki is entirely consistent with all that we have seen and heard:

Decades of reviews, reports and legislation on child welfare services have failed to produce a system that answers the needs of whānau and tamariki. Many of the same themes in this report appear repeatedly throughout the history of State engagement with Māori in the area of child welfare; the desire of Māori communities to keep tamariki with whānau; the lack of responsiveness of services to whānau needs; the continued failure of practitioners to exercise the required cultural intelligence in dealing with whānau. For these reasons, the same mistakes seem to be repeated generation after generation.⁶²

62. Kaiwai et al, *Ko Te Wā Whakawhiti/It's Time for Change*, p74

While we emphatically lend our voice to the calls for a transformation of Oranga Tamariki and restoration to Māori of rangatiratanga over kāinga, we refrain from overly prescriptive recommendations, and instead place emphasis upon the process by which Māori can and should lead the transformation.

6.4.2 Transformation – two caveats

We record two important caveats. First, while we endorse the call for a transformation to a ‘by Māori for Māori’ approach, we do not support calls for the complete abolition of Oranga Tamariki. Secondly, we are wary of the danger of simply replacing one bureaucracy with another and the associated risk of ‘commercialising’ kinship.

After carefully considering the range of views we have heard, particularly from those working on the frontline to support whānau and tamariki, it is clear to us that there will be, at least in the foreseeable future, an ongoing role for Oranga Tamariki. This is in part due to the large number of tamariki Māori already in State care. Sudden and arbitrary adjustments to their care risks creating further prejudice. Whatever changes may eventuate for this cohort, they must only be implemented after careful consideration of the particular needs of each child. Where reconnection with whanaunga is under consideration, careful assessment and planning will be required and Oranga Tamariki must be included in such planning and assessment. We also place weight on the evidence of a number of witnesses who spoke of the increase in the number of children, including tamariki Māori, with high or specialised needs. This includes conditions arising from in-utero exposure to alcohol and drugs, or early childhood trauma. It seems to us that, at least for the time being, some Māori communities may need access to specialist services that Oranga Tamariki or other Crown agencies can provide.

We can also see a role for an Oranga Tamariki statutory social worker – backed by the Crown’s coercive powers – in cases where the Māori organisation (be it whānau, hapū, or a Māori provider organisation) meets resistance to an intervention considered necessary for the safety of a child or children. As we understand it, this is in effect how the team at Waitomo Papakāinga currently operate. The statutory social worker is allowed to attend the whānau hui that Waitomo convene, but they attend only as observers and have no active role. In this way, they are able to see that the Waitomo workers are holding the family to account. Ms Murray described their role as something like that of the ‘angry aunties.’⁶³ They know the families and can interact with them in ways that an outsider never could. As we understand it, on most occasions they are successful in persuading the whānau that there is a short-term need to remove a child or children, so that they may be safe while the issues concerning a parent or parents can be addressed. The idea is to help the whānau work through the crisis that has brought them into contact with the care and protection system, and then let them return to their lives. Nonetheless, on occasion coercive intervention may be the only option to secure

63. Transcript 4.1.4, p176

the safety of the child or children. Who should hold and exercise that power can and should be a matter to be considered as part of the process for transformation we outline. In the meantime, and during the transition phase, there needs to be clarity about this. As a matter of both practicality and safety, we think this power should remain with Oranga Tamariki for the time being.

Our second concern relates to the risk of simply replacing one bureaucracy with another. While we agree that a transformation is required, we do not see it as simply a case of calculating and transferring to a new Māori organisation proportionate responsibilities and budget from Oranga Tamariki. Such an approach risks transferring a number of systemic problems, and also runs the risk of diverting focus onto resourcing issues, before system design is properly worked through. Allied to this is the risk of effectively ‘commercialising’ kinship on the basis of an assumption that all that is required is a transfer to Māori of a proportionate part of the resources allocated to Oranga Tamariki each year.

Identity is complex. Families are complex. Many children with Māori whakapapa will also have non-Māori whakapapa or whakapapa to a number of hapū and iwi. As Mr Timu put it, some Māori who join gangs have a problem with being Māori. There may also be intergenerational trauma and mamae resulting from past abuse, not only from the State but also from within dysfunctional whānau. This can mean that who should provide intervention or support services is not always straightforward. Tamariki Māori who have been separated from their whakapapa, and who have been in State care for some time, cannot simply be taken from what they know to whanaunga they may have never met.

Once again, the approach taken by Waitomo Papakāinga is informative. As they are able, they have been progressively trying to locate tamariki who have been taken into care and who whakapapa to the iwi or hapū of Te Hiku. Once they locate these children, their first concern is to ensure that they are safe and well cared for in their current placement. If not, they take steps to move that child. If the child is safe and wishes to remain where they are, they offer opportunities for that child to come back to the Far North and learn about their whakapapa and where they come from. This would typically include opportunity for visits over school holiday periods. We emphasise examples such as this because they illustrate not only the need to proceed with care so as to minimise the risk of further harm, but also the need to ensure that there remains room for local solutions to emerge and grow.

The Crown has intruded in harmful ways into areas the Treaty guaranteed to Māori. In considering how to remove the Crown and restore rangatiratanga over kāinga, it would be wrong to think of whanaungatanga as a service to be contracted. Similarly, being Māori is not a cultural competency that can be simply transferred to, or adopted by, a government department. Tamati Kruger put it this way in describing Tūhoe objectives:

In achieving an ‘autonomy’ or primary responsibility role we are not looking at building a Tūhoe care and protection service, rather we are restoring Tūhoe institutions that deliver leadership and kinship responsibility, displacing the low confidence

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in these institutions as the premier response to care needs of tamariki. Tūhoe will come to believe again that Tūhoe whānau and hapū are the best leaders, the most responsible and are and forever will be the best carers of their tamariki. They can fix this, and should fix this.⁶⁴

Māori must be given the right to chart their own path towards realisation in contemporary times of the Treaty promise of rangatiratanga over kāinga. This will require Crown support for the process, and almost certainly will result in a return to Māori of some of the power and control currently centrally held in Oranga Tamariki, together with appropriate resourcing. The important point is that sufficient time and proper support is provided so that Māori can lead the design of a new and different approach. The Crown must not simply divest or transfer to Māori parts of the current system, with all the attendant problems.

We accept, in part, the Crown's submission that, as a matter of Treaty principle and good governance, it has a role to provide a safety net for the most vulnerable children in need of care and protection. The present reality is that such a safety net is needed for both tamariki Māori and non-Māori children. However, as we stress, and as Oranga Tamariki appears to acknowledge through its section 7AA vision statement, consistency with the Treaty will be realised when no tamaiti Māori is in need of State care. In the meantime, there is also a question as to whether the Crown is best placed to actually provide that safety net, or whether its role is to ensure the provision of such a safety net. As the history we review clearly shows, the Crown has not been a good provider of such a safety net for tamariki Māori. For this reason, the process for change that we now go on to outline includes scope for Māori to have a direct say in how such a safety net can be designed and provided for their tamariki.

As noted in *Puao-te-Ata-tu*: 'The disintegration of Maori society has occurred over a 150 year period. It shall not be rebuilt in a decade.'⁶⁵

In the remainder of this chapter, we set out proposals for structural change. Most importantly, we outline recommendations concerning a process by which Māori can lead the design of the changes needed.

6.4.3 Legislative change

There are a number of specific legislative amendments proposed to us by a range of witnesses which we believe warrant consideration as part of the process for reform and structural change that we outline below. While we believe a number of these changes could (and should) be implemented as soon as practicable, on balance we think it best that they be considered collectively, as part of the process for reform we recommend. For ease of reference we have listed them as an appendix, (appendix III).

64. Document A178, pp 2-3

65. Document A55, p36

6.4.4 Structural change

6.4.4.1 What we have now

Oranga Tamariki currently operates as a large central government bureaucracy operating at 55 sites across the country. The budget for Oranga Tamariki for the 2019–20 financial year was \$1,198,615,000.⁶⁶ The legislation under which they operate is complex (over 400 pages), and there is daily interaction with a complex amalgam of other central government departments, non-governmental organisations, and the Family Court.

There are major systemic flaws in the current system which operate to the disadvantage and prejudice of Māori. We have detailed these aspects in the earlier chapters of our report. For present purposes, it is sufficient to stress that Treaty policy in the legislation – sitting in tension with child-centric provisions operating under a notify and investigate model – will inevitably continue to operate disproportionately and unfairly on communities under stress and in poverty. Regrettably, in modern-day Aotearoa New Zealand, this largely means Māori, and Pasifika. The disparities are entrenched and intergenerational. Despite the stated premise for intervention being in the best interests of the child, the Crown has historically failed to recognise the central finding from *Puao-te-Ata-tu* concerning the place of a Māori child within the whānau and hapū community, and has also failed to monitor or measure outcomes for tamariki taken into State care, and is only now taking steps to do so.

Such evidence as is available overwhelmingly points to highly prejudicial outcomes. As noted at section 11.3.2.2 of the statistical appendix (appendix 11), more than 80 per cent of current prisoners have spent time in State care. Jean Te Huia notes that the negative influence of State intervention on tamariki Māori who lose contact with their own whānau, leads them to find solace within gangs.⁶⁷ She cites statistics from Moana Jackson, who 20 years ago estimated that 85 per cent of the Mongrel Mob and 88 per cent of Black Power members had been State wards.⁶⁸ This indicates that gang members, as well as the adult and youth prison populations are largely a subset of the care and protection populace. As shown in figure 11.29 in appendix 11, 88 per cent of young people referred for a Youth Justice family group conference have previously been the subject of a report of concern to Oranga Tamariki relating to their care and protection. This shows a significant overlap between young people who have been called to the attention of Oranga Tamariki, and those also at the attention of the justice system.

66. Document A169, p 90; New Zealand Government, *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2020: Social Services and Community Sector* (Wellington: New Zealand Government, 2019), pp 125, 130

67. Document A69, p 6

68. Moana Jackson, 'Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Māori or Biculturalising the State?', *Australian & New Zealand Journal of Criminology*, vol 32, no 2 (1999)

6.4.4.2 Structural change; establishment of a Māori Transition Authority

Our primary recommendation is that the Crown steps back from further intrusion into what was reserved to Māori under te Tiriti/the Treaty, and allow Māori to reclaim their space. We have explained in chapter 2 the significance of the article 2 guarantee to Māori of tino rangatiratanga over kāinga. We have described in this report the pervasive prejudice to generations of Māori arising from the Crown's failure to honour that guarantee, and from legislation and policy hostile to it. The care and protection system we have been examining is a very significant contemporary component of this story. We explain in chapters 4 and 5 the systemic features of this system, which entrench disparity and serve to further weaken the whanaungatanga bonds that are the foundation of whānau, hapū, and iwi. We also explain why we consider the legislative and policy changes introduced since 2017 will not be sufficient to realise the kind of transformation required to achieve a truly Treaty-consistent future.

As the Crown steps back it must also work in partnership with Māori, so that Māori may take responsibility to lead the transformation. To this end we recommend that a Māori transition body (referred to hereafter in this report as the 'Transition Authority'), be established as soon as reasonably possible. The body will be independent of the Crown and its departments. Its function will be to identify the changes necessary to eliminate the State care of tamariki Māori, and realise the vision that Oranga Tamariki has set for itself, that no tamaiti Māori will need State care.

The Transition Authority should be tasked with considering system improvements including legislative and policy changes. The Transition Authority should be established as a priority. We see a role for such a body in both identifying policy and legislative changes that could and should be advanced in the short term, and also the longer-term function of designing and overseeing the implementation of a transformed care, protection, and support system that provides for 'by Māori for Māori' delivery.

In approaching its task, the Transition Authority should not be constrained by the legislative and policy settings for Oranga Tamariki. It should be free to examine and support the adoption of policies and service delivery options outside of care and protection parameters so that, wherever possible, the stresses on whānau that bring them into contact with the system are removed or reduced. It should also not be constrained by national approaches, but rather may respond to local circumstances in locally appropriate ways. The Whānau Ora model is one example of such an approach.

The brief given to the Transition Authority should include power to consider and recommend, where appropriate, transfer of statutory functions and responsibilities where sought by a particular Māori community or organisation. The factors to be addressed would include requirements for a transition plan, assessment of capacity and capability, necessary appropriations, and accountability arrangements.

The composition of the Transition Authority is an important and potentially contentious issue in itself. We do not wish to see the momentum for change

hindered by unnecessary conflict over this and we have a clear recommendation to make.

We believe that a suitable body has already emerged from within Māoridom that could serve as the foundation membership for the Transition Authority, or could be given the task of selecting and appointing a foundation board, in conjunction with the lead claimants. The governance group for the Māori-led inquiry into Oranga Tamariki came together for this very kaupapa. Within a short time after publicity concerning the Hawke's Bay case, this governance group established a Māori-led inquiry and held a series of national and regional hui. The resulting report, *Ko Te Wā Whakawhiti*, was released in 2020.

The Māori-led inquiry governance group was chaired by Dame Rangimārie Naida Glavish and its members were: Sir Toby Curtis, Sir Mason Durie, Dame Areta Koopu, Dame June Mariu, Lady Tureiti Moxon, Merepeka Raukawa-Tait, the Honourable Sir Pita Sharples, Sir Mark Solomon, Dame Iritana Tāwhiwhirangi, and the Honourable Dame Tariana Turia.

These renowned Māori leaders came together for this kaupapa, and we believe they have the wisdom and reach within Māoridom to lead the way forward. Members of the governance group attended all our hearings and several gave evidence before us. They are familiar with all the evidence we have heard.

In October 2019, the chairperson of the Tribunal granted urgency to two claims that had raised concerns about the contemporary actions of Oranga Tamariki. The claims were brought by Jean Te Huia (Wai 2823) and Dr Rawiri Waretini-Karena, Dr Jane Green, and Kerri Nuku (Wai 2891). Mr Stone and Ms Watene of Te Mata Law are counsel for Ms Te Huia. Ms Sykes and Ms Houia of Annette Sykes & Co are counsel for Dr Rawiri Waretini-Karena, Dr Jane Green, and Kerri Nuku.

The chairperson also granted an application by claimants Ian Shadrock, Marilyn Stephens, and Tyrone Marks (Wai 2615) and Aaron Smale and Toni Jarvis (Wai 1911) to be joined to the urgent inquiry. A number of other applications were declined, though most subsequently sought leave and were joined to this inquiry along with a considerable number of other claimants and interested parties. Mr Stone and Ms Watene of Te Mata Law are counsel for Ian Shadrock, Marilyn Stephens, and Tyrone Marks; and Mr Bennion and Ms Davidson of Bennion Law are counsel for Aaron Smale and Toni Jarvis. Throughout our inquiry, Mr Stone and Ms Watene performed a valuable and constructive role as co-ordinating counsel.

We believe there is a need to proceed with reasonable expedition and we recommend that these claimants and their counsel assume responsibility to provide a claimant voice to the Māori inquiry governance group. The purpose is to assist that group with the initial work required to establish a Transition Authority and settle details as to structure and function. This of course depends on the Crown's response to our recommendation.

We propose that this group of claimants and their counsel be given this role because these claimants took the lead in this inquiry, and they are represented by senior and experienced counsel who have demonstrated before us the ability to work efficiently and constructively together. In saying this, we mean no disrespect to other claimants or their counsel. What we propose is a compromise, because

on balance we think the present need is to move quickly, so that if the Crown accepts our primary recommendation, the Transition Authority can be established and its work can then feed into, and inform, the policy work already underway in government in response to the reports of the Māori-led inquiry, the Ombudsman, and the Children's Commissioner. We also think that emerging from these reports, and from our inquiry, are a number of changes to legislation and policy that could be advanced in the short term, pending wider systemic change. If the Crown is willing to accept the need for the Transition Authority we propose, then the Transition Authority could (and should) have a role in any such short- to medium-term changes also.

Should the Crown accept our recommendations as to the role we propose for claimant representatives and their counsel, we note there is likely to be a need to support this with appropriate funding. This funding support extends beyond only supporting claimant representatives and their counsel, it also extends to supporting the Māori-led inquiry governance group with appropriate funding. Funding support will also be required for the establishment and operation of the Transition Authority itself.

We strongly recommend that the Crown immediately engage with this group, and be guided by them in the steps required to set up the transition agency and appoint its initial board.

We note that two of the members of the governance group (Dame Naida Glavish and Sir Mark Solomon) were recently appointed to the panel to advise the minister on possible reforms to Oranga Tamariki. It may be that the ministerial advisory group could play a role in the interface between the governance group and responsible ministers – in the event that the Crown accepts this recommendation – so that practical and logistical arrangements could be coordinated.

Our recommendation that the governance group from the Māori-led inquiry – along with the claimants and their counsel that we have identified – be the body to commence engagement with the Crown over possible formation of a Transition Authority, reflects our overall assessment of what we consider to be a practical recommendation, designed to realise transformation necessary to achieve consistency with the Treaty and its principles and to reduce and remove prejudice to tamariki Māori and their whānau. We considered, but decided not to seek, further submissions from the Crown and claimants on this proposal; primarily because we consider that on balance it would be better that we reported as soon as possible, so that the Crown has time to consider our report and its recommendations in conjunction with the work of the ministerial advisory group currently underway. We appreciate that, while the governance group from the Māori-led inquiry has some crossover with a number of the claimants in this inquiry, they do not represent, or purport to represent, the claimants and interested parties. This is why we have proposed a short-term role for the lead claimants and their counsel in discussions over establishment of the Transition Authority. Our assessment is that given the composition of this governance group, they will know how to proceed in ways inclusive and respectful of the claimants and interested parties who appeared before us. We also urge the Crown to trust the judgement of this group and be

guided by them on what is appropriate in terms of the next steps towards the establishment of a Transition Authority and the process by which its composition and functions can be settled.

What would be required from the Crown is the commitment to a genuine partnership with the Transition Authority aimed at transformation of the care and protection system to one that is truly Treaty-consistent.

This partnership must be founded on a recognition on the part of the Crown that historically it has intruded into the realm of Māori rangatiratanga in ways that have been prejudicial. It is for Māori to determine how the prejudice should now be addressed and how rangatiratanga is to be restored. It is the Crown's role to work alongside Māori in support. While there are clearly a range of complex issues to work through, partnership in this context looks very different from a conventional policy development process or use of an independent expert panel to advise government.

We envisage a Transition Authority with power to decide the framework within which future care and protection services for tamariki Māori will be placed.

We are strengthened in the recommendation that the governance group for the Māori-led inquiry be given the important responsibility for initial set-up and composition of the Transition Authority. This is because they have already thought about how a Treaty-consistent framework could be designed. We note in particular the proposals from the Māori-led inquiry for a structural review of Oranga Tamariki's systems, policies, processes, and practices (Action Point 2).⁶⁹ This includes proposals to examine ownership or rights to whānau data, social workers' practice and authority, inter-agency targeting, and Family Court process.

We concur with the need for such a review and we also draw attention to the expertise of many of the witnesses who have appeared before us and the wealth of insight available on our record which could assist and inform such a review. As we see it, while there may be a number of constructive changes to legislation and policy that can and should be made in the short-to-medium term, significant system change should logically await completion of a structural review of the kind described as 'Action Point 2' in the report of the Māori-led inquiry. That said, we do not believe that progress on the transformation that we envisage should be delayed or hampered by revisiting issues that have already been the subject of significant scrutiny and evidence, including the reviews and evidence before the reviews of the Māori-led inquiry itself, the Children's Commissioner, the Ombudsman, and our own record of inquiry.

'Action Point 3' from that inquiry proposes long-term systemic change based on Māori decision-making, through the establishment of a 'by Māori, for Māori, with Māori' funding authority, with multi-dimensional deliverables that would address social and cultural determinacy of health and well-being for whānau Māori, including care and protection. We note that there are likely to be links between this proposal and policy work underway as a result of the Tribunal's stage 1 report on the Health Services and Outcomes Kaupapa Inquiry, and the Government's

69. Kaiwai et al, *Ko Te Wā Whakawhiti/It's Time for Change*, p70

recently announced reforms of the health system, which include the formation of a Māori health authority.

We otherwise leave matters of detail and implementation to the Crown and the Transition Authority. The final recommendation we make concerning future policy development, whether undertaken by the Crown or under the auspices of the proposed Transition Authority, is that close attention is paid to the insights available from the models that currently demonstrate what Treaty-consistent practice can and should look like. We think in particular of the work of Waitomo Papakāinga, the developments in the Eastern Bay of Plenty arising from the partnership between that site and Ngāi Tūhoe, and the evidence we have heard in relation to the Blenheim site.

We also think that if gang leaders such as Rex Timu reach out and are prepared to engage, then the Crown and the proposed Transition Authority, should respond in the same spirit. In the long term, gang members, their dependents, and whānau must be part of the solution.

The Crown can and should assist the Transition Authority with information and advice as required, but it must trust the Transition Authority with the task of overall design.

The Crown must also ensure that the Transition Authority has sufficient financial and administrative support to undertake and deliver a reform of this magnitude.

We accept that there will be important matters that go to how a redesigned system is to be delivered. This may include questions about the need for the establishment of infrastructure and ongoing resourcing. We accept that the Crown has legitimate interests in balancing its obligations under the Treaty towards Māori with its obligations to all citizens. But the fundamental point remains the reconfiguration required should be led by Māori with support from their Treaty partner. The partners must meet in good faith and try to agree on what is now required for the Crown to safely retreat from its intrusion into the Māori sphere. It would not be right for the Crown to unilaterally prescribe the fiscal or legislative parameters at the outset. As and when implementation issues arise, the Transition Authority must be at the table, working in partnership with the Crown to resolve them.

What we are describing is a Transition Authority with a clear mandate to design a reformed system for tamariki Māori, coupled with authority to work with the Crown to ensure a modified system is properly implemented.

6.4.5 The 'Hastings Uplift'

We conclude our report with some brief observations concerning what has come to be known as the 'Hastings uplift'. This attempt at uplift pursuant to a without notice section 78 custody order in May 2019 was, in many ways, the spark that lit the fire. The young Māori mother at the centre of this attempted uplift had previously had her first child taken into care and she had been working hard during her second pregnancy to convince Oranga Tamariki that she would be a good mother to this child. The courage of the young mother and her whānau and supporters in allowing their experience to be publicised, combined with the professionalism

of journalist Ms Reid and her *Newsroom* team, has meant that a very important window has been opened into a world normally shut by the operation of privacy principles and court process.

During confidential hearings held at Hastings, we had the opportunity to hear from Melanie Reid, from members of the whānau, and those supporting the whānau. We have been reluctant to say too much about this particular case, in part because we are conscious of the ongoing pressures on this whānau arising from publicity about their case, and also because matters are still the subject of ongoing Family Court proceedings. We also heard from a Crown witness and are aware that publicity associated with this case has also been difficult for a number of Oranga Tamariki staff.

The mother of the pēpi involved in the attempted uplift filed a confidential brief of evidence. On the day of our hearing, we were told that she was reluctant to appear because she was afraid that to do so would not be seen favourably by Oranga Tamariki. Crown counsel told us that no pressure had been placed on the mother by Oranga Tamariki to take this stance. We have no reason to doubt this, but neither do we doubt the fact that the ongoing presence of Oranga Tamariki in the lives of this whānau remains a source of stress. After we had commenced our hearing, the mother arrived with her child (at that time nearly two years old), and sat with her mother and sister. When it was confirmed that she still did not wish to speak to her evidence, our kaumātua, Ahorangi Tā Pou Temara, asked if we could meet the pēpi and so for a few moments we were able to meet the healthy and happy young man whose arrival started it all.

We have written at length in this report about systemic issues. We have done our best to describe how it is that the notify–investigate model – coupled with a child rescue imperative – inevitably results in over-surveillance and disproportionate intervention and harm to whānau Māori, and to other communities who may be struggling with entrenched inequality and poverty. We have tried to describe how such a system can also lead a range of State employees (including Māori staff) to act on occasion in harmful and apparently inhumane ways, simply because they have a court order to implement.

Protecting our vulnerable children is both necessary and important. It is an emotive and difficult topic and as the numerous reports and attempts at reform of the child protection system over the last 30 years show, it is difficult to get right.

The single recommendation we make with regard to the ‘Hastings uplift’ is that all ministers who carry the responsibility to decide what happens next, first make time to watch the *Newsroom* documentary of the attempted uplift in Hastings in May 2019 (if they have not already done so). We say this because we believe this short documentary makes a case for substantial reform in ways more eloquent and direct than we can convey in words.

Dated at Wellington this 29th day of April 20 21

m. Doogan

Judge Michael Doogan, presiding officer

R. Higgins

Professor Rawinia Higgins, member

Kim Ngarimu

Kim Ngarimu, member

W. Temara

Professor William Te Rangiuā (Pou) Temara, member



APPENDIX I

LIST OF CLAIMS, CLAIMANTS, AND INTERESTED PARTIES**I.1 CLAIMS AND CLAIMANTS**

The claims and claimants are as follows:

- The Māori Mothers Claim (Wai 2823), brought by Jean Te Huia on behalf of herself, Ngā Maia Māori Midwives Trust, Māori women and Māori pēpi who have been impacted by the Oranga Tamariki Act 1989.
- The Oranga Tamariki Claim (Wai 2891), brought by Dr Rawiri Waretini-Karena, Dr Jane Alison Green, and Kerri Nuku on behalf of themselves, their whānau, hapū, and iwi, and all Māori.
- The Māori Children Placed in State Care Claim (Wai 2615), brought by Ian Shadrock, Marilyn Stephens, and Tyrone Marks.
- The Adoption Act 1955 (Smale) Claim (Wai 1911), brought by Aaron Smale and Toni Jarvis.
- The State Care (Gray) Claim (Wai 2916), brought by Piripi Gray on behalf of the children of Ngāti Toa, Ngāti Raukawa, and Ngāti Kauwhata who have been placed in State or faith-based care or both.
- The Oranga Tamariki (District Māori Councils) Claim (Wai 2936), brought by several District Māori Council members on behalf of several Māori Council districts.
- The Oranga Tamariki (Hughes) Claim (Wai 2937), brought by Noelene Hughes on behalf of her children and whānau.
- The Oranga Tamariki (Te Whariki Mana Wahine o Hauraki) Claim (Wai 2938), brought by Denise Messiter on behalf of Te Whāriki Manawahine o Hauraki (Hauraki Māori Women's Refuge Centre) of Thames.
- The Oranga Tamariki (Lindsay) Claim (Wai 2940), brought by Carra Lindsay on behalf of herself and her whānau.
- The Oranga Tamariki (Dally-Paki) Claim (Wai 2895), brought by Nicola Dally-Paki on behalf of herself, her children, and her whānau.
- The Oranga Tamariki (Komene) Claim (Wai 2939), brought by Vanessa Komene on behalf of herself, her children, and her whānau.
- The Oranga Tamariki (Moxon) Claim (Wai 2941), by Lady Tureiti Moxon on behalf of herself, 'all Māori', and the National Urban Māori Authority, including the urban Māori authorities.
- The Oranga Tamariki (Kapa) Claim (Wai 2945), brought by Raewyn Louise Kapa on behalf of the whānau of Te Rito Foundation.
- The Oranga Tamariki (O'Keefe) Claim (Wai 2946), brought by Henare Ngaere O'Keefe on behalf of his tamariki and his whānau.

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- ▶ The Descendants of Hinewhare Claim (Wai 1541), brought by Louisa Te Matekino Collier and Frederick Collier junior on behalf of Hinewhare and her descendants.
- ▶ The Land Alienation and Wards of the State (Harris) Claim (Wai 1531), brought by Te Enga Harris and Lee Harris on behalf of the Harris whānau.
- ▶ The Ngāti Kawau (Collier and Dargaville) Claim (Wai 1673), supplements previous claims by Louisa Te Matekino Collier and Rihari Richard Takuira Dargaville on behalf of themselves and Ngāti Kawau Iti.
- ▶ The Pukenui Blocks Claim (Wai 1681), supplements previous claims by Popi Tahere, Louisa Te Matekino Collier, and Arthur Mahanga on behalf of themselves, the owners of the Pukenui blocks, the tuku whenua and ringa kaha of Pororua (Pororua Wharekauri), their tūpuna Te Mearono Hunia Mahanga, Tahere and Maraia Pororua, Te Waiariki-Ngāti Korora, Te Uri o te Aho, Ngai Tahu, and the hapū of Ngāpuhi, Ngāpuhi-Nui-Tonu.
- ▶ The Mana Wāhine (Cliffe) Claim (Wai 2863), brought by Mona Vercoe Cliffe on behalf of herself and her whānau as members of Ngā Maihi.
- ▶ The Mental Health (Huriana) Claim (Wai 2890), brought by Tasilofa Huirama on behalf of Ziporah Grace Huirama (deceased), and her whānau who are members of Ngāti Ueoneone and Ngāti Tautahi of Ngāpuhi.
- ▶ The Oranga Tamariki (Pickering) Claim (Wai 2954), brought by Thomas Glenn Harris on behalf of Māori tamariki, mothers, fathers, and Māori generally.
- ▶ The Oranga Tamariki (Tawhiao) Claim (Wai 2955), brought by Charlie Tawhiao on behalf of Ngai Te Rangi.
- ▶ The Oranga Tamariki (Durie and others) Claim (Wai 2957), brought by Sir Taihakurei Durie, Wiremu Puriri, Matthew Tukaki, Roimata Minihinnick, Tane Cook, and Derek King Huata on behalf of the New Zealand Māori Council and several district Māori councils.
- ▶ The Oranga Tamariki (Māori Women's Welfare League) Claim (Wai 2959), brought by Aroha Reriti-Crofts on behalf of Te Ropu Wahine Māori Toko i te Ora/the Māori Women's Welfare League Inc.
- ▶ The Mana Wāhine (Smith) Claim (Wai 2837), brought by Jayell Smith on behalf of herself, her whānau, her hapū Ngai Te Rangi and Ngai Kauwaha, her iwi Rakaipaaka, Rongowhakaata, and Rongomaiwahine, and all wāhine Māori.
- ▶ The Hastings Mongrel Mob Health Claim (Wai 2641), brought by Rex Timu, President and International President of the Hastings Chapter of the Mongrel Mob.
- ▶ The Te Kapotai and Ngāti Pare Hapū Claim/The Waikare Inlet Claim (Wai 1464, Wai 1546), brought by Te Riwhi Whao Reti, Hau Hereora, Romana Tarau, Karen Herbert, and Edward Cook on behalf of Te Kapotai.
- ▶ The Ngāti Hine Lands, Forests and Resources Claim (Wai 682), brought by Rewiti Paraone, Kevin Prime, Erima Henare, Pita Tipene, and Waihoroi Shortland on behalf of Te Runanga o Ngati Hine and the descendants of Torongare and Hauhaua.

- The Children of Te Taitokerau (Broughton) Claim (Wai 2217), brought by Violet Nathan and Maringi Broughton on behalf of themselves and their whānau and tamariki mokopuna.
- The Waitaha (Te Korako and Harawira) Claim (Wai 1940), brought by Jane Mihingarangi Ruka Te Korako and Te Rungapu (Ko) Ruka on behalf of the Grandmothers Council of the Waitaha Nation, including the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka.
- The Descendants of Io Matua Kore (McQueen) Claim (Wai 2118), supplements previous claims by Te Amohia McQueen and Albert McQueen on behalf of themselves, their whānau and hapū, and the descendants of Io Matua Kore and Te Wherowhero Tāwhiao of Waikato Maniapoto.
- Twenty of the claims in this inquiry are redacted and confidential. They are represented by Phoenix Law. The claimants brought their claims on behalf of themselves, their tamariki, and their whānau. These claims are:
 - the Oranga Tamariki Redacted (TK) Claim (Wai 2962);
 - the Oranga Tamariki Redacted (DC) Claim (Wai 2963);
 - the Oranga Tamariki Redacted (AB) Claim (Wai 2964);
 - the Oranga Tamariki Redacted (EM) Claim (Wai 2965);
 - the Oranga Tamariki Redacted (RC) Claim (Wai 2966);
 - the Oranga Tamariki Redacted (KM) Claim (Wai 2967);
 - the Oranga Tamariki Redacted (ZO) Claim (Wai 2968);
 - the Oranga Tamariki Redacted (TS) Claim (Wai 2969);
 - the Oranga Tamariki Redacted (SP) Claim (Wai 2970);
 - the Oranga Tamariki Redacted (SJ) Claim (Wai 2971);
 - the Oranga Tamariki Redacted (LI) Claim (Wai 2972);
 - the Oranga Tamariki Redacted (JA) Claim (Wai 2973);
 - the Oranga Tamariki Redacted (JF) Claim (Wai 2974);
 - the Oranga Tamariki Redacted (PA) Claim (Wai 2975);
 - the Oranga Tamariki Redacted (RK) Claim (Wai 2976);
 - the Oranga Tamariki Redacted (HR) Claim (Wai 2977);
 - the Oranga Tamariki Redacted (CD and KD) Claim (Wai 2978);
 - the Oranga Tamariki Redacted (BK) Claim (Wai 2979);
 - the Oranga Tamariki Redacted (AP) Claim (Wai 2980); and
 - the Oranga Tamariki Redacted (AL) Claim (Wai 2981).

1.2 INTERESTED PARTIES

The interested parties are as follows:

- The Kororipo Lands and Resources Claim (Wai 1247), brought by Te Iwi Ngāro Rameka, Cynthia Rameka, Piki Te Ora Mitchell, and others.
- The Health Services and Outcomes (for displaced Children) Claim (Wai 2850), brought by Beverley Wiltshire-Reweti on behalf of herself, and all Māori children that were displaced from their whānau, hapū, and iwi under adoption and care of children legislation.
- The Racism against Māori Claim (Wai 2494), brought by Donna Awatere

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Huata on behalf of herself, her whānau, hapū, and iwi, Māori who have been affected by the actions of the Crown in failing to protect them from racism, and all of their ancestors.

- The Child Welfare Act Claim (Wai 2408), brought by Teresa Aporo on behalf of the Aporo Mauhara Whānau Trust.
- Rua Rautau te Tekahi mai o Tauīwi.

APPENDIX II

STATISTICAL INFORMATION

II.1 INTRODUCTION

This appendix distills the statistical information on the Wai 2915 Oranga Tamariki record of inquiry contributing to the first two questions set out for investigation:

1. Why has there been such a significant and consistent disparity between the number of tamariki Māori and non-Māori children being taken into State care under the auspices of Oranga Tamariki and its predecessors? (Section 11.3).
2. To what extent will the legislative policy and practise changes introduced since 2017, and currently being implemented, change this disparity for the better? (Section 11.4).¹

The appendix primarily focuses on question 1, and places particular emphasis on the time period from 2015 to the present.

II.2 DATA LIMITATIONS**II.2.1 Limitations of Oranga Tamariki data**

The appendix includes statistical evidence provided by Oranga Tamariki. This evidence is subject to the following limitations, outlined by statistician Leonard Cook:

- ▶ The core statistics provided by Oranga Tamariki would not meet the requirements of tier 1 statistics.
Table 11.1 (included over) contains the assessment made by Mr Cook relating to the compliance of Oranga Tamariki with the six critical dimensions which were set in 2007 by the Government Statistician.²
- ▶ Oranga Tamariki has not continued to disseminate the regular range of information released up to 2017 by the Ministry of Social Welfare, whose ambit they used to fall under.
- ▶ Until mid-2019, information relevant to the Tribunal inquiry questions was garnered from initiating or searching requests under the Official Information Act.
- ▶ The statistical reporting of Oranga Tamariki, introduced in 2019, has been by way of infographs. This provides a pictorial snapshot, curated by the agency.

1. Memorandum 2.5.25, p 3

2. Document A17, pp 13–15

Principles and protocols for official statistics applying to Oranga Tamariki**Assessment of conformance with published statistical principles and protocols in January 2020****Principle 1: relevance**

In analysing and reporting the results of a collection, objectivity and professionalism are maintained and data is impartially presented in a manner that is easy to understand.

The focus on policy targets in infographics used in reporting does not address the need to monitor basic trends. The expanded release in January 2020 is a partial remedy for this.

Principle 3: quality

Information is more valuable if it is easily accessed by users, presented in a format that suits their needs, and is sufficiently documented for users to understand the data and judge the quality of the fit.

Published graphs distill just the information of the provider and do not enable external analysis.

Data revisions to ongoing statistical series follow a regular, well-established, and transparent schedule. If a significant error is found in the data, the corrected data is made publicly available as soon as possible after the identification of the error.

No process exists for this yet.

Principle 4: coherence

Standards and classifications are documented carefully and in a form that can be readily accessed and used by statistics producers and users.

This has yet to be done.

Classifications must be systematic and should classify observations consistently, using agreed criteria. Classification groups must be unambiguous, exhaustive, and mutually exclusive.

Uncertainty about impact of change in ethnicity classification and forms of whānau.

Principle 5: release practices

Statistics are presented in a clear and understandable manner and are widely disseminated.

Infographics are very limited, while time series are not published. Until recently, Official Information Act responses provided the main source of public information needed to monitor child custody.

Official statistics should be published. Only when they are published can official statistics benefit society and its citizens. Publication of data also serves to enhance trust in official statistics.

Standard not yet achieved. Need to copy OCC example.

Statistical information is presented clearly and impartially, without advocacy or unsubstantiated judgement, and supported by commentary and analysis to enable a wide understanding.

Infographics contain political rather than statistical language.

Principles and protocols for official statistics applying to Oranga Tamariki	Assessment of conformance with published statistical principles and protocols in January 2020
Statistics intended for the broader public are easy to read and do not mislead.	Loss of continuity from MSD publications have made it difficult to disentangle the period from 2017 from the period before.
Statistical commentary, tables, and graphs intended for general use are compiled with a view to their general-interest value, impartiality, and cost-effectiveness.	Infographics provide a narrow range of information and detract from attention to other aspects.
Principle 6: efficiency	
Administrative sources are used to their full potential for statistical purposes.	Significant counts are not included in published Infographics, nor are proportions estimated by Oranga Tamariki of tamariki Māori population in care of State. The January 2020 report of the Office of the Children's Commissioner was significantly more comprehensive than the Oranga Tamariki reports.
Principle 9: maximise existing resources	
Statistical material likely to be of historical interest is archived, subject to security, confidentiality, and statutory obligations.	Connection with recent past is weak or unavailable.

Table 11.1: Oranga Tamariki compliance with statistical principles and protocols

Unlike other public agencies, the common practice of presenting tables in excel spreadsheets, so that analysis can be carried out, has not been followed.

- ▶ Mr Cook asserts that these spreadsheets and the analysis that can be carried out upon their release, are critical to broaden understanding.³

Overall, it is necessary that Oranga Tamariki meet the six critical dimensions of data quality so that data can be accessed and utilised appropriately across agencies. As made clear by Mr Cook in the analysis above, statistics provided by Oranga Tamariki fall well below the data quality standards.⁴

11.2.2 General data limitations

Referring to the research and statistics provided by the Crown more generally, Mr Cook notes that:

- (a) Common rules, obligations, and tests of eligibility that are applied to Māori, have been based on analysis and knowledge which has been dominated by the characteristics usually measured and modelled for in Pākehā, because of the limited scale of Māori specific statistical sources.

3. Document A17, p15

4. Ibid, p17

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- (b) When applying policies which have been developed in such a limited way as outlined in (a), ethnic bias leads to parts of the Māori population being treated as outliers, as opposed to a community whose distinct characteristics need to be appropriately measured and reliably accounted for.
- (c) Where there are rules which bring groups to the attention of the State's care and protection system, these need to be audited regularly by qualified parties. This includes those with a deep knowledge of whānau, so that they can identify areas where there is potential for systemic bias against Māori.⁵

11.3 WHY HAS THERE BEEN SUCH A SIGNIFICANT AND CONSISTENT DISPARITY BETWEEN THE NUMBER OF TAMARIKI MĀORI AND NON-MĀORI CHILDREN BEING TAKEN INTO STATE CARE UNDER THE AUSPICES OF ORANGA TAMARIKI AND ITS PREDECESSORS?

11.3.1 What are the disparities?

11.3.1.1 Disparity between Māori and non-Māori with regard to entrance into care

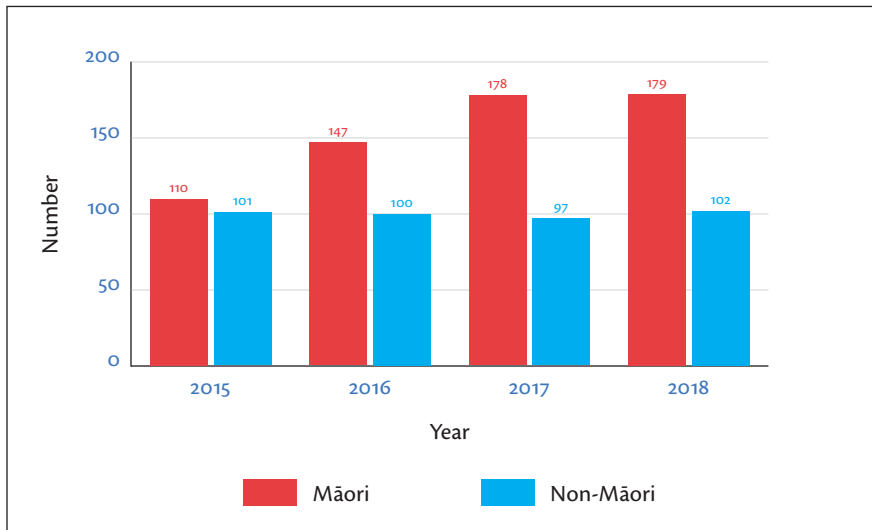


Figure 11.1: Newborn babies taken by the State, 2015–18

Redrawn from document A6, p 4

Figure 11.1 breakdown: Figure 11.1 shows that newborn pēpi Māori are taken into care at a rate higher than non-Māori.

5. Document A40(b), pp 5–6

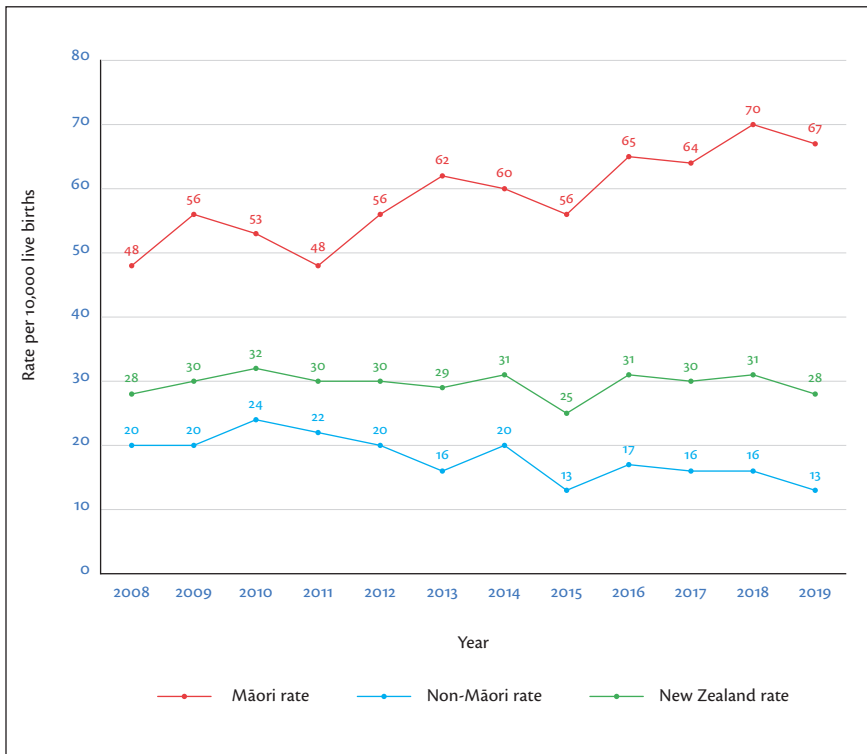


Figure 11.2: Entries into State custody of 0–3 month babies per 10,000 live births

Redrawn from document A29, p 5

Figure 11.2 breakdown: Pēpi Māori enter State custody at a higher rate than non-Māori.

Data limitations: The rate of being taken into State custody between zero and three months does not include decisions to take a pēpi into the custody of the State made prior to birth. If these decisions were included, the Māori rate would be much higher than it appears in figure 11.2.

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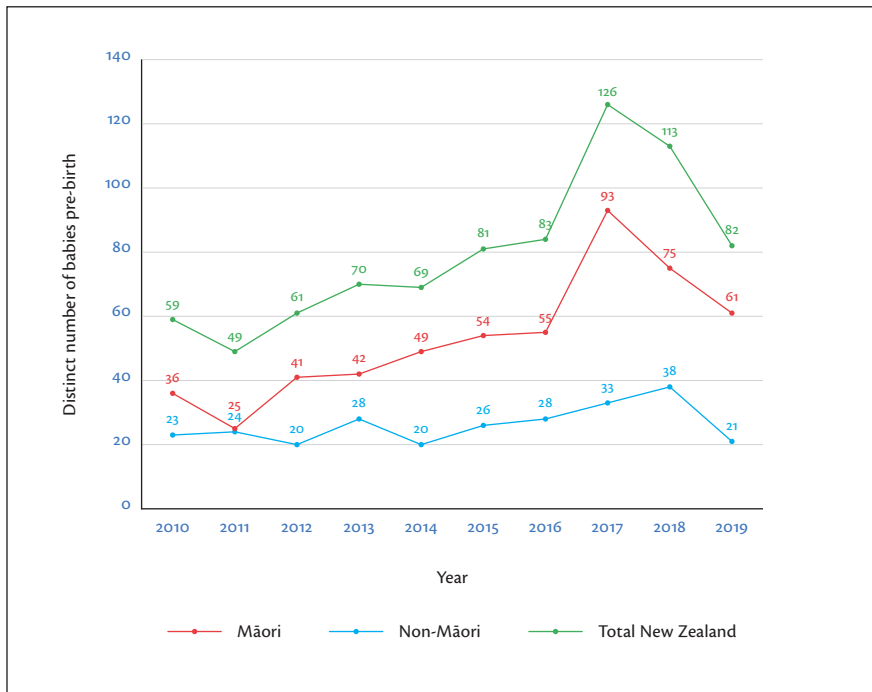


Figure 11.3: Distinct number of babies ordered into State custody before birth

Redrawn from document A29, p 6

Figure 11.3 breakdown: Pēpi Māori are ordered into State custody, prior to birth, at a much higher rate than non-Māori pēpi.

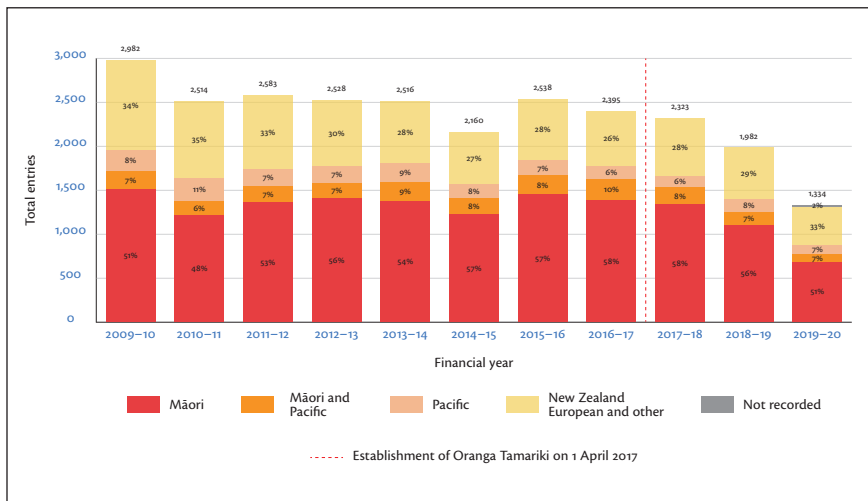


Figure 11.4: Entries into care from 2009 to 2020 by ethnicity of all children

Redrawn from document A16(a), p 4

Figure 11.4 breakdown: Over the past decade, the total entries to care have declined. This decline is a result of less non-Māori children entering the care of the State. The year ending 2019 saw the lowest number of children enter State care in New Zealand in the last decade, with the number of tamariki Māori also at its lowest.

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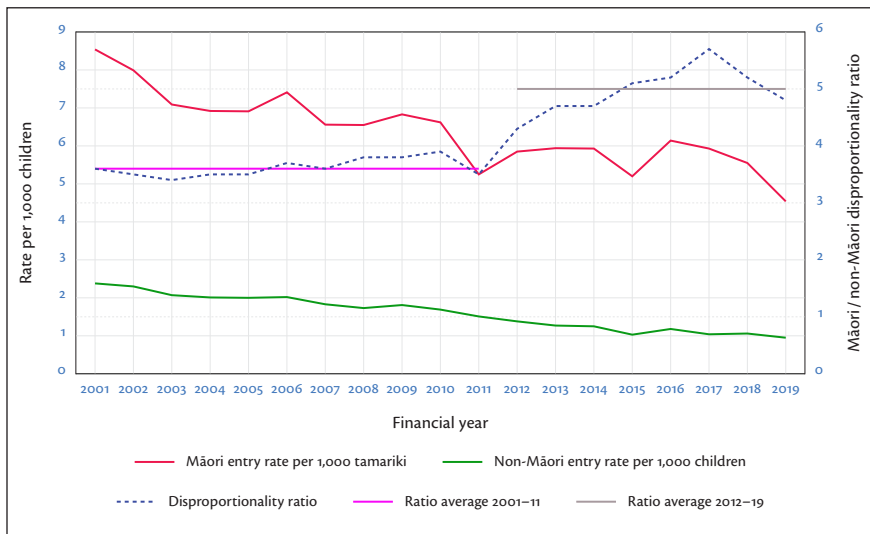


Figure 11.5: Entry into care of tamariki – disproportionality ratio and incidence of care Maori/non-Māori

Source: document A176(c)(i), p 12

Figure 11.5 breakdown: This figure shows an increasing disproportionality ratio between Māori and non-Māori tamariki entry into care since 2012, although this ratio has started to decrease since mid-2016. The figure also shows that, following 2012, the entry of tamariki Māori into care has averaged 5.0 times that of non-Māori.⁶

6. Document A176(c)(i), p 11

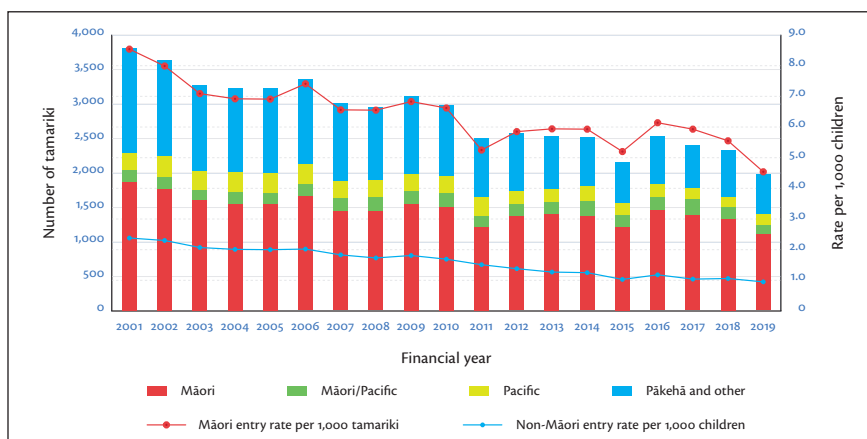


Figure 11.6: Entry into care of Ministry of Social Development/Oranga Tamariki – number and incidence by ethnicity
Redrawn from document A176(c)(i), p 11

Figure 11.6 breakdown: Figure 11.6 shows that the actual count of entries into care has declined over the past decade.

Figure 11.6 limitations: While figure 11.6 shows that the actual count of entries into care has decreased, as Mr Cook notes, this does not provide an indication concerning current trends in disproportionality in either the entry to care or the number of tamariki now in care.⁷

Entry overview and conclusion: While the *actual* count of entry into care for tamariki Māori has declined over the past decade to 2018, as submitted by Oranga Tamariki (see figure 11.6), this gives no indication of the trends regarding disproportionality of entry into care or the number or age at which children can remain in State care.⁸

The report of the Children’s Commissioner, regarding trends, notes ‘The recent reduction in numbers of pēpi Māori into State care, between 2018 to 2019, has followed a decade-long trend of increasing use of State custody for Māori, whereas for non-Māori the trend is relatively flat over the same time period.’⁹ The report notes that, since 2013, there had been a change in the way decisions were made by the State to take pēpi into care, stating: ‘The use of ‘planned’ removal of babies has reduced and the use of ‘urgent’ removal has increased. The rate of urgent entries approximately doubled from 2010 to 2019 for pēpi Māori aged 0–3 months but stayed the same for non-Māori babies aged 0–3 months.’¹⁰

7. Ibid, p 10

8. Ibid

9. Document A34, p 23

10. Ibid, p 11

11.3.1.2 Population disparity between tamariki Māori and non-Māori

Financial year	Māori	Non-Māori	Ratio Māori to non-Māori
2011	10.5	2.5	4.15
2012	10.5	2.4	4.36
2013	10.7	2.3	4.65
2014	11.4	2.3	4.93
2015	11.5	2.0	5.64
2016	12.2	2.1	5.80
2017	13.2	2.1	6.27
2018	14.7	2.3	6.28
2019	14.5	2.4	5.97
2020	13.3	2.2	6.05

Table 11.2: Number of children in care per thousand children as at 30 June each year

Redrawn from document A176(f), p2

Table 11.2 breakdown: The ratio of rates in care per thousand children of Māori to non-Māori rises to a peak in 2017 and 2018. It decreases from then on.

Table 11.2 limitations: As a statistic provided by Oranga Tamariki, this table is subject to the overarching data limitations found at section 11.2.

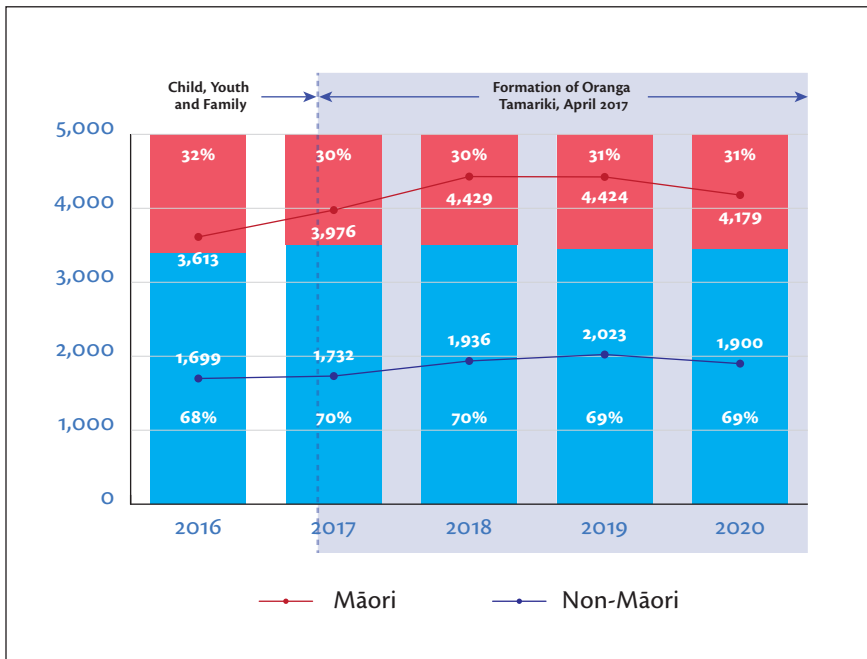


Figure 11.7: Distinct tamariki in care at 30 June

Redrawn from document A53, p 56

Figure 11.7 breakdown: The overall care population had increased until 2019. At this point, it began to decrease. The increase in the overall population was driven by the number of tamariki Māori in care, with the number of non-Māori in care remaining relatively static.¹¹

Data limitations: As a statistic provided by Oranga Tamariki, this table is subject to the overarching data limitations found at section 11.2.

11. Document A176(f), p 2

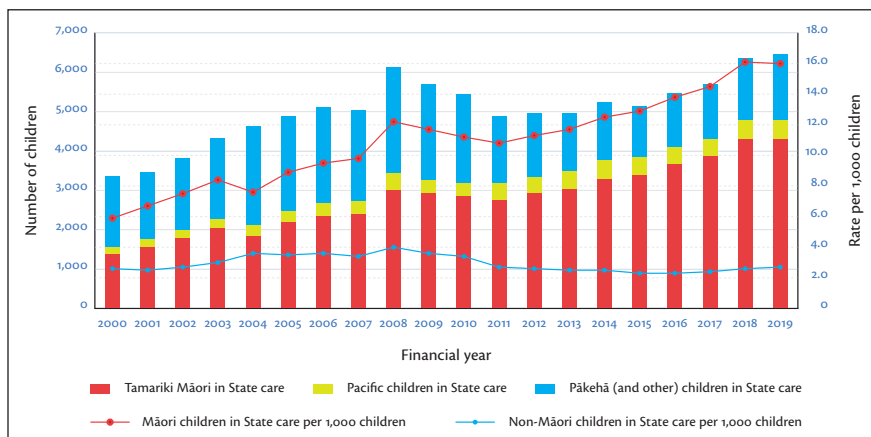


Figure 11.8: Ethnicity of children in State care and incidence per 1,000 children

Source: document A176(c)(i), p 13

Figure 11.8 breakdown: The number of tamariki Māori in care has increased significantly over the last 20 years, while the number of non-Māori children in care has remained relatively the same.

Conclusion: While the records of the number of children in State care are incomplete at points prior to 2000, there was a much lower count of children in care following the release of *Puao-te-Ata-tu* and the Children, Young Persons, and Their Families Act 1989.¹² Statistician Len Cook notes:

In 1978 just over 7,000 children were state wards, declining to 5115 state wards in 1988, then further falling to around 3,000 by 1989 when the Children, Young Persons and their Families Act came into force.

... the year ending June 1993 and 1994 as reported in the 1995 Yearbook, state wards numbered 2,654 and 2,862 respectively.¹³

It would appear that the reduced numbers of children in State care following *Puao-te-Ata-tu* were sustained into the 1990s. Records for the 1990s are particularly poor, which Mr Cook notes is 'an unfortunate loss of information as the period after 1988 is a rare time when disproportionality fell markedly'.¹⁴

12. Document A17, p 5

13. Ibid, pp 5–6

14. Ibid, p 6

11.3.1.3 Exit disparity between tamariki Māori and non-Māori



Figure 11.9: Distinct tamariki and rangatahi in the care and protection exits, 2015–20

Redrawn from document A58(a), p 28

Figure 11.9 breakdown: Figure 11.9 shows the distinct number of tamariki Māori exiting care and protection from 2015 to 2020. The table does not show the percentage of Māori and non-Māori children exiting care. When this is calculated, the percentage of Māori exiting care between 2015 and 2019 can be seen to rise from 59.2 per cent to 67.2 per cent before dropping to 64.3 per cent.¹⁵

Based on available data, 2019 was the first year where the proportion of tamariki Māori who exited care (67 per cent) was greater than the proportion who entered care (63 per cent). Notably, the total count of tamariki Māori who entered care each year has remained higher than the number of tamariki who have exited care each year.

15. Percentages calculated by staff.

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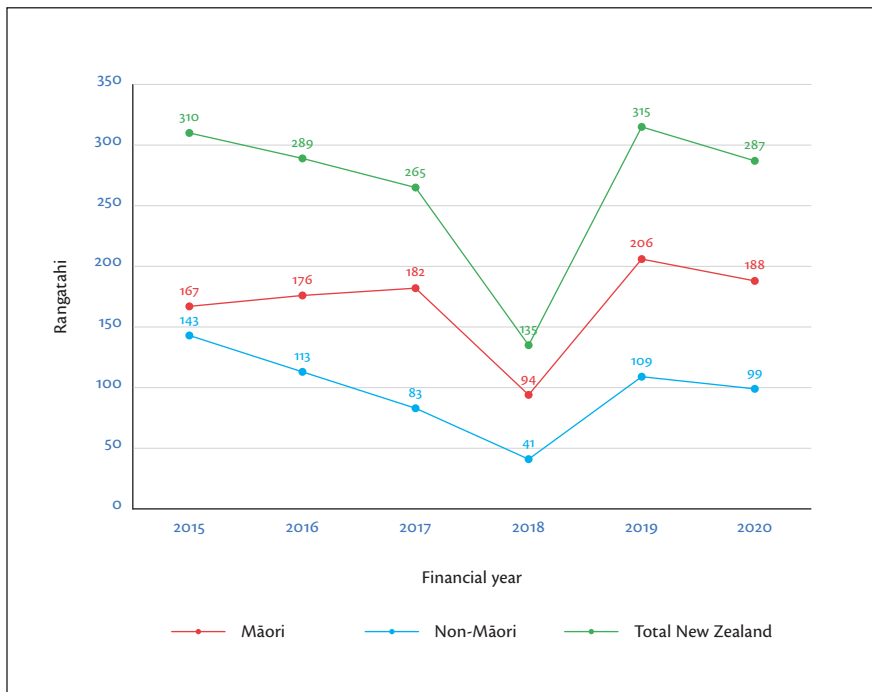


Figure 11.10: Rangatahi who 'aged out' of care by ethnicity, 2015–20

Redrawn from document A58(a), p 29

Figure 11.10 breakdown: In 2019 and 2020, the number of rangatahi Māori who aged out of care is almost double or over double of that for non-Māori.

Conclusion: The Crown provided data on the counts of exits from care by ethnicity for the period 2015 to 2020. Māori make up the majority of exits from care, with the proportion of Tamariki Māori increasing overall from 59 per cent in 2015 to 64 per cent of exits in 2020.¹⁶

16. Document A58(a), p 28. Percentages calculated by staff.

11.3.1.4 Disparity in rate of permanent care between tamariki Māori and non-Māori

As at	Placement type	Māori	Māori / Pacific	Pacific	NZ European / other	Total
30 June 2015	Family/whānau	465	88	61	130	744
	Non-family/whānau	99	24	4	112	239
Total		564	112	65	242	983
30 June 2016	Family/whānau	453	78	61	135	727
	Non-family/whānau	112	25	10	111	258
Total		565	103	71	246	985
30 June 2017	Family/whānau	527	85	53	142	807
	Non-family/whānau	136	24	8	126	294
Total		663	109	61	268	1,101
30 June 2018	Family/whānau	529	74	57	143	803
	Non-family/whānau	165	20	10	128	323
Total		694	94	67	271	1,126
30 June 2019	Family/whānau	509	76	49	141	775
	Non-family/whānau	156	19	10	139	324
Total		665	95	59	280	1,099
31 March 2020	Family/whānau	440	63	50	134	687
	Non-family/whānau	115	17	9	117	258
Total		555	80	59	251	945

Table 11.3: Total number of children and young people in a home for life placement, broken down by placement type and ethnicity, for 2015 to 2020

Source: document A58(a), p16

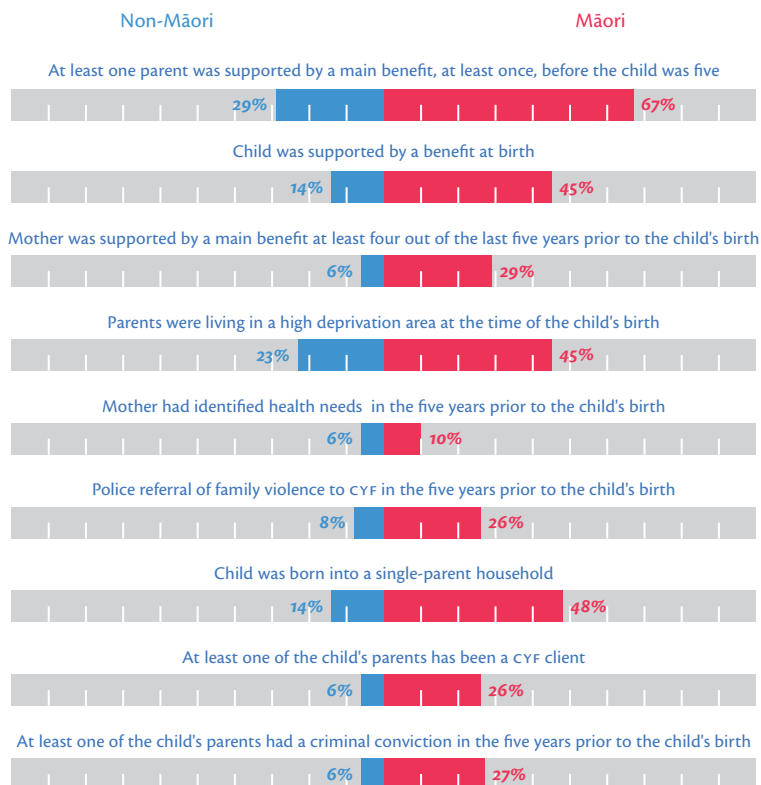
Table 11.3 breakdown: Table 11.3 shows the total number of children and young people in a Home for Life placement and whether that placement is with whānau, or people who are non-whānau. In 2020, more tamariki Māori were with whānau as a permanent placement, as opposed to being placed with non-whānau.

When examining the percentages of Māori children in a Home for Life placement, from 2015 to 2020, 67 per cent of the children in permanent placements were Māori (combining both Māori and Māori/Pacific children above), with 70 per cent of Māori children in permanent placements in 2017.¹⁷

17. Ibid. Percentages calculated by staff.

A PROFILE OF FAMILIES OF CHILDREN BORN BETWEEN 2005 AND 2007 —BY ETHNICITY

57% of children seen by CFS by the
 age of five were mokopuna Māori



Māori children are **4×** more likely
 to have a parent who was known to CFS as a child

Figure 11.11: Indicators of disadvantage and need of families of children born in
 New Zealand between 2005 and 2007, by Māori and non-Māori

Redrawn from document A181, p 127

11.3.2 What impact has colonisation had on the disparities?

11.3.2.1 *Structural disadvantage*

When taking into account factors leading to children being removed from the home and the high proportion of tamariki Māori in foster care, Emily Keddell and Ian Hyslop note the following:

The level of disproportionate representation is concerning, particularly against a historical background of colonisation and land alienation leading to economic oppression and high poverty rates (1/3 of Māori children live in poverty under the 60% median wage AHC poverty line compared with 1/6 Pakeha children).¹⁸

Figure 11.11 breakdown: Figure 11.11 shows the disproportionate level of structural and systemic disadvantage, such as socio-economic status and employment status, relating to Māori children being taken into care.

18. Document A98, p 3

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11.3.2.2 Previous involvement

Prior to the implementation of Oranga Tamariki, the overall number of children coming to the attention of CYF was decreasing. However, an increasing proportion of children referred to CYF were those already known to the agency. For instance, in 2014, six of the 10 notifications made for protection were for children already known to the agency and many of these had an extensive history with CYF. On average these children had three previous engagements with CYF.¹⁹

This can be seen in the following statement:

The extensive previous involvement with many of the tamariki in our sample was reflected in the nature of concerns contributing to the decisions to bring tamariki into care. These were typically related to enduring factors within the home that posed a risk to their long term safety and wellbeing.²⁰

Concern	Count	Percentage of total responses
Substance abuse	120	65
Family violence	119	64
Neglect or deprivation	105	57
Emotional abuse	98	53
Unsafe adults in the home	69	37
Physical abuse	59	32
Mental ill-health	56	30
Behavioural or relationship concerns	46	25
Transience or homelessness	48	26
Previous abuse of children	42	23
High tamaiti vulnerability (eg, significant medical needs)	22	12
Other (please specify)	16	9
Serious social isolation	11	6
Sexual abuse	12	6
Intellectual disability	6	3

Table 11.4: Prevalence of concerns in sampled cases

Source: document A169, p165

19. Document A181, p99

20. Document A169, p165

Table 11.4 breakdown: Some of the factors in the home that resulted in children being taken into care, and linked with ongoing previous engagement with the system, were substance abuse and family violence. These were present in over 60 per cent of the cases.

As well as this, neglect/deprivation and emotional abuse were present in over 50 per cent of cases, and physical abuse contributed to the decision to bring tamariki into care in about one third of the cases.²¹

General comment: *He Take Kōhukihuki* notes that many of the parents who have pēpi removed have had previous children removed or been in State care themselves.²² Notably, 48 per cent of pregnant women whose pēpi Māori are taken into State care before birth, had been wards of the State themselves.²³

For some children who have been removed from their families and whānau because of substantiated findings of abuse and neglect, this pattern of abuse continues in State care. For example:

- ▶ From January to March 2019, 103 individual children in State care were abused (up from 97 in the previous quarter);
- ▶ 76 per cent of children abused in State care were Māori (increased from 72 per cent and 65 per cent in the previous two quarterly reports);
- ▶ 7–10 per cent of all children in State care are abused annually.²⁴

As well as this, health and education outcomes for children in State care are often poor, with the average child having seven foster homes by the age of eight. More than 80 per cent of current prisoners have spent some time in State care, a factor that is explored in the following section.²⁵

21. Ibid

22. Document A54, p 79

23. Document A26, p 1

24. Document A34, p 13

25. Document A6, p 4

11.3.2.3 The cross over between State care and youth /adult justice

Country	Indigenous percentage of population	Percentage of indigenous children in State custody	Percentage of indigenous incarcerated youth	Percentage of indigenous incarcerated adults
Aotearoa	14.9	59	70	50.7
Australia	3.3	36.9	51	27
Canada	4.9	52.2	46	26
United States				
Alaska	14.8	50.9	38	33.2
South Dakota	9.43	52.5	53	29
Hawai'i	10	48	50.5	39

Table 11.5: Indigenous population incarceration percentages

Source: document A5(a), p 6

Table 11.5 breakdown: Table 11.5 shows the population of 'indigenous' children in State custody, in youth justice, and incarcerated across several nations and territories in 2019. As is seen in the table, while Māori make up around 15 per cent of the population, Māori young people make up over 70 per cent of the youth justice population and around 50 per cent of the prison population.

Overview and conclusion: Structural factors linked to colonisation continue to impact Māori disproportionately, resulting in tamariki Māori coming into contact with the care and protection system. This has an intergenerational pull, with babies being taken into care more likely to have a parent who has also been in contact with the system. Not only are there structural disadvantages leading to a disproportionate number of Māori in care, this is also seen in the extremely high rates of young people and adults in the youth justice system and in prisons across New Zealand.

11.3.2.4 The four key stages of care and protection: report of concern, investigation, family group conference, and placement

Trends in care and protection stages pre- and post-Oranga Tamariki formation – Māori compared to ‘NZ European and other’ ethnicities.

Event	Māori		NZ European and other ethnicities	
	Over the three years to 31 March 2017 (per cent)	Over the two years post 1 April 2017 (per cent)	Over the three years to 31 March 2017 (per cent)	Over the two years post 1 April 2017 (per cent)
First report of concern	4.0	3.8	1.2	1.2
First referral to assessment or investigation*	55	44	50	35
First FGC or FWA†	14	15	10	13
First placement‡	16	17	15	16

* For those recently reported.

† For those with recent reports and assessments.

‡ For those with recent family group conferences or family–whanau agreements.

Table 11.6: Average proportion of children who moved into each care and protection stage for the first time, before controlling for other factors

Source: document A56, p 9

Table 11.6 breakdown: Tables 11.6 and 11.15 show that for children involved in a report of concern over the three-year period to 31 March 2017:

- 4.0 per cent of Māori children and 1.2 per cent of children of ‘NZ European and other’ ethnicities with no prior report history were involved in first-time reports of concern each year (on average);
- Māori children were 3.4 times more likely than children of ‘NZ European and other’ ethnicities to be involved in a report of concern for the first time, before controlling for socioeconomic and other factors; and
- after controlling for other factors, Māori children were 1.2 times more likely than children of ‘NZ European and other’ ethnicities to be involved in a report of concern for the first time.

The following trends can be found in the data.

Reports of concern: Māori are 1.16 times more likely than ‘NZ European and other’ ethnicities to have a first report of concern, slightly down from 1.20 times pre Oranga Tamariki formation. This appears to be driven by a reduction in the proportion of Māori children being reported for the first time (down from 4.0 per cent to 3.8 per cent) relative to ‘NZ European and other’ ethnicities (which have remained static).

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First-time reporting rates were higher in 2018 than in 2017 or 2019, across all ethnicities and most ages. We have only two years of data post the establishment of Oranga Tamariki, so it is not yet clear whether this is year-to-year variation or a one-off spike we would not expect to see in future years.²⁶

First referral to assessment investigation: First-time referrals to assessment or investigation from reports decreased significantly over 2014–17 across all ages and ethnicities as a result of practice changes. Since then, referral rates have varied over time and by age, but to a much smaller extent.

Disparity ratios have increased, particularly for pēpi before they are born: there were eight times more reports of concern made for an unborn pēpi in 2019 than there were in 2004. For non-Māori, reports of concern made for Māori post-Oranga Tamariki establishment (up from 1.05 times to 1.14 times), as the decrease in Māori referral rates (down 11 percentage points) was smaller than for children with ‘NZ European and other’ ethnic backgrounds (down 15 percentage points).²⁷

First-time involvement in FGC/FWAs (for children recently reported and assessed): The 2017–19 decrease in disparity ratios appears to be driven by an increase in first-time FGC rates for children of ‘NZ European and other’ ethnicities, with Māori rates remaining similar or increasing by a smaller extent from previous years.²⁸

First placement (for children recently involved in FGC/FWAs): First-time placement entry rates can vary considerably from year to year – it is harder to establish trends given we have relatively few observations.²⁹

26. Document A56, p10

27. Ibid

28. Ibid

29. Ibid

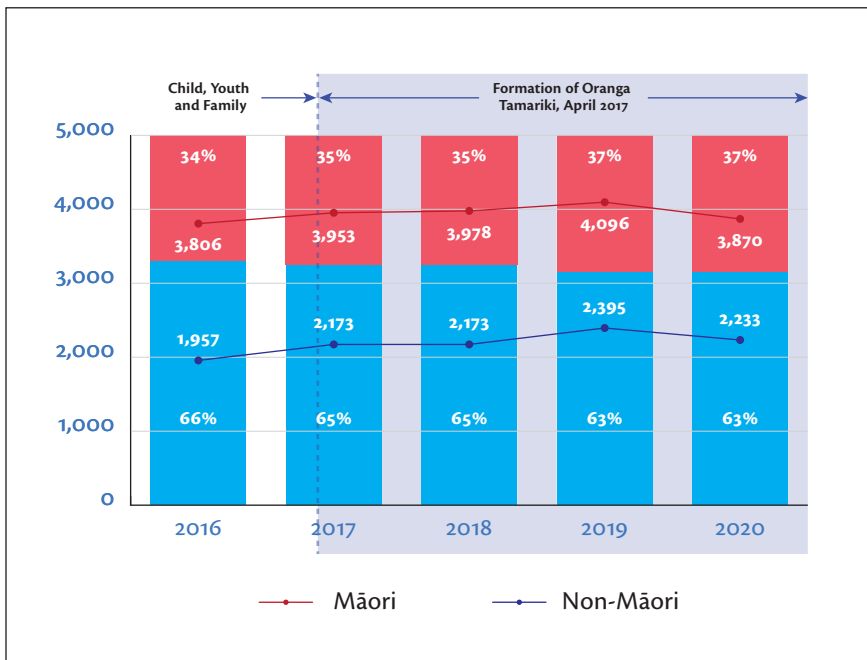


Figure 11.12: Distinct family group conferences

Redrawn from document A53, p 55

Figure 11.12 breakdown: The number of family group conferences engaged in has remained relatively static since the establishment of Oranga Tamariki in 2017.

Data limitations: As a statistic provided by Oranga Tamariki, this table is subject to the overarching data limitations found at section 11.2.

General comment: In terms of contact across the four key stages of the care and protection system, data indicates that the family group conference is the decision point that has the biggest disparity between Māori and non-Māori, with the convening of significantly more family group conferences for tamariki Māori. In the year to March 2020, 3,870 tamariki Māori had a family group conference, compared with 2,233 non-Māori children.³⁰ As a proportion, the percentage of family group conferences being completed for tamariki Māori has begun to decrease in the two years up to 2020, however this number remains exceptionally high.

30. Document A53, p 55

11.3.2.5 Youth justice disparity

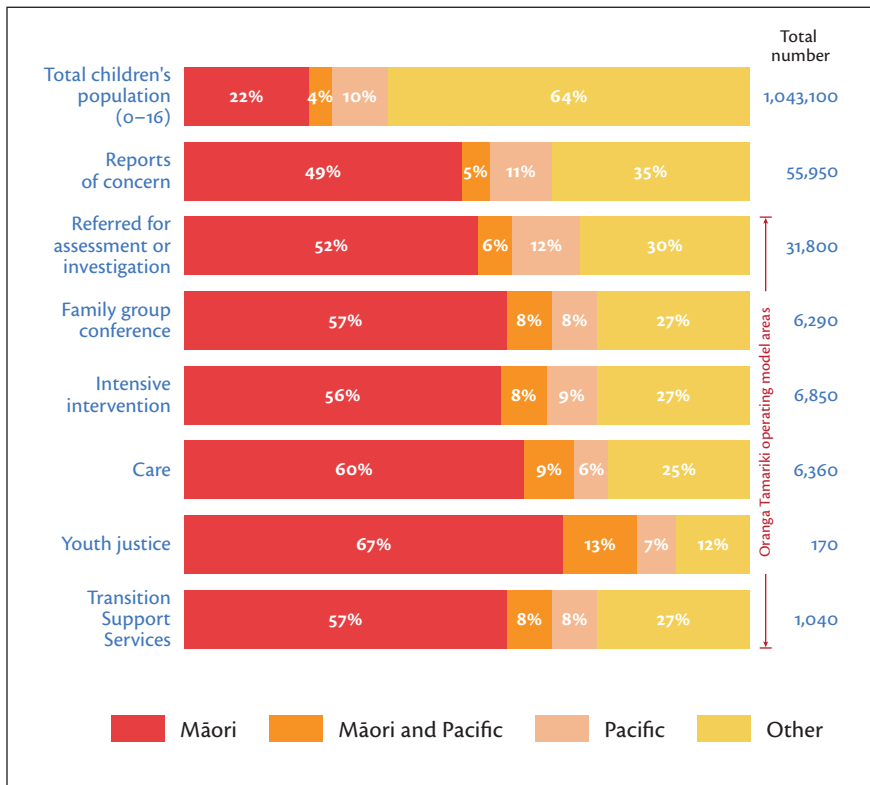


Figure 11.13: Representation of Māori and non-Māori children at key points, both before and throughout their involvement with Oranga Tamariki

Redrawn from document A192, p 24

Figure 11.13 breakdown: Tamariki Māori make up at least 49 per cent of all children at the key stages of Oranga Tamariki involvement, and in youth justice this figure is 67 per cent.

11.3.3 Staff data regarding cultural competency

11.3.3.1 Cultural competency

There is a small amount of data relating to staff and cultural competency. In one study, a sample group of social workers were questioned, with questions getting more difficult by stage. The same situation was given to all participants at random, with the only difference being some were told the family were Pākehā, while others were told the family were Māori.³¹

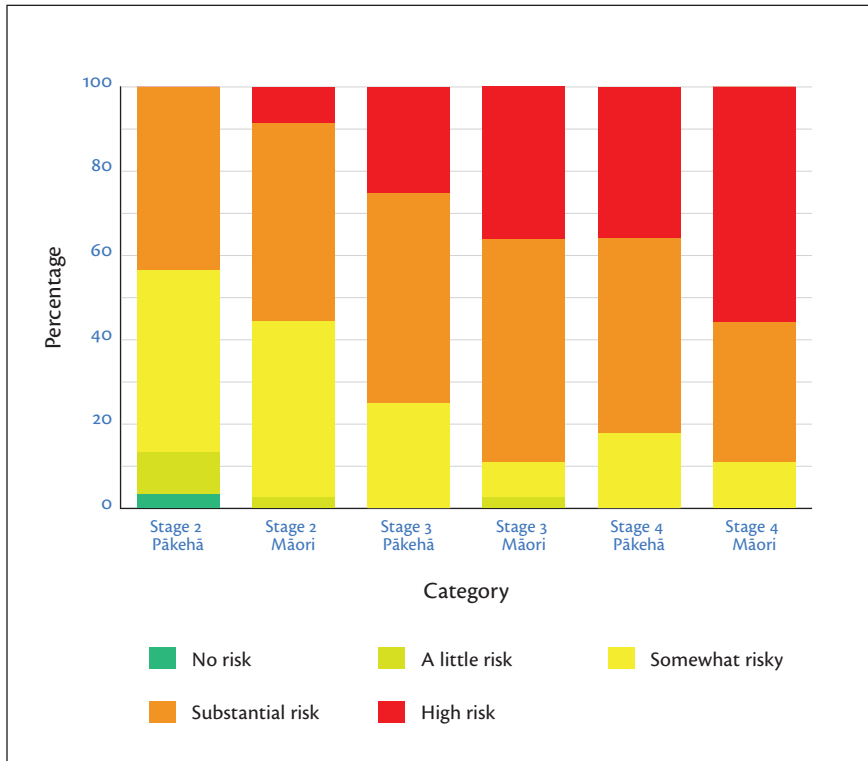


Figure 11.14: Perceptions of risk over stages 2 to 4, by vignette ethnicity

Redrawn from document A98, p 5

Figure 11.14 breakdown: As seen in figure 11.14, Māori were perceived to be more at risk than their Pākehā counterparts at each stage.

31. Document A98, p 5

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Answer	Pākehā		Māori		Pākehā		Māori	
	Stage 2 %	n	Stage 2 %	n	Stage 4 %	n	Stage 4 %	n
No action	0	0	0	0	0	0	0	0
Collect more information from other professionals	23	5	40	9	10	2	13	3
Visit the family	23	5	48	11	14	3	22	5
Interview the children	14	3	48	11	24	5	48	11
Refer to an NGO or community service	68	15	61	14	5	1	4	1
Refer to a children's team	37	8	26	6	0	0	4	1
Line of statutory intervention – total decisions		36		51		11		20
Hold a hui-a-whanau or whanau hui	37	8	57	13	19	4	39	9
Complete a child and family assessment	37	8	57	13	29	6	30	7
Complete a child protection investigation	5	1	4	1	62	13	52	12
Hold a family group conference	0	0	4	1	57	12	70	16
Try to negotiate a section 139 voluntary agreement for care	0	0	0	0	10	2	9	2
Apply for orders	0	0	0	0	10	2	9	2
Above statutory threshold – total decisions		17		28		40		53
Total respondents	100	22	100	23	100	21	100	23

All percentages rounded

n = number of decisions (participants could choose more than one)

Table 11.7: At stages 2 and 4, by vignette ethnicity, statutory participants' decision responses to: 'What would you do?'

Source: document A98, p 9

Table 11.7 breakdown: Table 11.7 indicates that decisions by statutory workers predominantly showed a greater total number of actions taken in relation to a Māori family than a Pākehā family: there were ‘nearly double the number of total decisions made for Māori whānau.’³² There were also differences in relation to decisions below and above the statutory intervention line, that is, the point in the decision-making continuum where cases are accepted by the statutory service for assessment and intervention. As can be seen in the table, there were nearly double the number of rates of information gathering decisions (such as interviewing the children, visiting the family, and collecting more information) below the line of statutory intervention. More intrusive intervention decisions below this line, such as referral to a children’s team or a non-governmental organisation, were roughly equal for both ethnic groups at both stages.³³

Conversely, stage 4 saw a different picture emerge. Double the percentage of respondents would hold a whānau hui and try to negotiate a voluntary care agreement if the children were Māori. Importantly: ‘Although the numbers are small, across the multiple decision points, there was a fairly consistent pattern of increased number of action decisions made if the family was Māori than if they were Pākehā.’³⁴

11.3.3.2 Overview and conclusion

Overall data is limited data in the area of cultural competency and staff decision-making relating to children in care. The data that does exist, however, shows staff are more likely to have an increased number of actions and to see children as more at risk if they are Māori.

32. Document A98, p 6

33. Ibid

34. Ibid

11.3.4 Section 78 (with and without notice) uplifts

When examining data in relation to section 78 removals, the *Te Kuku o te Manawa* report provides some insights. This report used a sample of 153 of 309 cases in which babies under one month of age were removed into State custody under section 78 between 1 July 2017 and 30 June 2019.³⁵ The following points were drawn from the data:

- ▶ *Pēpi accounted for two-thirds of those children removed under an urgent section 78 custody order:* As has already been noted, there are extensive inequalities facing pēpi Māori in the statutory care and protection system. These are reflected in the urgent section 78 custody orders, which show that 66 per cent of urgent removals into State custody relate to pēpi under one month old. When looking at section 78 orders between 1 July 2017 and 30 June 2019 for pēpi between zero and three months, a total of 70 per cent were Māori.³⁶
- ▶ *Historical information relating to a case commonly contributes to a decision to seek a custody order:* In half (54 per cent) of the cases reviewed, historical concerns relating to the whānau were one of three primary factors behind the decision to seek custody.

Most cases had more than one primary factor behind the decision to seek custody and ‘for many whānau this was related to current maternal drug and/ or alcohol use (49 per cent) and partner/within family violence (49 per cent)’.

In almost all cases (97 per cent) there was prior parental involvement with Oranga Tamariki or Child, Youth, and Family and this was consistent for Māori and non-Māori babies: ‘In four out of five cases there was a history of involvement with previous children, and in three out of four cases the parents themselves had previous care and protection involvement as children.’³⁷ Maternal intellectual disability or impaired learning or cognition was a key factor in 20 per cent of all cases reviewed.

When examining drug and alcohol use for section 78 removals, ‘mum’s drug or alcohol use’ was one of the top three factors underpinning decision making in over 50 per cent of Māori family cases, For non-Māori cases, the figure was 35 per cent.³⁸

- ▶ *In most section 78 cases, babies are removed directly from hospital:* In 82 per cent of section 78 cases, babies were removed into Oranga Tamariki custody whilst in hospital. A third of these babies remained with their mother while two-thirds were taken into kin or non-kin care. Yet, ‘[r]emoval from the mother at birth was described as depriving infants of critical needs, such as bonding and breastfeeding’.³⁹

35. Document A183, p 56

36. Ibid, p 57

37. Ibid

38. Ibid

39. Ibid, p 58

A small number of mothers whose babies were removed into Oranga Tamariki care were supported to remain with their baby in different residential settings, such as a residential parenting unit.

With regards to these babies, pēpi Māori were more likely to remain with their mothers (39 per cent) compared to non-Māori babies (25 per cent), however the exact numbers here are unknown. Furthermore, this analysis only looks at the initial placement and is therefore not indicative of the long-term placement of babies.⁴⁰

11.4 TO WHAT EXTENT WILL THE LEGISLATIVE POLICY AND PRACTICE CHANGES INTRODUCED SINCE 2017, AND CURRENTLY BEING IMPLEMENTED, CHANGE THIS DISPARITY FOR THE BETTER?

11.4.1 Legislative tools that have contributed to the disparity

Three types of legislative tools have contributed to the disparity between tamariki Māori and non-Māori children with regard to the rate at which they are taken into State care. These legislative tools are:

- ▶ warrants (sections 39–40);
- ▶ interim orders (section 78);
- ▶ guardianship orders (sections 110–113A) and;
- ▶ the subsequent child provisions (sections 18A–18D).

Each will be discussed under their corresponding sub-heading below, with data provided.

40. Ibid

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11.4.1.1 Warrant data (sections 39–40)

As at	Māori	Non-Māori	Total
30 June 2008	3,545	2,591	6,136
30 June 2009	3,427	2,262	5,689
30 June 2010	3,341	2,105	5,446
30 June 2011	2,973	2,047	5,020
30 June 2012	3,027	1,952	4,979
30 June 2013	3,104	1,856	4,960
30 June 2014	3,326	1,862	5,188
30 June 2015	3,383	1,643	5,026
30 June 2016	3,613	1,699	5,312
30 June 2017	3,976	1,732	5,708
30 June 2018	4,429	1,936	6,365
30 June 2019	4,424	2,023	6,447

Table 11.8: Tamariki in CE custody, including warrants

Source: document A18(a), p [9]

Table 11.8 breakdown: Section 39 (place of safety warrant) and section 40 (warrant to remove a child or young person) of the Oranga Tamariki Act can be seen to have been used for more Māori than non-Māori who are in custody consistently over the last decade (2008–19).

Despite the introduction of new legislation and the creation of Oranga Tamariki in 2017, the numbers of children in custody where a warrant was used to take tamariki Māori into the custody of the chief executive has increased. In fact, 2018–19 has seen more tamariki Māori who are in custody through use of a warrant than any of the 10 years prior.

Similarly, there has been an increase for non-Māori since the creation of Oranga Tamariki in 2017. However, the number of non-Māori children in custody in 2019 with section 39 and section 40 constitutes less than half of Māori children in custody.

Note that, from 2008 to 2013, the rate at which non-Māori tamariki are in custody as a result of warrants, declines and then remains relatively static. In contrast, Māori numbers from 2013 onward increase dramatically.

Data limitations: The data provided is subject to the following limitations:

- Reliable legal custody data was not available or routinely reported prior to 2008. This is why table 11.8 does not cover the years prior to 2008.

- Māori includes anyone who identifies Māori as one of their ethnicities.
- Non-Māori includes anyone who does not identify Māori as any of their ethnicities.

These final two points mean that Māori are being compared to all who identified as non-Māori.

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11.4.1.2 *Interim order data (section 78)*

Financial year	Filing method	Māori	Non-Māori	Unknown	Total
2004–05	On notice	37	83	190	310
	Without notice	206	188	812	1,206
	Total	243	271	1002	1,516
2005–06	On notice	119	103	148	370
	Without notice	418	398	526	1,342
	Total	537	501	674	1,712
2006–07	On notice	65	105	94	264
	Without notice	400	406	445	1,251
	Total	465	511	539	1,515
2007–08	On notice	53	83	93	229
	Without notice	302	299	334	935
	Total	355	382	427	1,164
2008–09	On notice	86	126	104	316
	Without notice	349	257	359	965
	Total	435	383	463	1,281
2009–10	On notice	73	76	103	252
	Without notice	377	280	452	1,109
	Total	450	356	555	1,361
2010–11	On notice	46	86	92	224
	Without notice	235	228	344	807
	Total	281	314	436	1,031
2011–12	On notice	50	76	59	185
	Without notice	392	235	434	1,061
	Total	442	311	493	1,246
2012–13	On notice	89	83	62	234
	Without notice	369	259	443	1,071
	Total	458	342	505	1,305
2013–14	On notice	68	44	99	211
	Without notice	379	273	531	1,183
	Total	447	317	630	1,394
2014–15	On notice	29	36	43	108
	Without notice	371	280	445	1,096
	Total	400	316	488	1,204

Financial year	Filing method	Māori	Non-Māori	Unknown	Total
2015–16	On notice	23	32	45	100
	Without notice	443	286	576	1,305
	Total	466	318	621	1,405
2016–17	On notice	30	24	35	89
	Without notice	490	273	642	1,405
	Total	520	297	677	1,494
2017–18	On notice	26	21	35	82
	Without notice	408	343	645	1,396
	Total	434	364	680	1,478
2018–19	On notice	20	6	36	62
	Without notice	295	508	508	1,068
	Total	315	271	544	1,130
Total		6,248	5,254	8,734	20,236

Table 11.9: Number of Family Court section 78 orders by financial year

Source: document A19(b), p 1

Table 11.9 breakdown: Since 2005, section 78 orders have been predominantly filed ‘without notice’ for all ethnic groups, in comparison to ‘with notice’ applications.

Since the establishment of Oranga Tamariki in 2017, the number of ‘without notice’ applications for both Māori and non-Māori tamariki has decreased.

However, when compared with the number of ‘with notice’ applications, there is still a large discrepancy with regard to use. Notably, 2017–18 saw 408 ‘without notice’ applications made for tamariki Māori, while only 26 were made ‘on notice’. That same year, 343 ‘without notice’ applications were made for non-Māori, in comparison to 21 ‘with notice’ applications.

It would seem that, while the number of applications made has decreased in recent years, there is still a disproportionate preference to undertake ‘without notice’ proceedings as opposed to those ‘with notice’.

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Financial year	Māori	Non-Māori	Total	Percentage Māori	Percentage non-Māori
2005	806	641	1,447	56	44
2006	1,003	682	1,685	60	40
2007	873	639	1,512	58	42
2008	667	487	1,154	58	42
2009	795	473	1,268	63	37
2010	852	507	1,359	63	37
2011	579	462	1,041	56	44
2012	758	428	1,186	64	36
2013	826	438	1,264	65	35
2014	890	448	1,338	67	33
2015	797	345	1,142	70	30
2016	853	420	1,273	67	33
2017	1,104	427	1,531	72	28
2018	1,011	461	1,472	69	31
2019	783	390	1,173	67	33

Table 11.10: Section 78 custody orders granted for financial years 2005–19

Source: document A19(a), p 1

Table 11.10 breakdown: Since the creation of Oranga Tamariki, the percentage of section 78 custody orders made in relation to has decreased. However, section 78 custody orders made in relation to non-Māori have increased.

Between 2005 and 2019, Māori were the primary subject of section 78 custody orders as opposed to non-Māori. In 2017, the percentage peaked, with 72 per cent of those subject to section 78 custody orders being tamariki Māori, and only 28 per cent being non-Māori.

Data limitations: The limitations of tables 11.9 and 11.10 include that ‘Māori’ includes anyone who identifies as Māori, while ‘non-Māori’ includes anyone who identifies with anything other than Māori.

11.4.1.3 Guardianship order data

Legal status	Financial year	Māori	Non-Māori	Total
Section 110AA	2020 (19 July – 20 March)	20	10	30
Section 110AA SOLE	2020 (19 July – 20 March)	2	6	8
Section 110(2)(a)	2015	10	13	23
	2016	27	6	33
	2017	22	5	27
	2018	22	4	26
	2019	24	11	35
	2020 (19 July – 20 March)	17	9	26
Section 110(2)(b)	2015	413	194	607
	2016	435	193	628
	2017	428	171	599
	2018	487	198	685
	2019	498	204	702
	2020 (19 July – 20 March)	208	128	336
Section 113A	2017	25	14	39
	2018	27	21	48
	2019	32	27	59
	2020 (19 July – 20 March)	27	16	43

Table 11.11: Total specific court orders granted for financial years 2015–20 by ethnicity

Source: document A47, p 5

Table 11.11 breakdown: Māori are more likely to be subject to guardianship orders under sections 110(2)(a), 110(2)(b), 110AA, and 113A.

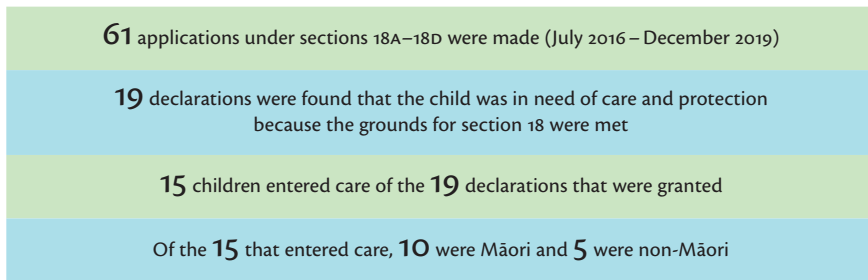
Data limitations: The limitations of table 11.11 are outlined as being:

- The data provided is only for orders made in favour of the chief executive of Oranga Tamariki (and its predecessor organisations). Oranga Tamariki does not hold data on all orders made in favour of other individuals or organisations.
- Section 113A came into effect on 1 July 2016 so information is only available since the 2017 financial year.
- Section 110AA came into effect on 1 July 2019 so information is only available from this point to March 2020.

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- The total number of orders applied for is not available as this information is only on individual files and is not held as a data set. The table only shows orders granted.
- Previously available published data on guardianship orders relates to the legal status of a child upon entry into care, rather than the total number of orders granted, so this information will differ from previously published data.
- A child may have more than one guardianship order during a single custody episode, so the total number of guardianship orders does not equate to the total number of children with guardianship orders during the financial year.
- Children may have more than one type of order in each financial year (eg, a child may have a section 110(2)(b) order and then a section 113 order in one financial year).⁴¹

41. Document A47, p 5

11.4.1.4 Subsequent child (sections 18A–18D) data**Figure 11.15: Section 18A–18D applications**

Redrawn from document A47, p2

Figure 11.15 breakdown: Two-thirds of subsequent children that are found to be in need of care and protection are Māori.

Data limitations: The limitations of figure 11.15 include that data on the number of assessments under sections 18A to 18D of the Oranga Tamariki Act is not routinely available as this information is recorded in individual files and not collated into a data set. The information informing figure 11.15 is taken from a 2019 project which saw the manual review of the case files of all children where a section 18A–18D application was made to the Family Court.⁴²

Subsequent child summary: While two-thirds of subsequent children that are found to be in need of care and protection are Māori, the subsequent child provisions are going to be partially repealed. They will only apply to parents who have a conviction for murder, manslaughter or infanticide of a child in their care.

11.4.1.5 Overview and conclusion

Overall, Māori have been subject to various legislative tools at higher rates than non-Māori, contributing to the disparity between Māori and non-Māori in State care. This can be evidenced in the fact that data provided shows:

- ▶ tamariki Māori are more likely than non-Māori to be taken into custody via warrant;
- ▶ tamariki Māori are more likely than non-Māori to be the subject of a section 78 ‘without notice’ custody order;
- ▶ tamariki Māori are more likely than non-Māori to be the subject of a guardianship order and;
- ▶ tamariki Māori are more likely to be found under the subsequent child provisions as needing care and protection.

42. Ibid

11.4.2 What policy and practice changes has Oranga Tamariki introduced since 2017 to address the disparate number of tamariki Māori and non-Māori children entering care?

Several changes have been made following Oranga Tamariki's creation in 2017, these are discussed below.

11.4.2.1 *Mana tamaiti data (section 7AA(2)(b))*

The mana tamaiti objectives inform the development of policies, practices, and services and are measured through the delivery of services across the operating model.

Mana tamaiti objective	Measure	Success indicator
Ensuring participation in decision-making	Percentage of tamariki Māori aged 10–17 who feel they have a say in important decisions about their life	Increase in percentage
Preventing entry into care or custody	Percentage of all service contract funding contracted with iwi and Māori organisations	Increase in percentage
Placing with whānau, hāpu, and iwi	Percentage of tamariki Māori in an out of home placement for more than three months, who are placed with whānau or with Māori caregivers	Increase in percentage
Supporting identity and belonging	Percentage of tamariki Māori who have identified an iwi affiliation	Increase in percentage
Supporting identity and belonging	Percentage of tamariki Māori aged 10–17 who are in touch with their birth whānau as much as they want to be	Increase in percentage
Supporting identity and belonging	Percentage of tamariki Māori aged 10–17 who know their whakapapa	Increase in percentage
Supporting identity and belonging	Percentage of tamariki Māori aged 10–17 who have the opportunity to learn about their culture	Increase in percentage
Leaving care or custody	Percentage of tamariki Māori referred for another Youth Justice FGC in the six months following release	Decrease in percentage
Leaving care or custody	Percentage of rangatahi Māori who receive support from Transition Services	Increase in percentage

Table 11.12: Mana tamaiti

Source: document A53, p 23

Breakdown of table 11.12: Table 11.12 shows how the success of mana tamaiti objectives will be measured by Oranga Tamariki.

Limitations: The measures are limited because they are based on data already collected by Oranga Tamariki. However, Oranga Tamariki speculates that, over the coming years, as its data collection improves, its ability to get its measures to better align with the intentions of the objectives will also improve.

As the data was provided by Oranga Tamariki, this table is subject to the overarching data limitations found at section 11.2.

11.4.2.1.1 *Since the implementation of section 7AA, have the mana tamaiti objectives found success, as specified by the measures in table 11.12?*

- ▶ A high percentage of tamariki Māori aged 10–17 (79 per cent), feel they have a say in important decisions about their life, partially fulfilling the mana tamaiti objective to ensure participation in decision making.⁴³
- ▶ Oranga Tamariki are working with a number of iwi and Māori organisations to facilitate early intervention, partially fulfilling the mana tamaiti objective to prevent the entrance of tamariki Māori into care or custody.

This includes partnering with Te Kopu Education and Research Limited, the Whānau Ora Commissioning Agency and Kiko Solutions.⁴⁴

- ▶ The percentage of tamariki Māori in an out of home placement for more than three months, who are placed with whānau or Māori caregivers has increased, indicating the mana tamaiti objective of placing tamariki Māori with whānau, hapū and iwi is being partially achieved.

Data shows that in 2017 85 per cent of children living away from home were with whānau or a caregiver of the same ethnicity. As of 2020, this percentage has risen to 89 per cent.⁴⁵

- ▶ The number of tamariki Māori entries with iwi affiliation has decreased, indicating the mana tamaiti objective to support identity and belonging is not yet being achieved.

Data shows that, since the implementation of section 7AA in 2017, tamariki Māori entries with iwi affiliation have decreased from 1,327 (2017) to 1,209 (2018) to 1,007 (2019) to 581 (2020).⁴⁶

This data is limited by the fact that some tamariki may have more than one entry into care in the period and that the data was extracted on 3 September 2020, which excludes part of the year, curtailing data.

- ▶ A high percentage of tamariki Māori aged 10–17 (71 per cent), felt that they were in touch with their birth whānau as much as they want to be, partially fulfilling the mana tamaiti objective to support identity and belonging.⁴⁷

43. Document A53, p 43

44. Ibid, p 44

45. Oranga Tamariki – Ministry for Children, 'Our Progress: 2017–2020', <https://orangatamariki.govt.nz/about-us/reports-and-releases/our-progress-2017-2020>, last modified 26 November 2020

46. Document A57, p 4

47. Document A53, p 51

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- Just over half of tamariki Māori aged 10–17 (59 per cent) felt that they knew their whakapapa. This indicates that the mana tamaiti objective to support identity and belonging is not being met.⁴⁸
- A high percentage of tamariki Māori aged 10–17 (80 per cent), felt that they have the opportunity to learn their culture. This indicates that the mana tamaiti objective to support identity and belonging is predominantly being fulfilled.⁴⁹
- Currently, there is no available data to show the percentage/rate at which young people are referred for another Family Group Conference within six months of release.

However, the proportion of Māori children who offend whose offending was serious enough to lead to an FGC or court action, was 2.1 times higher than that for European/Other.⁵⁰

Furthermore, for almost all of the children (97 per cent) and young people (88 per cent) referred for a youth justice Family Group Conference, someone had previously expressed concern that themselves or their family needed help. That is, Oranga Tamariki had already recorded a report of concern relating to the care and protection of that child or young person.⁵¹

- The percentage of rangatahi Māori who receive support has increased, indicating the mana tamaiti objective of supporting the exit from care or custody is being partially achieved.

Data shows that, since the creation of Transition Services in 2017, 740 young people (52 per cent of those eligible) now work alongside a transitions worker. Of those referred to Transition Support, 56 per cent were Māori, with an additional 10 per cent identifying as Māori and Pacific.⁵²

This data is limited insofar as a percentage increase was always inevitable where zero was the starting point.

11.4.2.1.2 *Are changes made to fulfill the mana tamaiti objective of section 7AA aiding the reduction in disparity?*

Using the measures of success specified in table 11.12, it would appear that of the data available, there is an indication that changes made to fulfill the mana tamaiti objective of section 7AA will contribute to reducing the disparity between Māori and non-Māori.

48. Document A53, p 51

49. Ibid

50. Ministry of Justice, *Youth Justice Indicators Summary Report, December 2020* (Wellington: Ministry of Justice, 2021), p 7

51. Ibid, p 6

52. Oranga Tamariki – Ministry for Children, 'Transition – Statistics', <https://www.orangatamariki.govt.nz/about-us/reports-and-releases/quarterly-report/transition>, last modified 15 December 2020

11.4.2.2 Quality assurance standards data

The five standards to be met by Oranga Tamariki staff when developing operational policies, practices or new services are:

- *Standard 1:* Uphold and protect Māori rights and interests.
- *Standard 2:* Head and act on the voices of Māori.
- *Standard 3:* Ensure equity by reducing disparities for tamariki Māori and their whānau.
- *Standard 4:* Have regard to mana tamaiti, whakapapa and whānaungatanga.
- *Standard 5:* Value the Māori evidence base.

Data limitations: Formal monitoring and reporting on how well quality assurance standards are being applied only commenced in August 2020. As such, progress will be made available in the next section 7AA report.⁵³

Summary: With formal monitoring and reporting only commencing in August 2020, it remains to be seen whether or not Oranga Tamariki are developing operational policies, practices or new services in line with their five quality assurance standards.

53. Document A53, p 24

11.4.2.3 Partnership data (strategic and other)

Breakdown of figure 11.16: Figure 11.16 shows:

- the total number of tamariki Māori in the care and protection system and;
- the number of tamariki Māori who have a whakapapa connection to one of Oranga Tamariki's four strategic partners.

For tamariki Māori who whakapapa to one of the strategic partners, the time-series shows:

- there has been a reduction in the number of tamariki Māori who enter care;
- there has been a reduction in the percentage of tamariki Māori entering care in comparison to all Māori tamariki and;
- there has been a reduction in the number of reports of concern received.

The reduced number of tamariki Māori entering care, who have a whakapapa connection to one of Oranga Tamariki's strategic partners, appears to show the positive potential impact for these partnerships.

Data limitations: As noted in the section 7AA report, it may be too early to draw substantive conclusions.⁵⁴ That is, whether or not the procurement of more iwi/Māori services are the reason for the decline in Māori linked to those iwi coming into care.

Claimant closing submissions state that, in any study into the decline of Māori coming into care who are linked to iwi, it would need to consider the 20–30 per cent increases in funding for many organisations that do not identify as iwi/Māori over the same time period and what, if any, impact this may have had.⁵⁵

As a statistic provided by Oranga Tamariki, this timeseries is subject to the overarching data limitations found at section 11.2.

54. Document A53, p 37

55. Submission 3.3.26, p 33

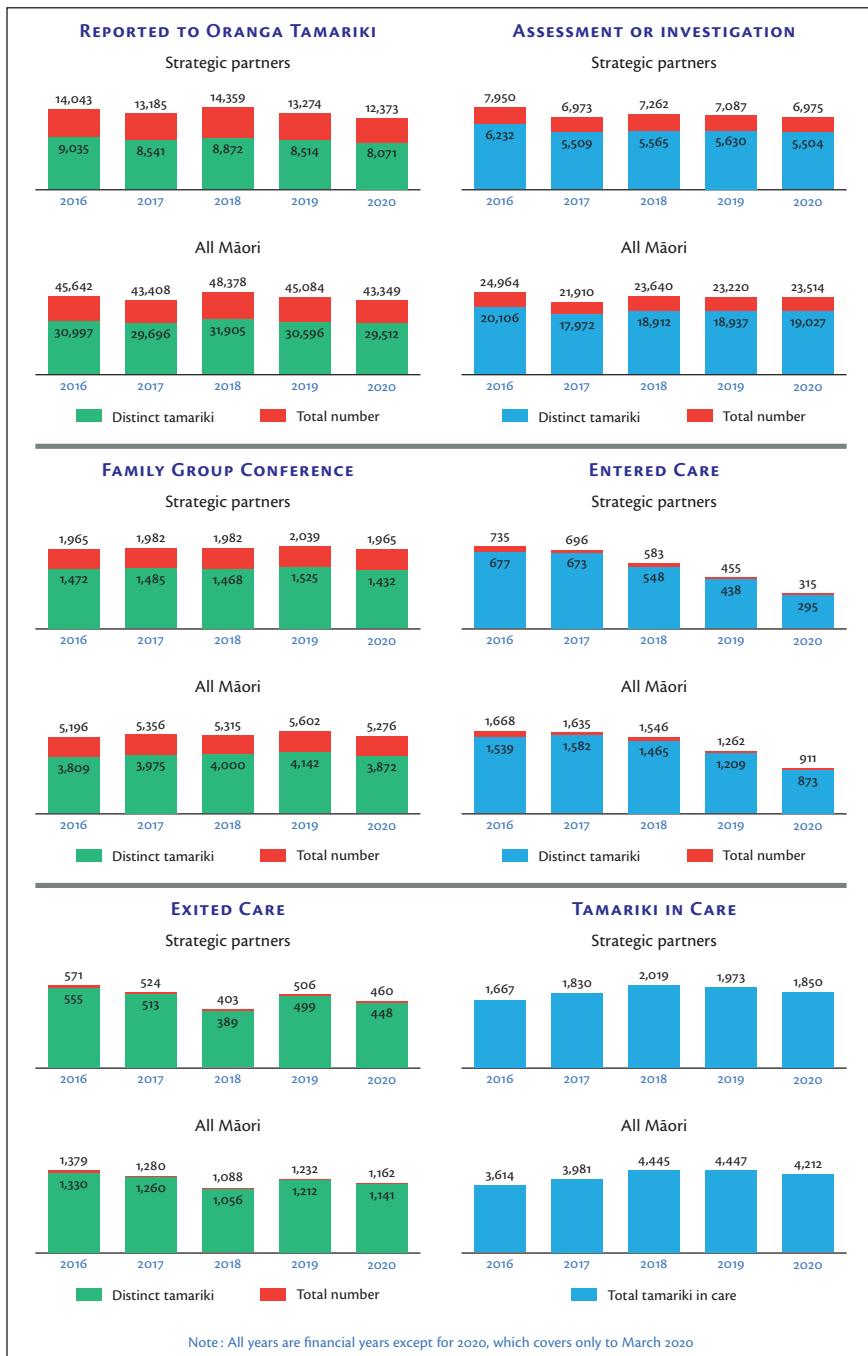


Figure 11.16: Partnership timeseries 1

Redrawn from document A53, p38

	Financial year		
	2017–18	2018–19	2019–20
Dollar spend with Māori/iwi providers	\$54 million	\$62 million	\$81 million
As a percentage of total spend	20.3%	20.8%	23.4%
Percentage increase on previous year's spend		15.5%	30.2%
Number of contracts with Māori/iwi providers	185	215	231
As a percentage of total contracts	25.1%	26.5%	28.4%
Increase on previous year's number		16.2%	7.4%

Table 11.13: Dollar spend with Māori/iwi providers, 2017–20

Source: document A53, p 58

Breakdown of table 11.13: Since the establishment of Oranga Tamariki in 2017, the percentage of total dollars spent with Māori/iwi providers has increased by 3.1 per cent. The number of contracts with Māori/iwi providers has also increased.

Data limitations: Oranga Tamariki data records organisations as ‘iwi/Māori’ where organisations grant themselves that designation. Claimant closing submissions make clear that the picture provided by the procurement data is not straightforward.⁵⁶ Indeed, a Māori named organisation does not necessarily mean that the client base is predominantly Māori. They provide an example where ‘Bream Bay Community Trust’ describes itself as an iwi/Māori organisation, while ‘Barnados New Zealand Incorporated’ does not – despite the fact that it provides services to hundreds of tamariki Māori.

As the data was provided by Oranga Tamariki, this table is subject to the overarching data limitations found at section 11.2.

56. Submission 3.3.26, p 31

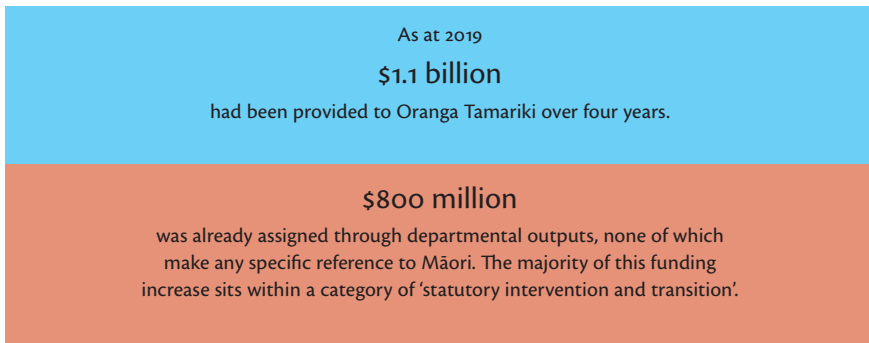


Figure 11.17: Financial breakdown

Redrawn from submission 3.3.26, p 29

Figure 11.17 breakdown: Of the \$1.1 billion provided to Oranga Tamariki over four years, \$800 million was already assigned, without any reference to Māori. The implication here is that, while money may target 'statutory intervention and transition', it does not appear to be oriented specifically to the benefit of tamariki Māori.

Provider	Funding
Youth Horizons Trust Kia Puawai	\$19,262,080.52
Stand for Children National Office	\$19,072,833.22
Barnados New Zealand Incorporated	\$18,017,364.66
The Open Home Foundation of New Zealand	\$17,659,693.47
Reconnect Family Services Limited	\$13,076,532.00
Presbyterian Support (Northern) T/A Family Works	\$8,736,190.88
Anglican Trust for Women and Children	\$6,642,073.36
Key Assets	\$6,606,585.68
Senate Nursing Bureau Limited	\$5,094,100.50
Turuki Health Care	\$4,982,729.09
Family Success Matters	\$4,759,460.16
Te Ikaroa Rangathai Social Services Incorporated*	\$3,831,703.88
Safe Network	\$3,807,682.44
Emerge Aotearoa Limited	\$3,574,330.06
Dingwall Trust	\$3,334,558.20
Ngapuhi Iwi Social Services Limited*	\$3,322,543.08
Kotahitanga Limited*	\$3,286,293.92
Early Start Project Limited	\$3,231,237.04
NZCare Group Limited	\$3,070,821.51
Wellstop	\$2,967,912.65

* Providers self-identifying as iwi / Māori

Table 11.14: The top 20 providers in terms of funding in 2019–20

Source: submission 3.3.26, p 33

Table 11.14 breakdown: In terms of funding for providers in 2019–20, only one self-identified Māori organisation can be found amongst the top 10. In the top 20, there are four overall. Notably, the sums provided to the top five are significantly larger than all other organisations listed, for example Turuki Health Care, placing tenth, receives \$4,982,729.09, while Youth Horizons Trust Kia Puawai, at first place, receives \$19,262,080.52. This is a difference of over \$14 million dollars.

11.4.2.4 Procurement changes data

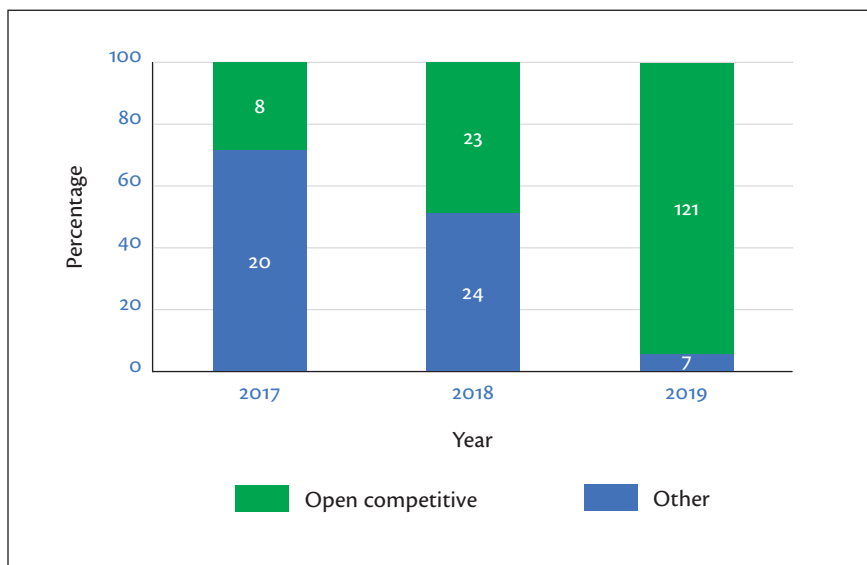


Figure 11.18: Oranga Tamariki procurement exercises

Redrawn from document A172, p 5

Figure 11.18 breakdown: Figure 11.18 shows a summary of the procurement activities of Oranga Tamariki since their establishment in 2017.

Data limitations: Crown witness Joe Fowler raised that it was important to note, alongside figure 11.18, that:

- ▶ the majority of procurements are now direct approaches to partners who have already been identified as being well-placed to deliver social services in a particular community; and
- ▶ the majority of organisations who have secured new services identify as iwi/Māori.⁵⁷

It is important to recall that an iwi/Māori categorisation is self-identified by different organisations.

57. Document A172, p 5

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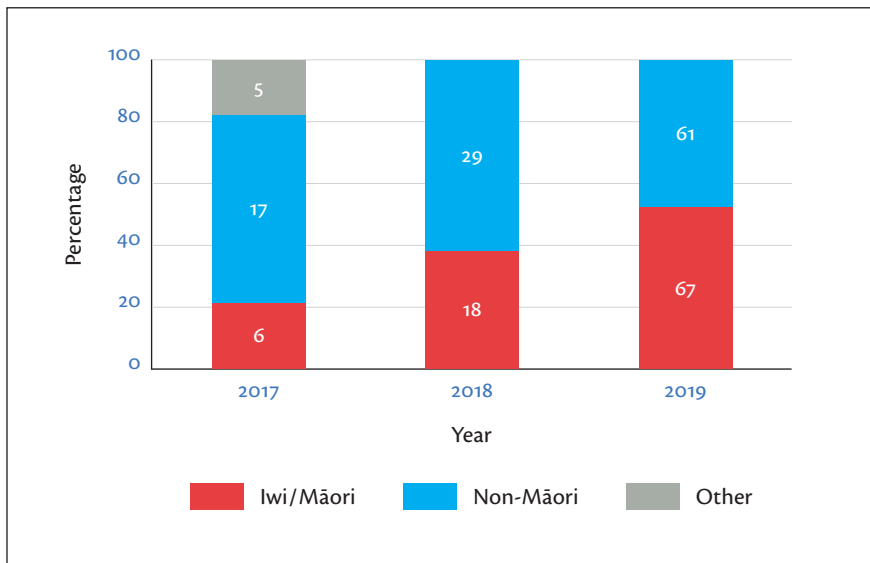


Figure 11.19: Organisations funded as a result of procurement

Redrawn from document A172, p 6

Figure 11.19 breakdown: Figure 11.19 shows how organisations were self-identifying. This shows an increase in the identification of organisations as iwi/Māori and also shows an increase in their funding as a result of procurement.

However, just under 50 per cent of the organisations freshly funded in the 2019 (non-competitive) procurement exercises do not identify as iwi/Māori.

Data limitations: Mr Fowler notes that:

- ▶ new service arrangements were something that ‘had to’ be set up to meet new legislative requirements and practices and that, as a result; and
- ▶ a majority of the social service contracts portfolio prior to 2017 has been left untouched.⁵⁸

Summary: From the data provided, it would appear Oranga Tamariki are making efforts to adjust how procurement of services occurs. In turn, this gives iwi/Māori services a better chance of securing funding for their preferred services. However, this effort is described as being ‘ad hoc’. This is because it relies on:

- ▶ discretionary exemptions from the standard procurement policy; and
- ▶ iwi in different regions to maintain services, despite iwi capacity being described as varying between regions.⁵⁹

58. Document A172, p 9

59. Submission 3.3.26, p 34

Claimant closing submissions note that the presence of bias, coupled with the ad hoc nature of procurement efforts, means that procurement is not “locked in”, nor can its success be proven.⁶⁰

60. Ibid

11.4.2.5 Notify–investigate model (inequitable reporting data)

Event	Over the three years to 31 March 2017		Over the two years post 1 April 2017	
	Before controlling for other factors (x)	After controlling for other factors (x)	Before controlling for other factors (x)	After controlling for other factors (x)
First report of concern	3.40	1.20	3.16	1.16
First referral to assessment or investigation*	1.10	1.05	1.24	1.14
First FGC or FWA [†]	1.39	1.09	1.22	0.96
First placement [‡]	1.07	n/a [§]	1.03	n/a [§]

* For those recently reported.

† For those with recent reports and assessments.

‡ For those with recent family group conferences or family–whanau agreements.

§ Results of 'n/a' are given where the results were already close to 1 and no different from each other so no further analysis was done or the numbers were too small to do an accurate regression analysis.

Table 11.15: Relative likelihood of Māori children moving into each care and protection stage for the first time, relative to children from 'NZ European and other' ethnicities

Source: document A56, p 9

Table 11.15 breakdown: As shown in table 11.15, Māori are more 1.16 times more likely than 'NZ European and other' ethnicities to have a first report of concern (notification). This report of concern is also more 1.14 times more likely to be investigated if the child is Māori than 'NZ European and other' ethnicities.

Per the Oranga Tamariki Evidence Centre report into factors associated with disparities experienced by tamariki Māori, disparity ratios have increased for Māori with regard to investigation since the establishment of Oranga Tamariki (up from 1.05 times to 1.14 times).⁶¹

Limitations: The 2020 report from the Oranga Tamariki Evidence Centre offers that the high first-time reporting rates in 2018 (compared to 2017 and 2019) could be a one-off spike. Considering that there were only two years of data available at the time the report was written, it could not be ascertained as to whether 2018 was a year-to-year variation or a singular event that could not be expected to be seen within the coming years.⁶²

Associate Professor Emily Keddell notes that the notify investigate model itself skews data in the following ways:

- The sole use of 'first-time' events (such as reports of concern, referral to assessment or investigation, FWA or FGC, first placement), reduces the

61. Document A56, p10

62. Ibid

inclusion of Māori event data more than non-Māori. This is because Māori are more likely to have had multiple contacts over childhood. Hence, documenting only first-time events will reduce disparity by reducing the Māori rates of events.

- The comparison between Māori and 'European/other' as a group, reduces the latter group rates, as Asian rates are very low and have a significant size population, this increases the representation of disparity.
- The 'controlled for' size of disparity is artificial. The true disparity is the uncontrolled rate. To 'control for' means to hold factors as if they were constant, when majority of the factors relating to Māori cannot and should not be held in this way.
- Reports of concern are internal decision making points, which evidence the disparities within cases accepted by Oranga Tamariki. Notifications made to Oranga Tamariki concern decisions made externally. As such, notification disparities do not reflect any decision making of Oranga Tamariki.⁶³

Summary: Per the data provided above:

- Māori are more likely to come to the attention of Oranga Tamariki as a result of a report of concern lodged externally.
- However, once this complaint has been lodged, Māori are more likely to be investigated by Oranga Tamariki.
- In addition, the notify investigate model itself skews data. This is because it documents only first-time events.

63. Document A90, p 20

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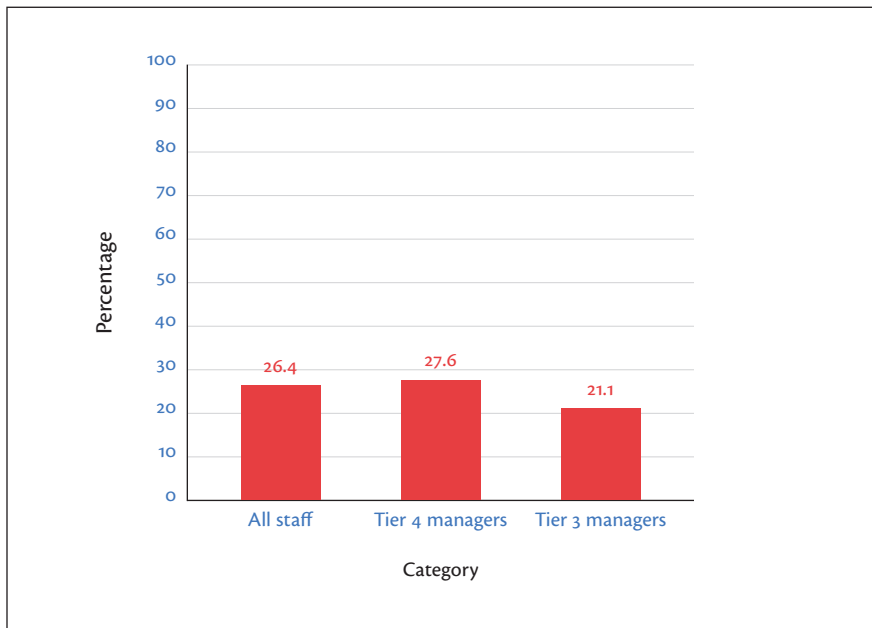
11.4.2.6 *Staff data*

Figure 11.20: Percentage of Māori staff

Redrawn from document A53, p 17

Figure 11.20 breakdown: As at 31 March 2020, 26.4 per cent of the workforce at the Oranga Tamariki identified as Māori. This percentage has decreased from 2019, where 27 per cent of staff identified as Māori.⁶⁴ In comparison, 2019 saw 64 per cent of staff identify as New Zealand European.⁶⁵

Data limitations: As a statistic provided by Oranga Tamariki, this figure is subject to the overarching data limitations found at section 11.2.

64. Steve Groom to redacted, 16 July 2019, <https://orangatamariki.govt.nz/assets/Uploads/About-us/Report-and-releases/OIA-responses/20190716-Information-on-diversity-within-Oranga-Tamariki-T1159080.pdf>, p 2

65. Ibid

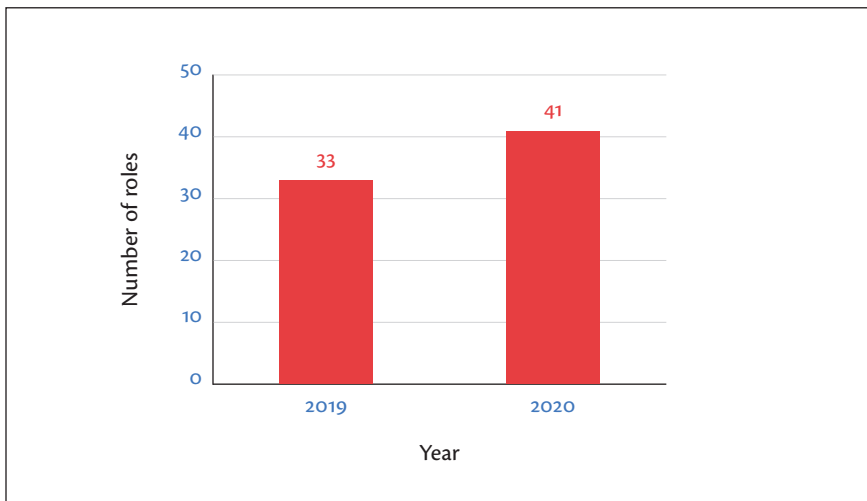


Figure 11.21: Kairāranga roles, 2019–20

Redrawn from document A54, p 79

Figure 11.21 breakdown: Since the selection of the pilot sites in 2017, additional kairāranga were appointed. At May–April 2019, there were 33 kairāranga roles. By February 2020, this had increased to 41.

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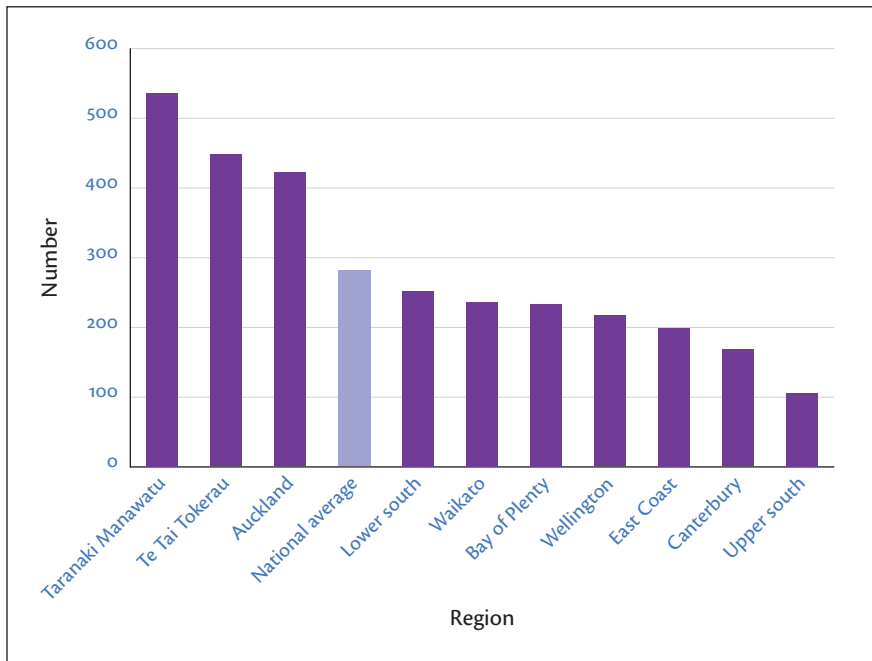


Figure 11.22: Estimated number of tamariki Māori Services for Children and Families is engaged with per Kairaranga-a-whānau by region

Redrawn from document A169, p397

Figure 11.22 breakdown: Roughly, there is one kairāranga-a-whānau per 300 tamariki Māori (1:300). As seen above, Upper South and Canterbury have the highest level of access with a ratio of 1:100–150. In contrast, Taranaki Manawatu and Te Tai Tokerau have the lowest levels of access with only one to every 400–500 tamariki.

Data limitations: As a statistic provided by Oranga Tamariki, this figure is subject to the overarching data limitations found at section 11.2.

Ethnicity	Count	Percentage
Disclosed as Asian	209	13
Disclosed as European	1,024	64
Disclosed as Māori	408	25
Disclosed as MELAA	47	3
Disclosed as other ethnicity	16	1
Disclosed as Pacific peoples	189	12
Total number of social workers	1,777	100

Table 11.16: Social workers by disclosed ethnicity

Source: document A57, p 17

Table 11.16 breakdown: Māori social workers constitute 25 per cent of the social work cohort, while Europeans make up 64 per cent. This is despite 57 per cent of the children in care identifying as Māori, with a further 11 per cent identifying as both Māori and Pacific.⁶⁶

66. Oranga Tamariki – Ministry for Children, ‘Care and Protection – Statistics’, <https://www.orangatamariki.govt.nz/about-us/reports-and-releases/quarterly-report/care-and-protection-statistics>, last modified 22 February 2021

Ethnicity	Count	Percentage
Disclosed as Asian	5	3
Disclosed as European	102	52
Disclosed as Māori	94	48
Disclosed as MELAA	*	*
Disclosed as other ethnicity	0	0
Disclosed as Pacific peoples	41	21
Total number of FGC coordinators workers	212	100

* Suppressed to protect individuals' privacy

Table 11.17: Family group conference coordinators by disclosed ethnicity

Source: document A57, p 17

Table 11.17 breakdown: Just over half of the family group conference coordinators are European, while just under half are Māori. While an almost even split may seem appropriate, one needs to recall that the majority of tamariki called before family group conference coordinators are Māori.

Data limitations for tables 11.16 and 11.17: As outlined by Valmai Joy Copeland, who provided further data at the request of the Tribunal, there are a number of things to keep in mind when reviewing tables 11.16 and 11.17, such as:

- ▶ The term 'social worker' uses the standard field social worker line (FSWL) definition. This includes social workers, senior practitioners, and supervisors.
- ▶ The statistics were the state of Oranga Tamariki as at 31 July 2020.
- ▶ The statistics included active employees only. This means that those on leave without pay, which includes those on paternity and maternity leave, were excluded.
- ▶ Only employees who were classed as permanent or fixed were included. This excluded contractors and people on casual contracts.
- ▶ Ethnicity was voluntarily self-disclosed.
- ▶ Ethnicity is self-perceived and people can belong to more than one group.
- ▶ Employees who chose more than one ethnicity are counted in each group. As a result, employee numbers by ethnicity may add up to more than the total number of employees.⁶⁷

67. Document A57, p 16

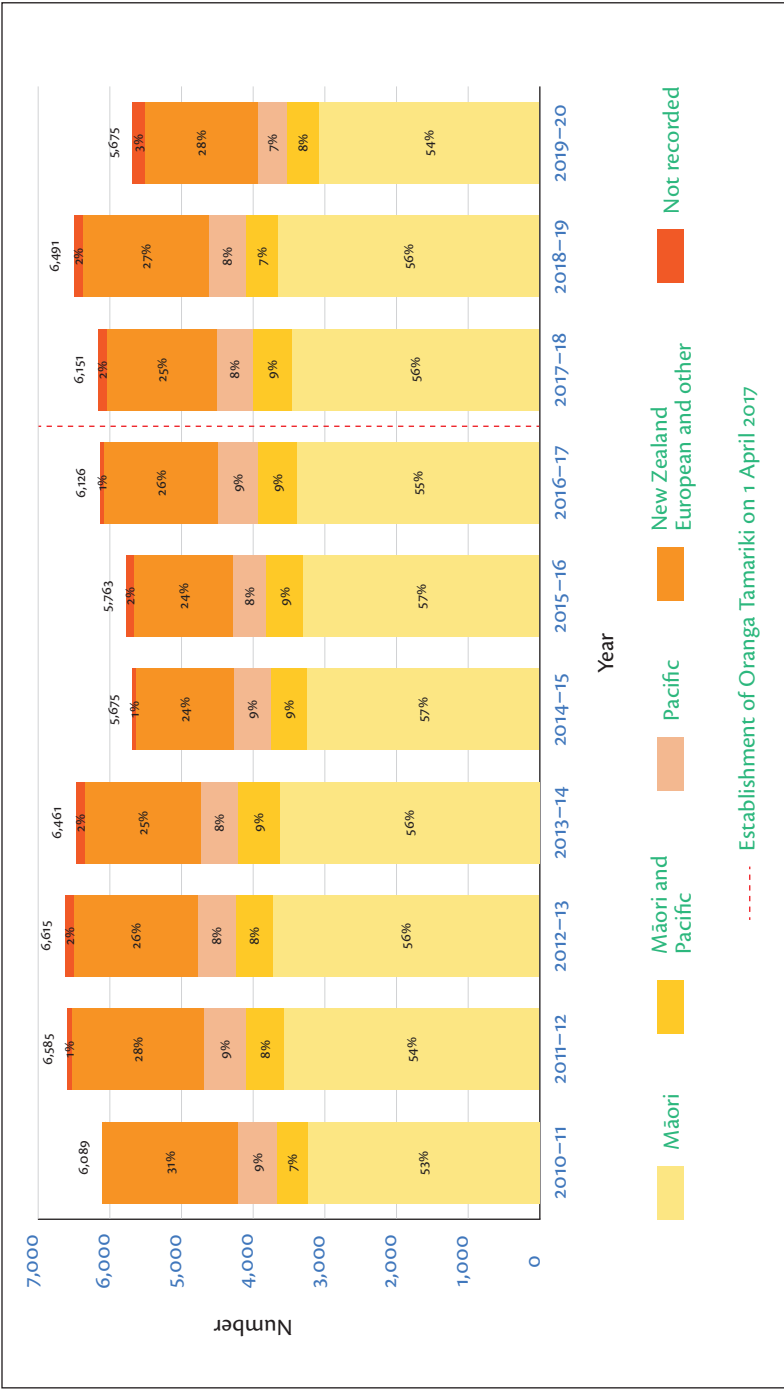
11.4.2.7 Family group conference data

Figure 11.23 breakdown: Since the establishment of Oranga Tamariki in 2017, the number of family group conferences involving tamariki Māori has remained relatively static. As shown in figure 11.23 (over), the number has fluctuated between 53 and 58 per cent for the last 10 years. As such, it does not seem to appear that the establishment of Oranga Tamariki has affected the number of family group conferences convened concerning tamariki Māori.

However, the last six years have seen a percentage increase each year for the number of Pakeha children called to have family group conferences.

Data limitations: As a statistic provided by Oranga Tamariki, this figure is subject to the overarching data limitations found at section 11.2.

Summary: The establishment of Oranga Tamariki has not significantly affected the number of tamariki Māori who are called to engage in the family group conference process.



11.4.2.8 Monitoring and accountability data

Objective	Aim	Metric
Timelines	1. Reduced open records	Number of feedback records on last day of each month
	2. Reduced days a feedback record is open	Percentage of complaints closed within agreed response timeframes
	3. Outcome recommendations captured are tracked and implemented in a timely manner	Average number of working days between opening and closing of the outcome recommendations, closed in the previous month
Quality responses	4. Reduced feedback providers returning with the same complaint	Number of duplicate records within the month
	5. Increased number of feedback records pass the QA checks	Number of QA checks passed during previous month
Continuous improvement	6. Increased actionable recommendations provided to the System Enhancement Board and/or relevant groups	Number of continuous improvement reports sent to the System Enhancement Board in the previous month
	7. All found complaints have recommendations recorded and tracked	Number of outcome recommendations created each month
	8. Increased improvement suggestions arising from feedback	Number of suggestion records created each month
Accessibility	9. Increased feedback received from children and young people	Percentage of total feedback providers recorded monthly who are children and young people*
	10. Increased feedback received from individuals who identify as Māori	Percentage of total feedback providers with recorded ethnicity who identify as Māori†

* Feedback from children and young people may come through other avenues but reporting metrics will be able to cover only what is recorded in the information technology system.

† Ethnicity is not a mandatory field in the information technology system and data may therefore not necessarily provide the full picture in regard to the ethnicity of complainants.

Figure 11.24: Proposed performance metrics for Oranga Tamariki

Redrawn from document A174(a), pp 572–573

Figure 11.24 breakdown: Figure 11.24 shows the proposed set of metrics Oranga Tamariki will use to measure their performance towards high level objectives related to the feedback provider experience. These include: quality responses, continuous improvement and accessibility. The CCS operating model aims to be consistent with section 7(2)(bad) and 7(2)(bae) of the Act.

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Data limitations: The first two rows of figure 11.24 already had existing baselines and initial targets as at 28 May 2020. All other rows were estimated to have baselines and targets established in 2020–21.⁶⁸

The CCS IT system went live on 24 February 2020, which means that there has only been a year of data generated, none of which has been released.

68. Document A174(a), p 573

Timeframe policies for	Current	Proposed
Recording and acknowledging complaints	Recorded as soon as possible and acknowledged within two working days of receipt.	Removed or no longer relevant as the CSS IT system automatically sends acknowledgement on receipt of feedback entry.
National Feedback and Complaints Team resolution of complaints	National Feedback and Complaints Team aim to resolve complaints referred to them within 45 working days.	Amend to 20 days, with a caveat that, if required for more complex complaints, we have the option to extend beyond 20 working days.* If the extension is used, we must be in regular contact with the individual regarding the progress of their complaint. It is expected that many complaints will be able to be resolved much more quickly.
Site-based resolution of complaints	Site-based resolution should occur within 15 working days of the concerns being raised.	

* Information and policy guidance around 'complex complaints' will be drafted prior to these changes going live.

Figure 11.25: Proposed changes in policies around complaints management timeframes

Source: document A174(a), pp 573–574

Figure 11.25 breakdown: Figure 11.25 outlines the 2020 proposed changes in policies around complaints management timeframes.

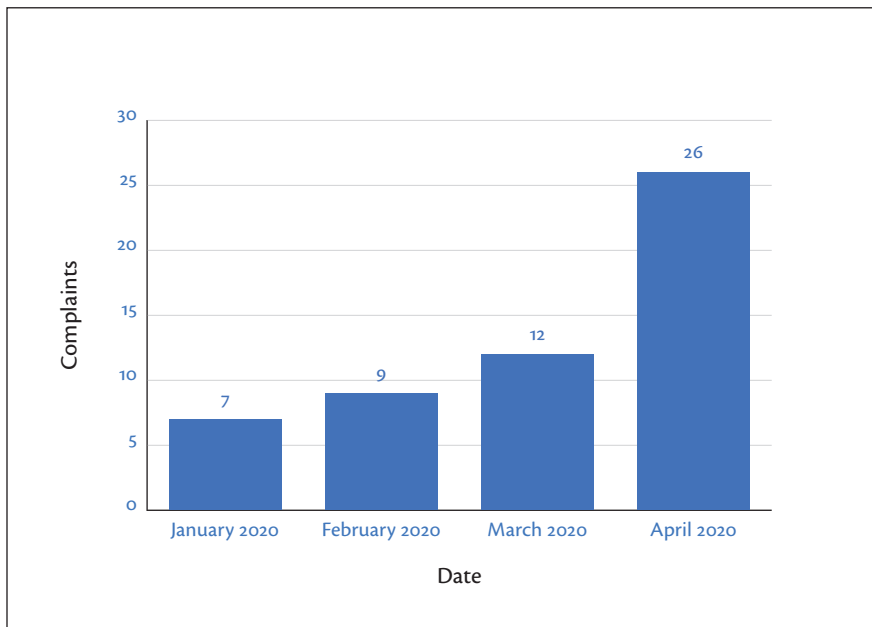
Data limitations: Claims of abuse in care are not subject to the existing or proposed timeframe regarding complaints resolution.⁶⁹

The changes outlined were expected to be implemented from 1 September 2020 onward. The Covid-19 pandemic has created a backlog of complaints work and pressure on sites to undertake work outside of core business functions. As such, the proposed shift in complaints management timeframes has yet to take effect.⁷⁰

69. Ibid, p 573

70. Ibid, p 574

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**Figure 11.26: Number of complaints direct to Ombudsman**

Redrawn from document A174(a), p

Figure 11.26 breakdown: From January to April of 2020, there has been an increase in the number of complaints about Oranga Tamariki that have gone directly to the Ombudsman. This means that the internal complaints management system has been bypassed.

If the trend whereby more complaints are made directly to the Ombudsman continues, Oranga Tamariki may have to dedicate more staff to liaise with the Office of the Ombudsman.

Summary: Proposed policy and practice changes have been shifted in response to the Covid-19 pandemic, which created a complaint backlog.

There is no data currently available on how the policy and practice changes relating to complaints and other accountability mechanisms are affecting disparity.

11.4.2.9 Life outcomes

High rates of removal of tamariki Māori into State care and protection have led many people to describe Oranga Tamariki as a 'gateway into the criminal justice system'.⁷¹

Despite Māori comprising around 16 per cent of the general population, they make up:

- 38 per cent of people proceeded against by police;
- 42 per cent of adults who are convicted; and
- 57 per cent of adults sentenced to prison.⁷²

Similarly, the youth justice populace is largely a subset of the care and protection population.

71. Te Uepū Hāpai i te Ora, *He Waka Roimata: Transforming Our Criminal Justice System* (Wellington: Te Uepū Hāpai i te Ora, [2019]), p 23

72. Ibid

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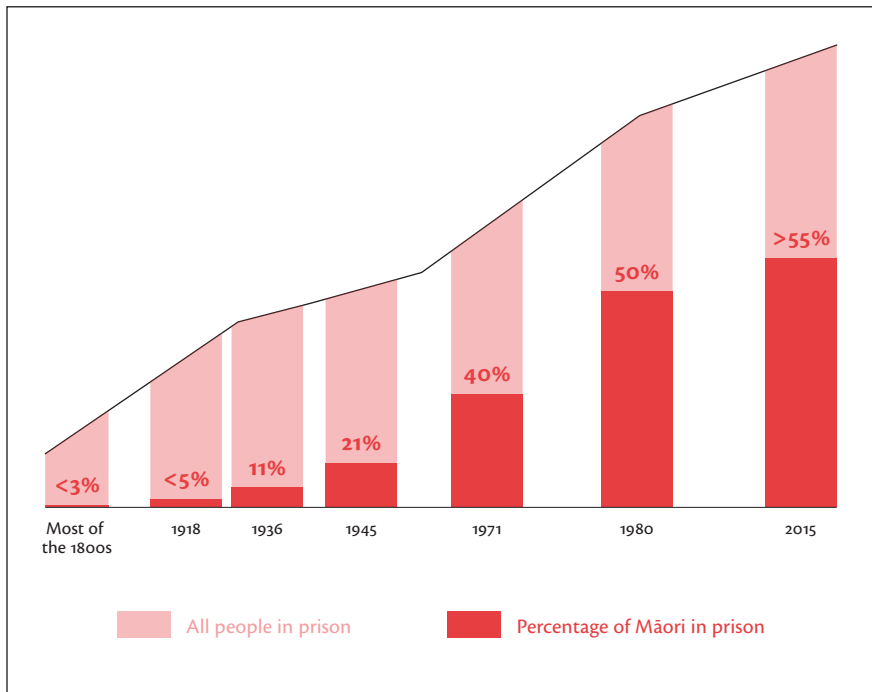


Figure 11.27: Percentage of people in prison who are Māori

Redrawn from Te Uepū Hāpai i te Ora, *He Waka Roimata: Transforming Our Criminal Justice System* (Wellington: Te Uepū Hāpai i te Ora, [2019]), p 23

Figure 11.27 breakdown: Since the signing of the Treaty of Waitangi, the number of Māori incarcerated has continued to rise. As at 2015, more than 55 per cent of the prison population was Māori.

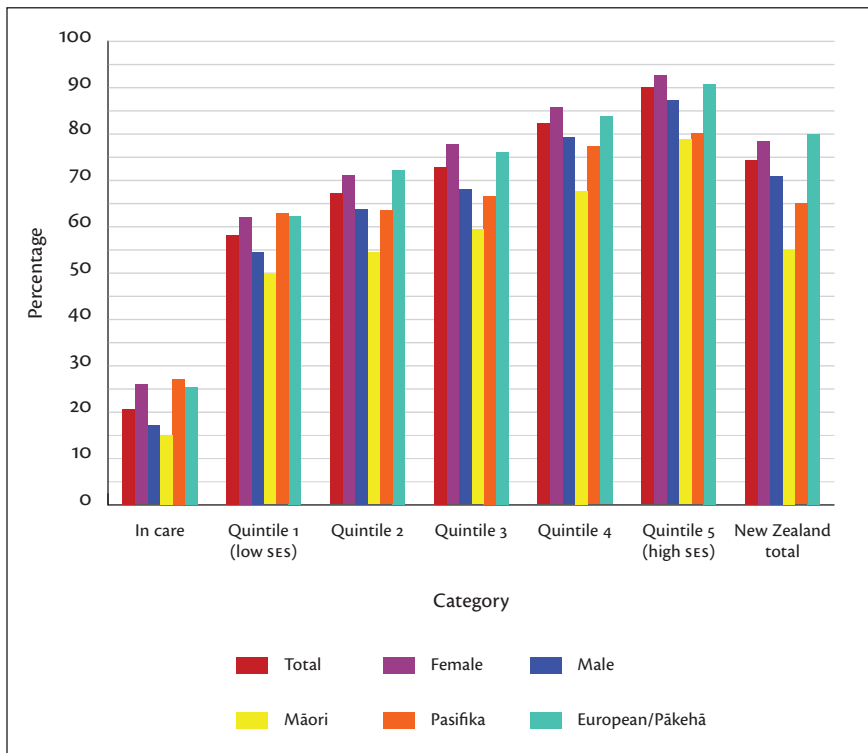


Figure 11.28: Life outcomes

Redrawn from Office of the Children's Commissioner, *State of Care 2015: What We Learnt from Monitoring Child, Youth and Family*, <https://www.occ.org.nz/assets/Publications/OCC-State-of-Care-2015-2.pdf>, p 50

Figure 11.28 breakdown: As at 2012, 80 per cent of children in State care were leaving school without NCEA level 2.

Data limitations: Per the commentary in the State of Care report released in 2015 by the Office of the Children's Commissioner, there is little reliable data about children's outcomes. They noted at the time that CYF's (now Oranga Tamariki's) systems were not set up to measure and aggregate the information that matters.⁷³

The proportion of young people aged 14–17 years who were referred for a Family Group Conference who have previously been the subject of a report of concern to Oranga Tamariki.

73. Office of the Children's Commissioner, *State of Care 2015: What We Learnt from Monitoring Child, Youth and Family*, <https://www.occ.org.nz/assets/Publications/OCC-State-of-Care-2015-2.pdf>, p 46

Appii

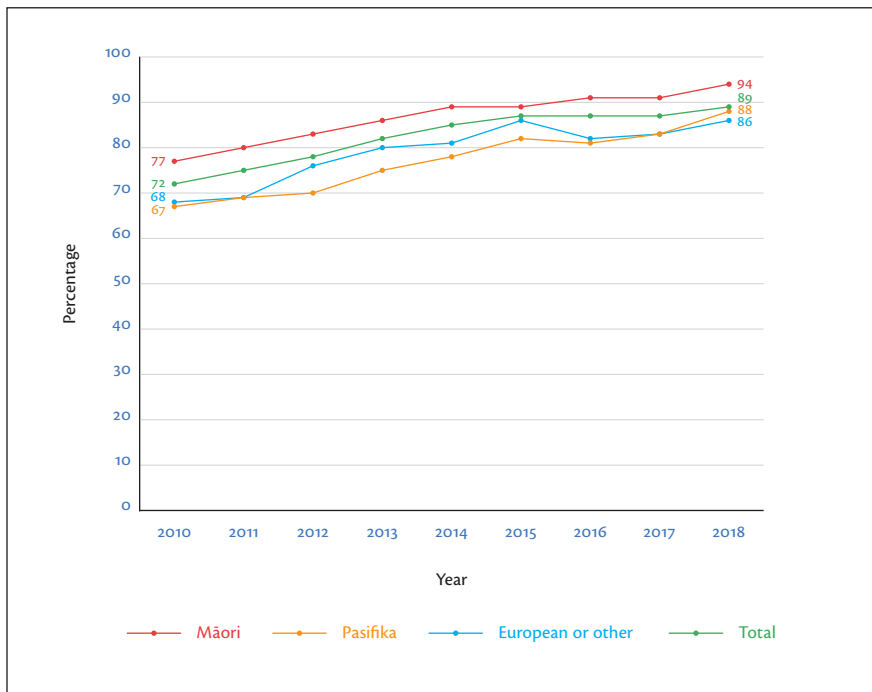


Figure 11.29: Life outcomes

Redrawn from Ministry of Justice, *Youth Justice Indicators Summary Report*, August 2019 (Wellington: Ministry of Justice, [2019]), p 16

Figure 11.29 breakdown: The graph shows that most (88 per cent) of the young people referred for a Youth Justice Family Group Conference from 2010 to 2020 had previously been the subject of a report of concern to Oranga Tamariki relating to their care and protection.

Notably, the percentage of Māori youth who were referred for a Youth Justice Family Group Conference continues to rise following the creation of Oranga Tamariki.

Data limitations: The report notes that, although the proportion has steadily increased from 71 per cent in 2009–10, this does not necessarily mean that young people who offend are more likely to have been subject to abuse. The change may be because there are fewer low-level offenders in the system, so proportionally more Family Group Conferences involve serious or persistent offenders who are more likely to have welfare concerns.⁷⁴

74. Ministry of Justice, *Youth Justice Indicators Summary Report*, August 2019 (Wellington: Ministry of Justice, [2019]), p 16

Summary: At every point in their lives, and generationally, Māori experience disadvantage that increases the number of risks they will come into contact with throughout life.⁷⁵ These include poorer physical and mental health, housing and employment, State care and the criminal justice system. Data indicates that:

- Māori are more likely to have poorer life outcomes;
- Māori are more likely to be taken into State care;
- Māori are more likely to have to participate in a family group conference; and
- Māori are more likely to come into contact with the criminal justice system.

75. Te Uepū Hāpai i te Ora, *He Waka Roimata*, p 23

APPENDIX III

LEGISLATIVE AMENDMENTS

The following legislative amendments to the Oranga Tamariki Act 1989 have been proposed by various witnesses to this inquiry. We believe they merit consideration as part of the reform process recommended in this report.

III.1 TANIA WILLIAMS-BLYTH

Tania Williams-Blyth is a senior legal practitioner with over twenty years' experience in family law. She is the principal of Te Kōpū Legal and director of Te Kōpū Education and Research Ltd. That company is the contracting entity for Te Korimako, who conduct research and deliver legal education for iwi and Māori social service organisations throughout New Zealand. In her evidence, she proposes that:

- ▶ The subsequent children provisions should be repealed.
- ▶ The legislative provision requiring access arrangements to be defined at the time a special guardianship order is made should be repealed.
- ▶ The enabling legislation for the Independent Children's Monitor should be amended to include an explicit requirement for the Children's Monitor to monitor, assess and assure compliance by the chief executive to the duties contained in section 7AA of the Act.
- ▶ Further recommendations concern the Family Court as a critical lever to effect change. A number of recommendations are made in the report *Te Taniwha i te Ao Ture-ā-Whānau: Whānau Experience of Care and Protection in the Family Court*, which was released on Monday 27 July 2020.¹

The Children's Commissioner recommends:

- ▶ Repealing the subsequent child provisions contained in sections 18A to 18D.
- ▶ Amending section 4(e)(i) of the Act to remove references to 'at the earliest opportunity', or at the very least, providing guidance about how to apply this provision.
- ▶ Replacing the word 'preference' with the word 'priority' in section 13(2)(g), so that it is clear priority must be given to placing a child or young person with a member of their wider family, whānau, hapū, iwi or family group.
- ▶ Strengthening the provision for sibling unity in section 13(2)(g) so that a child or young person should be placed with the child or young person's siblings unless, because of exceptional circumstances, this is clearly impracticable.

1. Document A46, p 23

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- Simplifying and harmonising the principles in sections 4, 4A, 5, and 13.
- Explicitly incorporating Te Tiriti o Waitangi into the Act, so that the Act is interpreted and administered to give effect to Te Tiriti o Waitangi.
- Amending section 7AA to oblige the chief executive and department to engage in 'genuine Treaty partnership' with iwi and Māori organisations in the delivery of care and protection services.²

In oral evidence before us the Children's Commissioner (Judge Becroft), also recommended that:

- There should be a child impact assessment for all legislation.³

III.2 MELISSA PYE

Melissa Pye is the Oranga Tamariki site manager at Whakatāne who has been instrumental in establishing a working relationship between that site and Ngāi Tūhoe. In her oral evidence, she noted possible legislative amendments, and we subsequently directed that she provide these in writing. We set out her response in its entirety below. These are Ms Pye's personal views offered to assist. They are not a statement of Oranga Tamariki policy:

List of legislation and policy changes or amendments

I make these statements in my own personal capacity as Site Manager Whakatane and recognise that legislative change is subject to decisions made by Parliament. My main suggestions are focused around ensuring hapū and Iwi are included in decisions in the Oranga Tamariki Act 1989 (the Act), as much as possible. The amendments I set out below could support the following:

- Empower hapū and Iwi to carry out functions – including the issue of delegation of functions along with responsibility/accountability.
- Enable hapū and Iwi to access information in carrying out functions – including enabling hapū and Iwi to be recognised as children's agencies for the pm-poses of the information sharing provisions in the Act.
- Streamline the Principles in the Act to increase ease of understanding.
- Frontline practitioners to interpret the operational functions of the Act and the role of whanau, hapū and Iwi more easily. Certain pieces of legislation are very specific and can be clearly operationalised. For example, Section 5 – General Principle, Part 2 Care and protection of children and young persons, section 7AA.
- Support others that follow the Act, including Crown agencies to more easily interpret its principles.
- Ensure section 7 AA mana tamaiti objectives are more obvious and/or more prominent in the principles.

2. Document A183, pp 92–94, 97

3. Transcript 4.1.4, pp 93–94

Section 15: Reporting of concerns to chief executive or constable

Section 15 does not allow for concerns to be reported to an Iwi Social Service or a hapū or Iwi group so they can work immediately on meeting the concerns.

It prevents the community from recognizing the agencies/Iwi in the community who can work with the concern and therefore, make a direct referral to them.

It does not allow Maori to work directly with Maori, the Crown becomes the first point of call.

Section 17: Investigation of report of ill-treatment or neglect of child or young person

This section of the legislation means that only the Crown can follow up to complete an investigation into a report of ill-treatment or neglect of a child or young person. There is provision in the Act to delegate this function but there is no provision for Maori to follow up or complete an investigation, whether that is an Iwi social service or hapū or Iwi.

The only option if the Crown has care and protection concerns is to then refer the report to the care and protection co-ordinator. Iwi could take on the role of a care and protection coordinator if they choose to.

Section 18AAA: Chief executive may make family group conference available in certain circumstances

This section does not allow for anyone else (whanau, hapū, Iwi, or professionals) to identify that a wellbeing Family Group Conference (FGC) is needed.

This section should be also available for tamariki who have major health and/or disability issues but are not in need of care or protection. In some cases, tamariki and whanau need someone who can pull together and co-ordinate services.

The care and protection co-ordinator does not necessarily need to be the person who must convene the FGC. Although there are delegation powers in the Act, having this piece of legislation changed would mean social workers would not have to find sections of the Act to work differently. There would also be consistency across the country about what could happen. Currently there is room for different interpretations of this section.

Section 18: Referral of care or protection cases to care and protection coordinator or youth justice co-ordinator

If section 15 and 17 were changed, then this part would also need to be changed to include hapū and Iwi to have the ability to refer to a co-ordinator who would not necessarily be employed by the organisation.

Any organisation should have an FGC co-ordinator. Oranga Tamariki uses FGC co-ordinators based outside of Oranga Tamariki, but delegation of this power is the first step.

Section 19: Referral of care or protection cases to care and protection coordinator by other persons or by court

Suggest an addition to the title of 'or hapū or Iwi or Iwi Social Service'.

Section 21: Care and protection co-ordinator to consult family, whanau, or family group on convening of family group conference

This section does not actually specify 'hapū or Iwi' to be included in that group to consult with.

Section 22: Persons entitled to attend family group conference

This section again does not specify 'hapū' and 'Iwi' as entitled members.

Section 24: Care and protection co-ordinator to ascertain views of persons unable to attend family group conference

Hapū and Iwi views are not always considered as part of this because they are not entitled members.

Section 39: Place of safety warrants

Only a constable or Chief Executive can be issued the warrant. A 'person' can be delegated to perform the function. There is the opportunity for the Act to include hapū and Iwi, and therefore enable the Treaty and true partnership.

Section 40: Warrant to remove child or young person

This section does not give power or authority to hapū and Iwi to be able to have this power.

Also, once the tamaiti has been removed the next part states 'and place the child or young person in the custody of the Chief Executive'. This could include 'Or hapū or Iwi or Iwi social service.'

Section 42: Search without warrant

Police should be able to place tamariki with hapū, Iwi, or an Iwi Social Service – not just the Chief Executive. If this legislation immediately stated that, there may be less direct placement of tamariki into Oranga Tamariki care.

Section 43: Placement of child or young person placed in custody of chief executive

This refers to any 'person' 'approved' by the Chief Executive – this does not specify hapū or Iwi. There is also a challenge regarding what constitutes an 'approved person'. The Crown must 'approve' Maori before they can have their tamariki placed with them. This again, does not show regard to the Treaty.

Section 44: Parent or guardian may apply for release of or access to child or young person

Does not allow for the hapū or Iwi to apply for release of or access to the child or young person.

Section 48: Unaccompanied children and young persons

Police should be able to place with hapū, Iwi, Iwi Social Service – not just the Chief Executive. If this legislation immediately stated that, there may be less direct placement of tamariki into Oranga Tamariki care.

Section 68: Application for care or protection order

Hapū and Iwi cannot make applications.

Section 69: Joint applications

This does not allow for a joint application with hapū and Iwi.

Section 79: Persons who may be granted custody under section 78**Section 101: Custody orders****Section 110: Guardianship orders****Section 126: Persons who may apply for variation or discharge of order****Section 139: Agreements for temporary care of children and young persons by chief executive, iwi social services, etc****Section 140: Agreements for extended care of children and young persons by chief executive, iwi social service, etc**

These Sections do not directly mention hapū or Iwi (only iwi social service).

Section 66A: Disclosure of information obtained under section 66

Section 66 does not allow specifically for information sharing between Oranga Tamariki and hapū and Iwi.

Summary

When the legislation does not specifically name hapū and Iwi, there is the possibility that frontline practitioners across Crown agencies do not always consider them. Also, by not specifically naming and identifying the role hapū and Iwi can play in the Act, it leaves the Crown to hold power over Maori. The proposed amendments I offer for consideration would support true 'partnership' in a response to child abuse and a greater opportunity for the Crown to honour the Treaty of Waitangi.⁴

III.3 UARNIE-JANE MORE

Uarnie-Jane More is the acting director for the Treaty Response Unit in the Head Office of Oranga Tamariki. In answer to questions from the Tribunal, she offered the following ideas for possible legislative change or clarification. They are her personal views, offered to assist, and are not a statement of Oranga Tamariki policy.

- Section 113(a) on special guardianship orders, as currently written, is inconsistent with section 7AA as it puts rights of special guardians over those who may have a vested interest in decisions about the tamariki, specifically whānau, hapū and iwi.

4. Document A176(f), pp 3–7

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- In section 66(a), information can be shared with a child welfare agency or an independent person if the chief executive reasonably believes that providing that information will fulfil purposes, however iwi and hapū are not defined as child welfare agencies so it is very difficult to share information.
- The definitions in the Act pose some challenges. For example, 'whānau' is not specifically defined but the specific term 'family group' is.
- The *Puao-te-Ata-tu* recommendations on district executive committees should be considered.⁵

5. Transcript 4.1.9, p [252]

APPENDIX IV

SELECT INDEX TO THE RECORD OF INQUIRY

SELECT RECORD OF HEARINGS

TRIBUNAL MEMBERS

The Tribunal members were Judge Michael Doogan (presiding), Professor Rawinia Higgins, Kim Ngarimu, and Professor William Te Rangiua (Pou) Temara.

HEARINGS

The first contextual hearing was held on 30 and 31 July in the Waitangi Tribunal's offices in Wellington and the second contextual hearing was held on 7 August 2020 in the Waitangi Tribunal's offices in Wellington.

Hearing week 1 was held from 19 to 23 October 2020 at the Vodafone Events Centre in Manukau, Auckland; hearing week 2 was held from 27 to 30 October 2020 at the Hawke's Bay Racing Centre in Hastings; hearing week 3 was held from 25 to 27 November 2020 in the Waitangi Tribunal's offices in Wellington; and hearing week 4 was held on 14 and 15 December 2020 in the Waitangi Tribunal's offices in Wellington.

Closing submissions were heard on 15 and 16 February 2021 in the Waitangi Tribunal's offices in Wellington.

SELECT RECORD OF PROCEEDINGS

* Document confidential and unavailable to the public without leave from the Tribunal

1 STATEMENTS

1.1 Statements of claim

1.1.3 David Stone, statement of claim for Jean Te Huia on behalf of herself, Ngāti Kahungunu, and Māori living in Heretaunga Tamatea, 31 August 2018

(a) David Stone, James Lewis, and Kelly Davis, amended statement of claim for Jean Te Huia on behalf of herself, Ngā Maia Māori Midwives Trust, and Māori parents, children, and whānau impacted by the Oranga Tamariki Act 1989 and the Children's and Young People's Well-being Act 1989, 17 June 2019

1.1.7 Ārama Ngāpō-Lipscombe and Norman Te Kanawa-Gwynne, statement of claim for Noelene Hughes on behalf of herself, her children, and her whānau, 12 November 2019

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1.1.8 Ārama Ngāpō-Lipscombe and Norman Te Kanawa-Gwynne, statement of claim for Denise Messiter on behalf of herself and Te Whāriki Manawahine o Hauraki (Hauraki Māori Women's Refuge Centre), 12 November 2019

1.1.9 Ārama Ngāpō-Lipscombe and Norman Te Kanawa-Gwynne, statement of claim for Vanessa Komene on behalf of herself, her children, and her whānau, 12 November 2019

1.1.10 Ārama Ngāpō-Lipscombe and Norman Te Kanawa-Gwynne, statement of claim for Carra Lindsay on behalf of herself and her whānau, 12 November 2019

1.1.15 Darrell Naden, Siaosi Loa, Stephanie Roughton, and Natasha Hall, seventh amended statement of claim for Te Enga Harris and Lee Harris on behalf of the Harris whānau, 20 December 2019

2 TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS

2.5 Pre-hearing stage

2.5.1 Chief Judge Wilson Isaac, memorandum granting urgency, 25 October 2019

2.5.13 Judge Michael Doogan, memorandum appointing Ophir Cassidy as counsel to assist Wai 2915 Tribunal, 11 March 2020

2.5.14 Judge Michael Doogan, memorandum concerning judicial conference and contextual hearings, 11 March 2020

2.5.17 Judge Michael Doogan, memorandum convening judicial conference and placing chairperson's decision regarding confidential claims on record of inquiry, 29 April 2020

2.5.25 Judge Michael Doogan, memorandum clarifying scope and procedure of inquiry, 18 June 2020

2.6 Hearing stage

2.6.2 Judge Michael Doogan, Kim Ngarimu, and Rawinia Higgins, memorandum concerning approach for remainder of inquiry, 19 August 2020

2.6.8 Judge Michael Doogan, memorandum confirming procedure for closed sessions at October hearings, 25 September 2020

3 SUBMISSIONS AND MEMORANDA OF PARTIES

3.1 Pre hearing stage

3.1.89 Virginia Hardy, memorandum concerning disproportionality, areas of debate, scope of inquiry, hearing process, and confidentiality protocol, 13 May 2020

3.1.168 Matewai Tukapua, memorandum accompanying relationship instruments, 16 September 2020

(a) Matewai Tukapua, comp, relationship instruments, 16 September 2020

3.2 Hearing stage

3.2.75 Matewai Tukapua, memorandum responding to some Tribunal requests for information and seeking extension to respond to remainder, 7 December 2020

3.3 Opening, closing, and in reply

3.3.2 Roimata Smail, opening submissions on behalf of Tureiti Moxon (Wai 2941), 12 October 2020

3.3.3 David Stone, Catherine Leauga, Azania Watene, Dylan Lafaele, and Amber Evans, opening submissions on behalf of Ian Shadrock, Marilyn Stephens, and Tyrone Marks (Wai 2615), 12 October 2020

3.3.4 David Stone, Catherine Leauga, Azania Watene, Dylan Lafaele, and Amber Evans, opening submissions on behalf of Jayell Smith (Wai 2837), 12 October 2020

3.3.7 Siaoisi Loa, Darrell Naden, Meerah Yogakumar, Vanshika Sudhakar, Edwin Greensmith-West, and Maithili Sreen, opening submissions on behalf of Te Enga and Lee Harris (Wai 1531), Mona Vercoe (Wai 2863), and Tasilofa Huirama (Wai 2890), 15 October 2020

3.3.8 Season-Mary Downs, Chelsea Terei, Heather Jamieson, and Huhana Rolleston, opening submissions on behalf of Rewiti Paraone, Kevin Prime, Erima Henare, Pita Tipene, and Waihoroi Shortland (Wai 682), Te Riwhi Whao Reti, Hau Hereora, Romana Tarau, Karen Herbert, and Edward Cook (Wai 1464, Wai 1546), and Charlie Tawhiao (Wai 2955), 15 October 2020

3.3.9 David Stone, Catherine Leauga, Azania Watene, Dylan Lafaele, and Amber Evans, opening submissions on behalf of Jean Te Huia (Wai 2823), 15 October 2020

3.3.11 Kelly Dixon and Aroha Herewini, opening submissions on behalf of Dallas Pickering (Wai 2954), 15 October 2020

3.3.12 Donna Hall, Lyndon Rogers, and Jesil Cajes, opening submissions on behalf of the New Zealand Māori Council (Wai 2957), 15 October 2020

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3.3.18 Donna Hall, Lyndon Rogers, and Jesil Cajes, closing submissions on behalf of the New Zealand Māori Council (Wai 2957), 29 January 2021

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- 3.3.30** David Martin Stone, Catherine Leauga, and Azania Watene, specific closing submissions on behalf of Ian Shadrock, Marilyn Stephens, and Tyrone Marks (Wai 2615), 2 February 2021
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- 3.3.32** Kelly Dixon, Aroha Herewini, and Amy Chesnutt, joint closing submissions on behalf of Dame Aroha Reriti-Crofts (Wai 2959) and Thomas Harris (Wai 2954), 2 February 2021
- 3.3.33** Annette Sykes and Camille Houia, joint closing submissions on behalf of Dr Rawiri Waretini-Karena, Alison Green, and Kerri Nuku (Wai 2891) and Donna Huata (Wai 2494), 4 February 2021
- 3.3.34** Rachael Schmidt-McCleave, Matewai Tukapua, and Tessa Didsbury, closing submissions on behalf of the Crown, 9 February 2021
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- (b) Table of recommendations sought and Crown responses, [9 February 2021]
- 3.3.35** Janet Mason, joint closing submissions on behalf of David Potter and Andre Paterson (Wai 996), Titewhai Harawira, Benjamin Pittman, and Hinewhare Harawira (Wai 1427), Louisa Collier (Wai 1541, Wai 1573, Wai 1673, Wai 1681, and Wai 1917), Jane Te Korako and Te Rungapu (Ko) Ruka (Wai 1940), Te Amohia McQueen and Albert McQueen (Wai 2118), Beverley Reweti (Wai 2850), Cletus Maanu Paul, Raymond Hall, Desma Ratima, Diane Black, and Rihari Dargaville (Wai 2936), Raewyn Kapa (Wai 2945), Henare O'Keefe (Wai 2946), TK (Wai 2962), DC (Wai 2963), AB (Wai 2964), EM (Wai 2965), RC (Wai 2966), KM (Wai 2967), ZO (Wai 2968), TS (Wai 2969), SP (Wai 2970), SJ (Wai 2971), LI (Wai 2972), JA (Wai 2973), JF (Wai 2974), PA (Wai 2975), HR and RK (Wai 2976), CD and KD (Wai 2978), BK (Wai 2979), and AP (Wai 2980), 9 February 2021
- 3.3.36** Roimata Smail and Erin James, submissions in reply on behalf of Lady Tureiti Moxon (Wai 2941), 12 February 2021
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