THE ORANGA TAMARIKI (SECTION 7AA) URGENT INQUIRY REPORT

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Pre-publication Version

WAI 3350

WAITANGI TRIBUNAL REPORT 2024

ISBN 978-1-7385974-4-4 (PDF)

www.waitangitribunal.govt.nz
Typeset by the Waitangi Tribunal
Published 2024 by the Waitangi Tribunal, Wellington, New Zealand
28 27 26 25 24 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

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Minister of Justice

Parliament Buildings
WELLINGTON

29 April 2024

E ngā Minita

E hika mā, tēnā koutou i roto i ngā whakamātautau o te wā e whakapātaritari nei i tā tātau noho tahi. Anei rā tā mātau pūrongo whawhati tata e tukua atu nei ki a koutou, hei arotake mā koutou i ōna hua, aha ake rānei. Kua oti i a mātau te tuhi mō tēnei wāhanga i runga i ngā tini whakaaro i tukua mai e ngā kaikerēme, e ngā kaiwhakaaro nui ki te kaupapa o ngā tamariki. Kāore he kaupapa nui atu i ā tātau tamariki i te mea ki te kore he tamariki, ka ngaro te iwi. Me waiho noa tērā whakaaro ki ngā pakitara o te ngākau mau ai i tēnei wā, i te mea taro ake nei ka whakanuitia atu te whakaaro.

He oi e ngā Minita.

We enclose an interim report concerning the proposed repeal of section 7AA of the Oranga Tamariki Act 1989. We explain in the report why we

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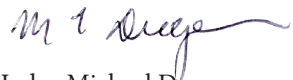
MINISTRY OF JUSTICE
Tāhū o te Ture

have decided to report at this time. As it is an interim report, we make no findings or recommendations, but there are three important matters that we feel we must draw to the attention of the government now. They include issues concerning implementation of a commitment in a coalition agreement and the constitutional significance of the Treaty of Waitangi. It is for this reason that this interim report is also respectfully directed to the Prime Minister, Attorney-General, and Minister of Justice, as well as the relevant portfolio Ministers.

Child protection law is complex, emotive, and difficult to get right. Changes to the law call for the utmost care and attention.

With this in mind, we commend this interim report to you for consideration.

Nāku noa, nā



Judge Michael Doogan
Presiding Officer

ABBREVIATIONS

ACT	Association of Consumers and Taxpayers
doc	document
ltd	limited
p, pp	page, pages
RIS	regulatory impact statement
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the index to the Wai 3350 record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

REPORT

1.1 What is at Issue?

This inquiry responds to claims submitted to the Waitangi Tribunal under urgency regarding the Crown's policy to repeal section 7AA of the Oranga Tamariki Act 1989. Section 7AA imposes specific duties on the Chief Executive of Oranga Tamariki so as to provide a practical commitment to the principles of the Treaty of Waitangi. It was introduced by the then National government in 2017. A key policy objective of section 7AA was reducing the disproportionate number of Māori entering into care, together with a focus on improving outcomes for those tamariki in care. Under section 7AA, iwi or Māori organisations may enter into a strategic partnership with the Chief Executive. There are 10 strategic partnership agreements under section 7AA in place, as well as nine relationships with Post Settlement Governance Entities, some of whom are also strategic partners.

Claimants and interested parties argue the repeal of section 7AA itself, and the absence of consultation with Māori and the Crown's strategic partners, is in breach of the Crown's Treaty duties. In August 2020, the Māori Women's Welfare League entered into a section 7AA strategic partnership agreement with Oranga Tamariki. They particularise the prejudice arising from the proposed repeal of section 7AA as follows:

> 49. The repeal will increase the probability of negative outcomes for Māori children in care who comprise the majority of children in care.
> 50. It will eliminate the only statutory lever the Claimants have to hold Oranga Tamariki accountable for practising in a way that is consistent with the principles of te Tiriti o Waitangi.
> 51. Repealing section 7AA, without any indication of what will replace it or how actions undertaken in reliance of section 7AA will be addressed, exposes the vulnerability of strategic partners (and Māori) to unilateral changes in Oranga Tamariki policy or practices, and risks to Māori who are seeking to exercise rangatiratanga and/or seeking to act in partnership with the Crown.
> 52. The repeal of section 7AA will result in the removal of the primary legal mechanism in child protection legislation for recognising and providing a practical commitment to the Crown's obligations under te Tiriti o Waitangi.[1]

1.1.1 Why we are releasing this interim report

On 26 April 2024, Crown counsel advised that officials are working towards Cabinet making decisions about the introduction of the Bill between 9 and 13 May.

1. Amy Chesnutt and Alisha Castle, amended statement of claim filed on behalf of Druis Barrett, the Māori Women's Welfare League, and all wāhine Māori, 17 January 2024 (Wai 2959 R01, claim 1.1.1(d)), paras 49–52

Counsel went on to advise that it is not possible to be definitive as to the earliest date on which the Bill may be introduced because the decision remains one for Cabinet to make. We were also advised that it is not possible to provide the Tribunal with at least two working days' notice of the government's intention to introduce the Bill because, once a decision is made to introduce a Bill, the process allows for that introduction to occur swiftly, and within the two-day notice period we had requested. In light of the possibility that the Bill may soon be introduced, we think this is the right time to raise three matters with the government in the hope they may consider them before taking final decisions on how to proceed. As this is an interim report, we make no findings or recommendations. We will continue with our inquiry on the basis of the advice from Crown counsel that the Bill is unlikely to be introduced before 13 May 2024. Unless and until advised otherwise, we will proceed on the basis that we must conclude our urgent inquiry and report on or before 12 May 2024.

We are conscious that matters in relation to evidence from the Minister are currently before the Court of Appeal. We say nothing in this interim report about that issue and will await the outcome of that proceeding.

1.1.2 The focus of this interim report

There are three matters we wish to raise.

First, we are concerned that the government's singular focus on implementation of a commitment made in one of the coalition agreements has caused it to disregard its obligations under the Treaty of Waitangi, and this needs to be corrected before proceeding further. The second is a concern that this rushed repeal of section 7aa will cause actual harm. The third is to draw to the government's attention a more principled way forward, already available under the Act. This is the periodic review of the legislation and policy provided for in section 448b of the Oranga Tamariki Act 1989.

These are matters we will report on in more detail as and when we have the opportunity to do so.

We begin by briefly outlining the nature of our inquiry, the parties, and our process. In order to place the nature of our concerns in context, we then provide a brief overview of the origins of the policy to repeal section 7aa in the National – act coalition agreement and the central aspects of the policy process since the coalition government was formed. We focus in particular upon the Cabinet paper and the regulatory impact statement (ris). We touch on the origins of the policy to repeal section 7aa that predate the formation of the current government because this is necessary to make sense of what has transpired since the coalition government was sworn in. We accept that it is not our role to inquire into the policy positions adopted by political parties outside of government. However, we do need to describe these events as matters of necessary context. We then review the evidence concerning the Cabinet paper and the ris in order to demonstrate why we have a concern that the government's Treaty duties have not been properly addressed.

1.1.3 Background – section 7aa of the Oranga Tamariki Act 1989

In 2017, Oranga Tamariki – Ministry for Children was established as a stand-alone ministry and the successor to the Department of Child, Youth and Family. The then National government made a number of amendments to the Oranga Tamariki Act 1989, including the insertion of section 7aa. It came into effect in 2019. The Minister responsible for introduction of section 7aa, the Honourable Anne Tolley, said at the third reading of the Bill:

> We know that 6 out of 10 children in care are Māori, and young Māori are over-represented in the youth justice system. This legislation specifically seeks to improve outcomes for Māori. It places a set of duties on the Chief Executive to give a practical commitment to the principles of the Treaty of Waitangi, including an obligation to seek to develop strategic partnerships with iwi and Māori organisations. And it requires regular public reporting on how well we are improving these outcomes for young Māori.[2]

Section 7aa provides:

> **7aa Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)**
> (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:

2. Honourable Anne Tolley, Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill and Vulnerable Children Amendment Bill, third readings, 6 July 2017

(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.[3]

1.2 The Claimants, their Claims, and the Interested Parties

On 26 March 2024, the Tribunal Deputy Chairperson Judge Sarah Reeves granted urgency to the following three claims:

- Verna Te Rohe Gate on behalf of Ngāti Pukenga and Ngā Potiki (Wai 3309);
- Druis Barrett on behalf of Te Ropu Wahine Maori Toko i te Ora/the Maori Women's Welfare League Incorporated, its members, and all wāhine Māori of Aotearoa (Wai 2959); and
- Rewiti Paraone, Erima Henare, Pita Tipene, and Waihoroi Shortland on behalf of Te Rūnanga o Ngāti Hine (Wai 682).

Leave was also granted to 29 parties to participate as interested parties. They are listed in an appendix to this report.

On 27 March 2024, the Tribunal Chairperson Chief Judge Caren Fox appointed Judge Michael Doogan, Ahorangi Tā Pou Temara, and Kim Ngarimu as the panel to inquire into these urgent claims. Aside from Professor Rawinia Higgins, who is currently not available, this is the same panel which earlier inquired into the significant and consistent disparities between the number of tamariki Māori and non-Māori children being taken into state care under the auspices of Oranga Tamariki and its predecessors. Our report on this issue and the extent to which the legislative changes, including section 7aa, would change the disparities for the better was released in April 2021.[4]

3. Oranga Tamariki Act 1989, s 7aa
4. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021)

1.3 Our Process

We held a judicial conference with the parties on 3 April 2024 and conducted a one day hearing, held in Wellington on 12 April 2024. At the hearing, we heard evidence from the following Crown officials: Oranga Tamariki's Deputy Chief Executive System Leadership, Phil Grady; the Deputy Chief Executive Quality Practice and Experiences, Nicolette Dickson; and the Acting Chief Executive, Darrin Haimona.

We note that Oranga Tamariki's Chief Executive Officer, Chappie Te Kani, was not able to appear but did provide a brief of evidence in response to a separate series of questions directed to him by the Tribunal.[5]

1.4 The Origins of the Policy

1.4.1 The Oranga Tamariki (Repeal of Section 7aa) Member's Bill, 2023

In July 2023, ACT list member of Parliament Karen Chhour introduced a Member's Bill to the House of Representatives. During debate of the Oranga Tamariki (Repeal of Section 7aa) Amendment Bill, Ms Chhour argued section 7aa creates a conflict for Oranga Tamariki between honouring the Crown's Treaty duties and making decisions in the best interests of the child.[6] In the Bill's general policy statement, she claimed Treaty duties are not child-centric and section 7aa has had unintended damaging consequences, including the reverse uplifts of children.[7]

Then National Party spokesperson for Children/Oranga Tamariki, Harete Hipango, referred to section 4a of the Oranga Tamariki Act, which stipulates that in all matters (including section 7aa), 'the well-being and best interests of the child or young person are the first and paramount consideration'.[8] She stated the National Party supported a principled policy making process whereby the Bill would reach Select Committee and receive public submissions. However, as Ms Hipango explained, the National Party did not support the total repeal of section 7aa: 'If the National Party gets into government, we would not be repealing it, but we would look at amending this'.[9] Then National Party spokesperson for Māori Development, Tama Potaka, voiced his support for this position, stating the main problem was not section 7aa itself, but the misinterpretation and misapplication of it. During the debate, he stated '[i]t would be contradictory of us to dismiss this provision entirely, which is intended to be a genuine option to address and meet the best interests of the child in State care'.[10] The Bill was voted down and did not pass its first reading.

5. Memorandum 2.5.3
6. 'Appendix a: Parliamentary Debates on Repeal of s7aa and the Oranga Tamariki (Repeal of Section 7aa) Amendment Bill 2023' (submission 3.1.24(a)), pp [10]–[12]
7. Ibid, p [24]
8. Ibid, p [14]
9. Ibid
10. Ibid, pp [20]–[21]

After the Bill was voted down, Ms Chhour issued a press release which concluded with the following:

> Oranga Tamariki's governing principles and its act should be colour blind, utterly child centric and open to whatever solution will ensure a child's wellbeing. My members bill would have insured this, placing more value on the best interests of the child rather than the Treaty.[11]

1.4.2 The National–ACT coalition agreement

Following the General Election held on 14 October 2023, the New Zealand National Party entered into coalition agreements with the ACT New Zealand Party and the New Zealand First Party. The National and ACT coalition agreement, dated 24 November 2023, includes a commitment that in this parliamentary term the coalition government will progress the ACT party's policy to:

- remove section 7AA from the Oranga Tamariki Act 1989;
- create a truly independent monitoring and oversight agency for Oranga Tamariki;
- improve the rights and responsibility of caregivers to give them more autonomy; and
- increase devolution of care decisions to relevant community organisations.[12]

On 27 November, the formal swearing-in of the new coalition government was held at Government House. The Honourable Karen Chhour was sworn-in as Minister for Children, with the portfolio sitting outside of Cabinet.

1.5 The Preparation of the Cabinet Paper Recommending the Repeal of Section 7AA

On 15 December 2023, the policy team within Oranga Tamariki's System Leadership group provided Minister Chhour initial advice on options for repealing section 7AA.[13] We do not cover that advice here, but note we heard Minister Chhour advised Oranga Tamariki Chief Executive Chappie Te Kani at this stage that she did not support options other than a full repeal. Mr Te Kani then instructed the Deputy Chief Executive System Leadership, Phil Grady, to initiate the repeal process.[14] On 12 February, Minister Chhour signalled her preference for the Bill to undergo six months consideration by Select Committee.[15]

1.5.1 The Cabinet paper

In a Cabinet paper dated 19 March, and lodged with the Cabinet Social Outcomes Committee on 27 March, the Minister for Children sought agreement to draft a

11. Karen Chhour, 'Labour Refuses to Put Children First', press release, 26 July 2023
12. Memorandum 3.1.14
13. Philip Albert Grady, affidavit, 10 April 2024 (doc A23), p 2; Te Hapimana Te Kani, affidavit, 10 April 2024 (doc A21), p 2; Crown bundle of documents (doc A26(b)), p 1
14. Te Hapimana Te Kani, affidavit, 10 April 2024 (doc A21), p 2
15. Crown bundle of documents (doc A26(b)), p 12

Bill to repeal section 7AA of the Oranga Tamariki Act on the grounds that section 7AA:

> has created a conflict between the requirement to make decisions in the best interests of the child and places duties on the Chief Executive of Oranga Tamariki to organise the department around a relationship between the Crown and signatories of the Treaty of Waitangi.[16]

The Minister claimed that the duties placed on the Chief Executive divert Oranga Tamariki's focus away from ensuring their services are entirely 'child-centric'. Further, the Minister stated there was concern from 'prominent individuals' that section 7AA may be influencing practice decisions to the detriment of the safety of Māori children, including through changes to long-term care placements.[17] She claimed the individual needs of the child are not being prioritized because 'Section 7AA creates a system that treats children and young people as an identity group first and a person second'.[18]

A further concern addressed in the Cabinet paper was the possibility of unintended consequences on caregivers. The Minister said that some caregivers had suggested that under section 7AA, culturally appropriate environments are valued more than children's welfare. In her view, tamariki Māori were being removed from 'safe and loving homes because the caregivers were deemed the wrong ethnicity'. As a result, Minister Chhour stated her intention for repealing section 7AA was to 'improve the rights and responsibilities of caregivers, giving them more autonomy and making it easier for caregivers to offer safe and loving homes for children'.[19]

The Cabinet paper argued that Oranga Tamariki will not be stopped from considering the cultural wellbeing of children and young people. The principles listed under section 5 of the Act (these include mana tamaiti, whakapapa, and whanaungatanga) would continue to guide decisions, and section 4 which outlines the purposes of the Act – including providing a practical commitment to the principles of the Treaty of Waitangi – would not be altered. The ministry would also still be obliged to meet its general Treaty obligations in the development of policies, practices, and services, as required by all Crown agencies. In addition, strategic partnerships with iwi and Māori organisations would continue, with the ability to enter into further agreements unaffected.[20]

The Cabinet paper noted that the repeal would remove the statutory requirement to set and report on measurable outcomes for Māori. Minister Chhour acknowledged that these duties were not reflected in other parts of the Act and a repeal 'could be seen as a reduction in responsibility'. The Minister instead suggested additional measures could be added to the Oranga Tamariki's Annual

16. Ibid, p 72
17. Ibid, pp 71, 72–73
18. Ibid, p 69
19. Ibid, p 72
20. Ibid, pp 73–74

Report (which she noted presently covers 'two impacts specific to tamariki Maori'), and that doing so would 'provide assurance that disparities are continuing to be addressed'.[21]

In their feedback on the paper provided to Oranga Tamariki officials on 26 February 2024, Te Puni Kōkiri did not support the proposal to repeal 7AA, because it 'is highly likely to undo the significant progress that has been made to reduce the disproportionate number of tamariki and rangatahi Māori in the care of the state'. Te Puni Kōkiri noted that considerations towards the cultural needs of children in care and protection, are 'essential ingredients' to their success and wellbeing. Te Puni Kōkiri cautioned that alterations to such a significant piece of legislation must rely on evidence and should be informed by community engagement and consultation.[22] Te Puni Kokiri also said in feedback that a major impact of the repeal of section 7AA would be the further erosion of trust:

> Many people within Oranga Tamariki and Iwi and Māori organisations have been working hard to restore trust through partnership agreements. The repeal of section 7AA would not only remove a mechanism of transparency and accountability that is sorely needed but is highly likely to have a serious impact on trust in Oranga Tamariki to do its best for tamariki Māori. While your paper argues that there are other provisions to address the care of tamariki, the repeal is highly likely to have a real impact, but also a symbolic and emotional impact that will undermine the small but important gains your organisation has achieved.[23]

The Cabinet paper concluded with recommendations to the Cabinet Social Outcomes Committee:

> The Minister for Children recommends that the Committee:
> 1. note the Coalition Agreement between the National Party and the Act Party includes the agreement to remove section 7AA from the Oranga Tamariki Act 1989 to ensure better public services are delivered;
> 2. agree to the repeal of section 7AA of the Oranga Tamariki Act 1989 and any consequential amendments;
> 3. authorise the Minister for Children to further clarify and develop minor and technical policy matters in a way not inconsistent with these Cabinet decisions;
> 4. invite the Minister for Children to issue drafting instructions to the Parliamentary Counsel Office to give effect to recommendation 2.[24]

It is unclear if the Minister turned her mind to the Treaty implications when approving the Cabinet paper. The available evidence suggests she did not.

21. Crown bundle of documents (doc A26(b)), pp 73–74
22. Ibid, p 76
23. Ibid, p 42
24. Ibid, p 77

However, as Mr Grady acknowledged in hearing, officials received no guidance or instruction from the Minister about the Treaty consistency of the policy. He went on to say that Treaty considerations were not a feature of the paper: '[t]here wasn't a discussion around the te Tiriti elements.'[25]

Mr Grady was then asked if it was possible that from the time the Minister made the decision in December 2023 that the policy would be a full repeal and no other option was to be considered, from that point onwards the Minister simply did not turn her mind to the question of the consistency of the policy with the Treaty and its principles. Mr Grady responded: 'Yes, I would agree that that prospect it looks possible, yes.'[26]

1.5.2 The regulatory impact statement

A regulatory impact statement (RIS) on the proposed repeal of section 7AA prepared by Oranga Tamariki staff accompanied the 19 March Cabinet paper. Unlike the Cabinet paper, which reflects the Minister's policy, intention, and voice, the RIS is an opportunity for officials to provide independent analysis and free and frank advice to Cabinet. The RIS specifically addressed the consistency of the repeal with the principles of the Treaty of Waitangi. We repeat the relevant section in full:

> Repealing Section 7AA removes the duties imposed on Oranga Tamariki to recognise and provide a practical commitment to the principles of the Treaty. The repeal goes against evidence that highlights:
>
> - Section 7AA has led to strategic partnerships with iwi and Māori organisations to provide early support, which has prevented Māori from entering the Care and Protection system, improving long-term outcomes. This also reduces disparities between Māori and non-Māori in care and reduces disparities down the line.
> - The duty in section 7AA(2)(b) has supported tamariki and rangatahi Māori to connect with their culture and develop a positive sense of identity which protects against adversity and supports long-term well-being.
> - The introduction of section 7AA has also played a pivotal role in strengthening trust and relationships between Oranga Tamariki and Māori. Repealing section 7AA is not consistent with the Treaty of Waitangi.
>
> The principles outlined in section 7AA play an important role in reducing levels of inequity between Māori and non-Māori in care. While strategic partnerships would continue to drive down disparities in the absence of section 7AA, other statutory requirements, such as setting measures to reduce inequities and report publicly on progress in achieving these would be removed. Without replacing these accountabilities and reporting mechanisms after a repeal, work to reduce inequities may slow. This could have a material impact on the safety, stability, rights, needs and long-term well-being of children with whom we interact.[27]

25. Transcript 4.1.2, p 48
26. Ibid
27. Crown bundle of documents (doc A26(b)), pp 96–98

The RIS concluded that neither a full repeal, nor a partial repeal would address the policy problem identified and recommended that the government retain section 7AA and continue to strengthen practice and operational guidelines. The RIS also concluded that the repeal of section 7AA would be worse than the status quo.[28]

The RIS also highlighted that '[t]here is no empirical evidence to support the notion that section 7AA has driven practice decisions that have led to changing care arrangements'. Internal evaluation by Oranga Tamariki also suggested that 7AA had not explicitly influenced care decisions.[29] In hearing, Mr Grady confirmed his opinion that at its highest the evidential base for the repeal of section 7AA for this reason was purely anecdotal.[30] Indeed, evidence held by the ministry demonstrated that the problem identified by the Minister, was more likely caused by individual staff practice.[31] As Mr Grady emphasised, 'we were very clear in the RIS . . . that that the problem that we needed to fix was related to social work practice, related to individual social workers', and that repealing section 7AA 'was not the mechanism to fix the policy question'.[32]

Officials noted progress to address disparities experienced by tamariki Māori in care and protection:

> Changes introduced in Oranga Tamariki that resulted from the introduction of 7AA have been effective at reducing some of the disparities and inequities experienced by tamariki, rangatahi, and whānau Māori. There has also been considerable progress as a Department towards honouring the principles of the Treaty of Waitangi through the current practice approach and operating model.[33]

The RIS also raised the significance of section 7AA to developing strategic partnership arrangements with iwi and Māori. The statement noted '[s]ome of our strategic partners have emphasised that without section 7AA they would not have been taken seriously by the Department in terms of their experience of the system and their decades-long expertise in working with tamariki and whānau'.[34] Officials advised that, in their view, 'non-regulatory changes, such as further strengthening of practice guidelines, would better address the problem' identified by the Minister.[35]

Officials noted the scope of policy options the ministry could consider was necessarily constrained 'by the Government's commissioning'[36] (direction). '[t]he Minister has directed us to prepare for the repeal of section 7AA, and as such, we are unable to provide detailed analysis regarding non-regulatory options which we

28. Crown bundle of documents (doc A26(b)), pp 79, 100
29. Ibid, p 87
30. Transcript 4.1.2, p 36
31. Crown bundle of documents (doc A26(b)), p 79
32. Transcript 4.1.2, p 35
33. Crown bundle of documents (doc A26(b)), p 86
34. Ibid
35. Ibid
36. Ibid, p 90

believe would better address the perceived problem. Nor do we consider alternative potential legislative options'.[37] It further noted tight timeframes had meant officials were 'unable to undertake public consultation with affected stakeholders'.[38] This engagement is 'considered critical for the success of this organisation [Oranga Tamariki] and has played a vital role in previous legislative reforms', including the development of proposal that led to the introduction of section 7aa.[39] And,

> [g]iven the Minister's intention to progress the legislative process without public consultation except through the select committee process, there is likely to be a strong response among Māori, with a significant risk for eroded trust and relationships between the Department [Oranga Tamariki] and whānau, hapū and iwi Māori.[40]

The RIS also noted the limited timeframe to prepare the paper had prevented consideration of 'a wide range of robust evidence regarding the impact of a repeal of section 7aa', or the impact of the repeal on the Youth Justice system.[41]

Crown witnesses acknowledged the risks of a rushed process, imposed by the Minister, noting that 'making any particular legislative change needs time and careful consideration [of] the full impacts not just for the impacts for today but the impacts downstream'. Official advice was hampered by the time pressure and Oranga Tamariki was unable to fully consider the risks or downstream impacts.[42] Mr Grady commented '[i]t seems to me there are gaps about how this repeal might interact with other future amendments that may or may not be planned for the Act and we've got no sense of what shape they may take and what that interaction might be.' The wider risk is that Oranga Tamariki will no longer have the mechanisms in place to reduce disparities for tamariki Māori.[43]

A key risk identified in the RIS was the affect a repeal of section 7aa would have on confidence and trust in Oranga Tamariki. Officials said:

> a full repeal is likely to diminish confidence and trust in the Department in the communities for whom sustaining trust is most critical. Because these communities are among our most marginilised and express low levels of trust in public services already, a full repeal risks increasing long-term mistrust and disengagement in our services.
>
> As such, we consider that repealing section 7aa in its entirety may worsen long-term public confidence in Oranga Tamariki overall.[44]

At the hearing, Mr Grady was asked about the pivotal role section 7aa has played in strengthening trust and relationships between Oranga Tamariki and

37. Ibid
38. Ibid, p 79
39. Ibid, p 90
40. Ibid, p 79
41. Ibid, pp 80, 90
42. Transcript 4.1.2, p 24
43. Ibid, pp 23–25
44. Crown bundle of documents (doc A26(b)), p 96

Māori. He was asked whether it would be fair to say that a repeal is likely to be highly prejudicial to that work or to the continuity of that work. Mr Grady responded: 'I certainly do. You know, to the continuity of that work, yes that would be fair to say.'[45]

Mr Grady was also asked about the following sentence in the RIS: 'without replacing these accountability and report mechanisms after a repeal, work to reduce inequities may slow. This could have material impact on the safety, stability, rights, needs, and long term wellbeing of children with whom we interact.'[46]

Mr Grady was asked: 'That seems like a very, very significant risk and as I understand it, it's a risk the Minister and Cabinet simply do not appear to have turned their minds to. Is that a fair assessment? And Mr Grady responded: 'That would be a fair assessment.'[47]

Finally, with respect to the RIS Mr Grady was asked whether the position of Oranga Tamariki differed in any material way from the advice earlier provided by Te Puni Kōkiri which stated: 'We argue strongly that any policy change of such a significant piece of legislation such as the repeal of section 7AA must rely on evidence and not on anecdotal evidence, hearsay, and ideological positions and be informed by community consultations.'

Mr Grady confirmed that there was no material difference and that this is what was reflected in the RIS, noting that the positions of the two departments were 'well aligned.'[48]

Considering the gaps in the Treaty consistency of the process leading to Cabinet's decision to repeal section 7AA, Mr Grady said 'there could have been and should have been much more consultation and engagement, particularly with iwi Māori and particularly with our strategic partners.'[49]

1.5.3 Cabinet agreement

On 27 March, the Cabinet paper and regulatory impact statement were lodged with the Cabinet Social Outcomes Committee. The Committee agreed to the recommendations set out in the Cabinet paper.[50]

1.6 A Pause to Consider the Treaty and the Risk of Harm

As a panel, we had the opportunity in 2020 and in early 2021 to examine closely the legislative and policy settings for Oranga Tamariki. We released our report in April 2021 and it is available to government.[51]

In that report, we set out in detail why the article two guarantee to Māori of tino rangatiratanga over kainga is central. We reviewed the evolution of the care and

45. Transcript 4.1.2, p 49
46. Crown bundle of documents (doc A26(b)), p 98
47. Transcript 4.1.2, p 49
48. Ibid, pp 71–72
49. Ibid, pp 22–23
50. Crown bundle of documents (doc A26(b)), p 107
51. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua*

protection system in New Zealand, the causes of disparity between the number of Māori and non-Māori tamariki entering care and looked closely at whether the changes to policy, practice and legislation introduced since 2017 would be sufficient to achieve consistency with the Treaty. We specifically looked at section 7aa and its place in the legislative and policy settings. We agreed with the Crown that section 7aa is for all intents and purposes, Oranga Tamariki's Treaty clause. We also accepted arguments advanced by a number of parties that the Treaty policy reflected in the Oranga Tamariki Act needed to be simplified and clarified. Proposals for legislative change that we considered merited consideration were included as an appendix to our 2021 report.

In short, we do not take issue with the idea that policy and legislation in this difficult and complex area should be reviewed or amended as necessary to ensure that it is achieving the policy intent. But not like this.

To the extent that the policy has arisen as a result of the Minister's concerns about cases known as 'reverse uplifts', we share the Minister's concerns and said so in our 2021 report.[52]

A key problem we see with the government's decision to repeal section 7aa is that it has come about without proper regard to its obligations to Māori under the Treaty of Waitangi. The evidence suggests this is due to a belief or assumption on the part of the government that the coalition agreements that lead to its formation override or take precedence over the Crown's obligations under the Treaty of Waitangi.

It is not for us to comment on the coalition agreement between the National party and the ACT party but, once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Māori under the Treaty of Waitangi. It is a Treaty of Waitangi, not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms. The obligation is to honour the Treaty and act in good faith towards the Treaty partner.

To the extent there is any evidence to support the idea that section 7aa is causing unsafe practice, it is entirely anecdotal. We have seen none. Crown counsel and Crown witnesses have confirmed that the government's decision to repeal section 7aa is not based on an empirical public policy case. The Minister's repeal proposal as approved by Cabinet is said to reflect a political or philosophical viewpoint not reduceable to empirical analysis. Accordingly, officials were instructed to proceed in an instrumental way to give effect to the policy, representing as it does a commitment in the coalition agreement between the National party and ACT.

Another reason we say that the government decision to repeal section 7aa has been taken without proper regard to its Treaty obligations is that a core premise upon which the proposed repeal is based, represents a fundamental misunderstanding or misstatement of what the Treaty says, and requires. This is the view that the best interests of the child and compliance with the Treaty and its principles conflict. At this point in our inquiry, we are struggling to understand how

52. Ibid, p182

any government having proper regard to the Treaty could conclude that the repeal of section 7aa was appropriate on the basis of the case presented in the Minister's paper to Cabinet. It is no answer to suggest that other provisions remain in the Act which enable the Crown to meet its Treaty obligations. Retrospective reasoning of that kind cannot make up for the absence of a principled, evidence based and Treaty compliant reason to proceed with the repeal of section 7aa.

We return shortly to this but first we need to say more about why it would be wrong for the government to assert that implementation of its coalition agreement is a legitimate basis on which to act in a way that is contrary to the Treaty of Waitangi and its principles.

The reasons are clearly set out in the *Cabinet Manual 2023*. On the topic of individuals, autonomy and majority rule the *Cabinet Manual* notes:

> A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice.[53]

On the main features of the New Zealand constitution the *Cabinet Manual* notes:

> The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand (see appendix a). The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.[54]

A more detailed description of the Treaty of Waitangi as a major source of the constitution follows and says:

> The Treaty of Waitangi, which may indicate limits in our polity on majority decision making. The law sometimes accords a special recognition to Māori rights and interests, particularly those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of

53. Cabinet Office, *Cabinet Manual 2023* (Wellington: Department of Prime Minister and Cabinet, 2023), p 5
54. Ibid, p 1

the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi, of two parties negotiating and agreeing with one another, is appropriate. Policy and procedure in this area continues to evolve.[55]

It is important to note that section 7aa is a Treaty clause which puts in issue fundamental article 2 rights reserved to Māori, in particular, the guarantee of Tino Rangatiratanga over kainga and the right to cultural continuity it embodies. It is also the provision under which Treaty partnership agreements have been entered into between the Crown and various iwi and Māori organisations. The first aspect goes to the substance of the policy to repeal, the second goes to the appropriate process in the event government wishes to repeal or amend such a provision. There are established Treaty-based relationships in place. If the Crown wishes to make a fundamental change of this nature it should start by having direct good faith dialogue with the parties to these agreements. To simply tell those parties what is going to happen, and invite them to make submissions to a select committee, is to dishonour the very basis of the agreement itself.

1.6.1 Are the best interests of the child and the Treaty in tension?

The Cabinet paper suggests that the central premise for the proposed repeal of section 7aa is the belief that the best interests of children are undermined by 'cultural considerations' or by treating the child primarily as an identity group which means their individual needs are not prioritised. The policy concern appears to be that section 7aa is influencing Oranga Tamariki practice to the detriment of the safety of children and that this has created a conflict between the requirement to make decisions in the best interest of the child by placing duties on the Chief Executive to organise Oranga Tamariki around a relationship between the Crown and signatories of the Treaty of Waitangi.[56]

Not only is there no empirical evidence to support this belief (the evidence before us says the opposite), but it also presupposes conflict between the safety and best interests of a child and Oranga Tamariki acting under section 7aa consistently with the Crowns Treaty obligations. This and the associated rhetoric around treating all children the same regardless of ethnicity is the same issue the authors of *Pūao-te-Āta-tū* challenged nearly 40 years ago when they said '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.'[57]

55. Ibid, p 2.
56. Crown bundle of documents (doc a26(b)), pp 71, 72
57. Department of Social Welfare, *Pūao-te-Āta-tū (Daybreak): The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare*, (Wellington: Department of Social Welfare, 1988)

Māori do have particular rights guaranteed to them under the Treaty and honouring them has nothing to do with separatism and everything to do with accepting the fact that Māori actually have the right to live here, as Māori.

The short answer as to why we say this is a false premise is succinctly stated by Waihoroi Shortland in his evidence:

> My view would be that the assumption of putting children first is one that we all subscribe to and is paramount in the work of any organisation who cares for children. The requirement to do that work with regard to Te Tiriti o Waitangi and its principles is not in conflict, it is complimentary.[58]

The longer answer is contained in our 2021 report and the article two guarantee of tino rangatiratanga over kainga.

1.6.2 The risk of harm arising from a repeal of section 7AA

We are particularly concerned about evidence before us concerning the risk of harm to vulnerable children arising from the sudden and arbitrary repeal of section 7AA. We heard evidence in 2020 and now in the course of this inquiry about the very low levels of trust in Oranga Tamariki amongst marginalised Māori communities. In our 2020 inquiry we heard disturbing evidence of vulnerable young mothers avoiding medical care for fear of Oranga Tamariki intervention. The evidence now before us indicates that the relationships established under section 7AA have played an important role in strengthening trust and relationships between Oranga Tamariki and Māori. Officials go so far as to say the relationships established under section 7AA have been pivotal. We agree entirely with officials' analysis that a full repeal will diminish confidence in trust in Oranga Tamariki in the communities for whom sustaining trust is most critical. Constructive engagement with such communities through connected iwi and Māori providers is a common-sense approach and one that ought not to be undermined by an arbitrary appeal of the provision under which a number of existing arrangements are in place. Of particular concern is officials' assessment that, without replacing the section 7AA accountability and reporting mechanisms, work to reduce inequities may slow, which could have material impact on the safety, stability, rights, needs, and long-term wellbeing of the children with whom the department interacts.[59]

Standing back, we broadly see harm more generally from what would be lost by the arbitrary repeal of section 7AA in terms of even greater uncertainty in the legislation as to the relative importance of matters fundamental to the best interests of tamariki Māori. A major issue we identified in our 2021 report was the fact that the care and protection system was structured in such a way that the gate keepers of decisions concerning the best interests of Māori children were not their whānau, hapū or iwi but statutory social workers and the Courts. We also examined at length the effects of the notify investigate model coupled with a child

58. Waihoroi Paraone Shortland, brief of evidence, 17 January 2024 (doc A2), p 8
59. Crown bundle of documents (doc A26(b)), pp 96–98

rescue imperative and how this leads to over surveillance of communities struggling with poverty.

Set against the systemic issues we examined in our 2021 report, it is clear that section 7aa agreements and the reporting and accountability measures required of the Chief Executive are an important part of the legislative policy directed at reducing disparities and achieving the vision Oranga Tamariki set for itself that no tamariki Māori would require state care. That is of course what the Treaty guaranteed. It was never envisaged that the state would be a parent for tamariki Māori let alone in numbers vastly disproportionate to that of non-Māori children.

In this interim report, we do not address the detailed and thoughtful submissions of counsel, and neither can we do justice to the depth of evidence placed before us. It is important, however, that we convey to government a sense of what we are hearing. Joanne Pera filed a brief dated 10 April 2024.[60] Her brief included the following and her sentiments are repeated in multiple briefs of evidence before us:

> My experience is that Oranga Tamariki started slowly but in recent years has begun to more effectively meet the Tiriti obligations imposed on the Chief Executive. In particular, partnership relationships with other agencies have led to a stronger and more effective service. It is not perfect but is better.
>
> . . . . .
>
> In particular, I have strong views that, without the specific s7aa clause, all assurances that the commitments made under the clause will remain in place are instead at risk.
>
> What is of most concern to me is that this is not a well-considered policy of a thoughtful government. It was simply one of a pile of wish list items thrown into the stack that made up the Coalition agreement.
>
> It appears to have been born out of an aversion for specific Māori policies rather than out of any consideration of how the wellbeing of Māori tamariki can be improved in this sensitive area by good policies and practices.
>
> I am sure that the Crown will offer assurances that the relationships and agreements put in place under clause 7aa will endure. My experience as a worker in related sectors is that every day there are struggles for Māori to be heard, and that every little bit helps. However incomplete the s7aa work is, things can only get worse without it.
>
> If the government was serious about making things better for whānau and tamariki in this space, any changes to the law would have been a rational process to find out where the shortcomings lie and what has to happen. This is not what we are seeing at all.
>
> . . . . .
>
> The unilateral decision by the Coalition to repeal s7aa is a shameful act that will bring the Crown into disrepute. While certain anti-Māori groups will see it as a victory, actually there will be no winners at all from the repeal – only losers. Only those

60. Joanne Tania Pera, brief of evidence, 10 April 2024 (doc a28)

who wish harm on the most at risk tamariki in Aotearoa can rejoice at this move. It will have short- and longer-term consequences on real children in real need.

The Waitangi Tribunal can rule, and I hope will rule, that the repeal of s7aa breaches the Crown's obligations to Maori. What I am hoping, though, is more than that. I am hoping that the Minister, in engaging in this process, realises that there are no gains, only losses, from the repeal, and that she and her colleagues should change their minds.[61]

The final matter we wish to bring to the attention of government is the option of a more considered and principled way forward that is available under section 448b of the Act. We are obliged to counsel for Te Whakakitenga o Waikato (Mr Ferguson, Ms Wikaira, and Ms Douglas) for bringing this to our attention. Section 448b provides:

> **448b Periodic review of legislation, government policy, and other arrangements**
>
> The Minister must, not later than 1 July 2022, and on at least 1 occasion during each 3-year period after that date, report to Parliament on the following matters:
>
> (a) whether existing legislation, government policy, and other arrangements that affect the accountability of the Minister, the chief executive, and other persons or bodies carrying out functions under this Act ensures that—
>
> (i) the needs of children and young persons with whom the department is concerned are met; and
>
> (ii) the needs of Māori children and young persons with whom the department is concerned are met:
>
> (b) whether any amendments to legislation, or government policies or other arrangements referred to in paragraph (a), are necessary or desirable in order to ensure the needs of the children and young persons, or particular groups of children and young persons, referred to in paragraph (a)(i) or (ii) are met.

As we understand it, such a review and report by the Minister is required in any event by 1 July next year. As claimant counsel point out, this process would allow any concerns the Minister may have to be the subject of a considered analysis within the broader context of the purpose, principles, and imperatives of the Act. We commend this option to government for consideration and propose that the repeal of section 7aa be stopped to allow it to happen.

61. Joanne Tania Pera, brief of evidence, 10 April 2024 (doc a28), pp 2–3

Dated at Wellington this 29th day of April 2024

Judge Michael Doogan, presiding officer

Kim Ngarimu, member

Tā William Te Rangiua (Pou) Temara, member

APPENDIX

INTERESTED PARTIES

Interested parties to the Oranga Tamariki (Section 7AA) Urgent Inquiry (Wai 3350) are as follows:

1 Merepeka Raukawa-Tait on behalf of her whānau, hapū, iwi, whānau, whānui, and whāngai
2 Jean Te Huia (Wai 2823, the Māori Mothers claim)
3 Natasha Willison-Reardon on behalf of Iwi me Hapū ki Marokopa
4 Maia Honetana on behalf of her whānau
5 Mereana Peka
6 Te Puna Ora o Mataatua
7 Thomas Glenn Harris on behalf of himself, the Waitematā community, Māori children, and Māori generally (Wai 2954, the Oranga Tamariki (Pickering) claim)
8 Aaron Smale and Toni Jarvis (Wai 1911, the Adoption Act 1955 (Smale) claim)
9 Annette Hale on behalf of the late James Toopi Kokere Wikotu and the Wikotu whānau of Te Upokorehe
10 Te Urunga Aroha Evelyn Kereopa on behalf of herself and Te Ihingaarangi (Wai 762, the Waimiha River Eel Fisheries (King Country) claim)
11 Te Enga and Lee Harris on behalf of themselves and the Harris whānau (Wai 1531, the Land Alienation and Wards of the State (Harris) claim)
12 Violet Walker on behalf of the late Nuki Aldridge, her whānau, and members of Ngāti Uru and Te Tahawai hapū (Wai 2382, the Tahawai (Aldridge) claim)
13 Tasilofa Huirama on behalf of the late Ziporah Huirama and the Huirama whānau (Wai 2890, the Mental Health (Huirama) claim)
14 Stephanie August on behalf of the late Robert Charles William James Farrar and her whānau (Wai 3096, the Health Services and Outcomes (August) claim)
15 Jasmine Cotter-Williams on behalf of her whānau as members of Ngāti Taimanawaiti (Wai 2063, the Ngāti Tai Lands (Cotter-Williams) claim)
16 Robert Gabel on behalf of Ngāti Tara (Wai 1886, the Ngāti Tara (Gabel) claim)
17 April Grace on behalf of herself, her whānau, Ngā Wahapū o Te Rarawa o Kohai Settlement, and Te Hokingamai e te iwi o Ngāti Whātua Ngāpuhi nui tonu (Wai 2206, the Ngā Wahapu o Mahurangi – Ngāti Whātua/Ngāpuhi claim)
18 David Hawea on behalf of the Hawea whānau and the Te Whānau a Kai iwi (Wai 892, the Patutahi, Muhunga, and Other Lands and Resources (Te Whanau-a-Kai) claim)
19 Richard John Nathan and Tom Kahiti Murray on behalf of the late Sir Graham Stanley Latimer and the late Sir Hekenukumai Busby, on behalf of the Mangakāhia Hapu Claims Collection

20 Diane Marie Paekau on behalf of herself and her whānau as members of Ngāti Hounuku, Ngāti Houa, Ngāti Poua, Ngāti Mahuta, Ngāti te Ata, and Ngāti Whātua (Wai 3104, the Paekau (Housing) claim)
21 Aubrey Okeroa Rogers on behalf of herself, her whānau, and members of Ngāti Koheriki (Wai 2869, the Mana Wāhine (Rogers) claim)
22 Jane Stevens on behalf of the late Nicky Taiaroa Macpherson Stevens and her whānau as members of Ngai Tahu (Wai 2671, the Mental Health Services (Stevens) claim)
23 Kahura James Watene on behalf of Tukōkō and Ngāti Moe (Wai 2778, the Marine and Coastal Area (Takutai Moana) Act (Watene) claim)
24 Jessica and Michael Williams on behalf of Ngatitūpango (Wai 2776, the Marine and Coastal Area (Takutai Moana) Act (Ngai Tupango) claim)
25 Colleen Skerret-White, Timitepo Hohepa, and Te Ariki Derek Morehu on behalf of themselves, Ngāti Te Rangiunuora, and Ngāti Pikiao (Wai 1194, the Taumanu Land claim, and Wai 1212, the Ngā Uri o Nga Tokotoru o Manawakotokoto Lands and Resources claim)
26 Te Whakakitenga o Waikato Incorporated
27 Paula Ormsby on behalf of the Wahine Toa movement for women and children associated with gangs (Wai 3011, the Mana Wahine (Ormsby and Kurarangi) claim)
28. Doreen Puru, Anna Kahukura Hotere, the late Louie Katene, Emma Torckler, and William Puru on behalf of themselves, Te Hoia, Ngāti Rangimatamoemoe, and Ngāti Rangimatakaka (Wai 1684, the Puru, Torckler, and Katene Whānau claim)
29. Donna Awatere-Huata on behalf the Racism Against Māori Claim Wai 2494