THE ORANGA TAMARIKI (SECTION 7AA) URGENT INQUIRY 10 MAY 2024 REPORT

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Pre-publication Version

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Minister of Justice

Parliament Buildings
WELLINGTON

10 May 2024

E ngā Minita, mauri ora ki a koutou

Anei te roanga atu o tā mātau pūrongo te tukua atu nei. I tēnei rā ka tīkina atu e mātau te whakaaro i whakairia ki ngā pakitara o ō koutou ngākau, i te mea kua whakawhānuitia atu e mātau, kia kite ai koutou i te matū me ngā kōiriiri o ā mātau whakatūpato ki a koutou. Kia towaitia anō tā mātau kōrero, kāore he kaupapa nui atu i ā tātau tamariki i te mea ki te kore he tamariki, ka whare ngaro te iwi.

Ko te tūmanako ka noho koutou ki te āta hōmiromiro i ngā kōrero o tēnei pūrongo, ā, ka whai whakaaro koutou ki ngā whakatūpato me ngā tohutohu kei roto inā pīratia te tekihana 7AA. Heoi, ka waiho mā koutu hei whiriwhiri ki tā koutou i pai ai.

We enclose our report concerning the proposed repeal of section 7AA of the Oranga Tamariki Act 1989. This follows our interim report released

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MINISTRY OF JUSTICE
Tāhu o te Ture

on 29 April 2024. It is our final report, save for any further inquiry process that may be required following release of the decision of the Court of Appeal concerning evidence from the Minister for Children. In this report, we build on the matters addressed in our interim report, including issues concerning implementation of a commitment in one of the coalition agreements and the constitutional significance of the Treaty of Waitangi. We have found clear breaches of the article 2 guarantee to Māori of tino rangatiratanga over kāinga and of the Treaty principles of partnership and active protection. For these reasons, we respectfully direct this report 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. Put simply, this is not what we see with the proposal to repeal section 7AA. We agree entirely with the views of senior officials that a policy change of such significance must rely on evidence and not on anecdotal stories, hearsay, and ideological positions. It should also be informed by community consultation, and in particular consultation with the iwi and Māori organisations that have established strategic agreements with the Chief Executive pursuant to section 7AA.

We cannot understand how 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. We say why in this report.

We find that prejudice will arise from this rushed and arbitrary repeal of section 7AA, not only due to the failure to properly analyse likely downstream effects but more importantly due to the significant risk of actual harm to vulnerable tamariki and the risk of erosion of trust among Māori whānau and communities.

We recommend that the repeal of section 7AA be stopped in order to allow for the periodic review provided for in section 448B of the Oranga Tamariki Act. This would be due to be completed by 1 July 2025 in any event.

We also recommend as a first step in that process that the Crown engage in good faith dialogue with those iwi and Māori organisations that have agreements with the Chief Executive pursuant to section 7AA. We also recommend consideration be given to the proposals for legislative change that are appended to our 2021 Oranga Tamariki report. We also recommend the retention of provisions for the establishment of strategic

partnerships and the setting of expectations and targets to reduce disparities.

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)
sec	section (of a book or report)
SPA	strategic partnership agreement
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 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. 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 RO1, claim 1.1.1(d)), paras 49–52

1.2 The Claimants, their Claims, and the Interested Parties

On 26 March 2024, the Tribunal's Deputy Chairperson Judge Sarah Reeves granted urgency to the following three claims concerning the proposed repeal of section 7aa:

- 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 appendix I to this report.

1.3 Our Process

On 27 March 2024, the Tribunal Chairperson, Chief Judge Dr 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.[2]

On 28 March 2024, the presiding officer issued directions proposing an indicative timetable and issuing directions for evidence from the Crown. Crown counsel had previously argued that the proposed repeal of section 7aa is not the product of a policy process undertaken by officials but was part of an agreement made at a political level by political parties in the process of forming a government.

On that basis, we considered that information central to our inquiry was held primarily at the political and not the departmental level. Accordingly, a number of questions were directed to the Crown through the responsible Minister and a brief of evidence or affidavit was sought from the Minister for Children, the Honourable Karen Chhour, to be filed on or before 9 April 2024. As section 7aa imposed a range of specific duties on the Chief Executive, a series of questions were also directed to the Chief Executive with a similar request to provide a brief of evidence or affidavit by the same date.

We held a judicial conference with the parties on 3 April 2024 and conducted a one day hearing in Wellington on 12 April. 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.

2. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021)

1.3.1 Our requests for evidence and the Minister's response

Following an indication from Crown counsel on 5 April 2024 that the Crown did not intend to call evidence from the Minister for Children, the presiding officer issued further directions on 9 April asking that the Minister reconsider her position and voluntarily provide evidence. Some further questions were also posed for the Minister's response.

On 10 April, counsel for the Crown filed a memorandum confirming that it did not intend to call the Minister for Children to present evidence, nor produce a written statement.[3] On 11 April, the presiding officer issued a summons to the Minister for Children.[4] The Crown then sought judicial review in the High Court. The High Court set aside the summons in a decision issued on 24 April.[5] Following this, the Minister responded to the Tribunal's questions via a letter on 26 April.[6] The Minister's letter is reproduced as appendix II to this report.

Following the High Court decision, a number of parties appealed, and the Court of Appeal conducted an urgent hearing on 1 and 2 May. At the time of writing, the Court of Appeal decision is still pending, and there is no response as yet from the government to our interim report. We are most reluctant to report in these circumstances but are mindful of the fact that the coalition government introduced the Bill to disestablish the Māori Health Authority ahead of a pending Tribunal hearing, and we have been unable to secure a commitment from the government through Crown counsel to a period of reasonable notice before the introduction of the Bill. Crown counsel have advised that the Bill is unlikely to be introduced before 13 May 2024 and, as we indicated in our interim report, that is the deadline we have been working towards. We therefore issue this report now and will reserve leave to the parties to apply for further directions once the Court of Appeal's decision is available.

We reproduce the Tribunal's questions, and the Minister's responses later in this report when we review the evidence concerning development and implementation of the policy to repeal section 7AA.

We note that Oranga Tamariki's Chief Executive, Chappie Te Kani, was not able to appear at our hearing, but did provide a brief of evidence in response to a separate series of questions directed to him by the Tribunal.[7] By directions dated 28 March 2024, those questions that we asked the Chief Executive to respond to were as follows:

(a) If s 7AA is repealed, what are the implications and likely outcomes with respect to all current and planned work in place to meet the duties set out in s 7AA(2) and (4)?

3. Memorandum 3.1.56
4. Memorandum 2.5.7, p [3]
5. *Minister for Children v Waitangi Tribunal* [2024] NZHC 931
6. Memorandum 3.2.18(a)
7. Memorandum 2.5.3

(b) With respect to each of the duties imposed by s7aa(2) and (4) to what extent do available fiscal and policy settings enable continuity of work and commitments if s7aa is repealed?
(c) What are seen as the likely difficulties arising from a repeal of s7aa in terms of continuity and coherence of existing policy and practice?
(d) What are seen as the likely difficulties arising from a repeal of s7aa in terms of potential damage to relationships established with Māori by way of the strategic partnership agreements and by way of other relationships with Post-Settlement Governance Entities and Māori providers?
(e) What steps are available to mitigate these problems within current legislative and policy settings?
(f) For all agreements established under s7aa, will they endure, or be replaced if s7aa is repealed?
(g) What are the actual and predicted fiscal implications of a repeal of s7aa in terms of investing in iwi and Māori Providers and service contract funding?

It is unfortunate that, due to circumstances beyond his control, the Chief Executive was unable to appear at our hearing on 12 April, and we were therefore unable to question Mr Te Kani and neither were counsel for the claimants nor interested parties able to cross examine.

1.3.2 Our interim report

On 29 April 2024, we released an interim report. This was in light of the possibility the Bill would shortly be introduced to Parliament and also because there were three matters we wished to raise with the government for immediate consideration. They were:

- our concern that the government's singular focus on implementing a commitment made in one of the coalition agreements has caused it to disregard its obligations under the Treaty of Waitangi, a matter we believe should be corrected before proceeding further, and;
- our concern that the rushed repeal of section 7aa will cause actual harm, and;
- our wish to draw to the attention of the government a more principled way forward, already available under the Oranga Tamariki Act by way of the periodic review provided for in section 448b.[8] We invited the government to stop the repeal of section 7aa to allow that review to take place.

At the time of writing, we do not know what the government's response to these matters is.

8. Waitangi Tribunal, *Oranga Tamariki* (*Section 7aa*) *Urgent Inquiry Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024)

1.4 The Focus of this Report

This report builds on our interim report and as appropriate incorporates parts of it.

We begin by briefly outlining the nature of our inquiry, the parties, and our process. 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 on 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 policy development process, and set out the positions of the parties. We address the prejudicial effects and harm we believe the proposed repeal will cause to some of the most vulnerable tamariki in our society, to their whānau, and hapū. Finally, we set out our findings and recommendation.

1.5 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 policy objective was to introduce practical measures to reduce the disparity in the number of Māori children coming to the attention of Oranga Tamariki. These included the setting of measurable expectations and targets about which the Chief Executive was required to report publicly each year. Reducing disparities was also to be addressed by way of strategic partnerships with iwi and Māori organisations. The Minister responsible for the introduction of section 7aa, the Honourable Anne Tolley, said at the committee stage and at the third reading of the Bill:

> We know that six out of ten 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.[9]

She also said:

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

These are quite onerous responsibilities that are put on the chief executive, because 60 percent of the children in care are Māori. That has not changed much in 20 years, and we are absolutely determined, unashamedly, and have high aspirations to reduce the number of tamariki Māori who need to come into care and whose families need that ongoing support.[10]

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:

    (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

10. Honourable Anne Tolley, Children, Young Persons and their Families (Oranga Tamariki) Legislation Bill and Vulnerable Children Amendment Bill, in Committee, 5 July 2017, p 38

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.

1.6 The First Oranga Tamariki Urgent Inquiry and the 2021 Report (Wai 2915)

In October 2019, we commenced an urgent inquiry into claims related to legislation, policy, and practice concerning tamariki Māori in state care. Applications for urgency had been made following a number of high profile 'uplifts' of tamariki Māori from whānau.[11]

The three issues that were the focus of that inquiry were:

(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?[12]

We released our report *He Pāharakeke, He Rito Whakakīkīnga Whāruarua* in April 2021. We found that the Crown breached its Treaty obligations to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga. As a consequence, significant disparities between the number of tamariki Māori and non-Māori children being taken into state care persisted.[13] A central finding was:

> 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.[14]

11. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021), pp 136–138
12. Ibid, p 4; Wai 2915 ro1, memo 2.5.25, p 3
13. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua*, p xv
14. Ibid, p 12

With regards to section 7AA, we said:

> While we support this forward step in legislation governing care and protection for children, we note and echo the recommendation of the Childrens' Commissioner, that there is insufficient clarity as to how the various principles set out in the Act are understood and applied. We agree that the Act could benefit from 'a simplification and harmonisation of the existing principles'. 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'. 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.[15]

We listed in an appendix to that report a number of proposals for legislative amendment that we believed should be considered as part of a wider reform process.[16]

We also noted:

> 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 [the] *Puao-te-Ata-tu* [report].[17]

One of the central systemic issues we identified in our 2021 report was the fact that the gate keepers of decisions considering the best interests of Māori children were no longer their whānau, hapū, or iwi, but statutory social workers and the Courts. This situation is profoundly inconsistent with the terms and principles of the Treaty, which never envisaged a role for the state as a parent to tamariki Māori.

1.7 The Origins of the Policy to Repeal Section 7AA

1.7.1 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 the debate of the Oranga Tamariki (Repeal of Section 7AA) Amendment Bill, Ms Chhour argued that section 7AA creates a conflict for Oranga Tamariki between honouring the Crown's Treaty duties

15. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua*, p 267
16. Ibid, p 153
17. Ibid, p 154

and making decisions in the best interests of the child.[18] 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.[19]

Then National Party spokesperson for Children/Oranga Tamariki, Harete Hipango, referred in the house 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'.[20] 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'.[21] 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. He stated that '[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'.[22] The Bill was voted down and did not pass its first reading.

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 Member's Bill would have ensured this, placing more value on the best interests of the child rather than the Treaty.[23]

1.7.2 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 – ACT coalition agreement, made public in 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 responsibilities of caregivers to give them more autonomy; and

18. '4. Question No 4 – Children', New Zealand Parliament Debates, https://tinyurl.com/m32ynf4n, accessed 9 May 2024; memo 3.1.24(a), pp [10]–[12]
19. Ibid, p [24]
20. Ibid, p [14]
21. Ibid
22. Ibid, pp [20]–[21]
23. Karen Chhour, 'Labour Refuses to Put Children First', press release, 26 July 2023

- increase devolution of care decisions to relevant community organisations.[24]

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.

1.7.3 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.[25]

In the briefing, Oranga Tamariki officials made a number of references to the ministry's ongoing Treaty commitments, noting that in the event of legislative amendment, Oranga Tamariki would not change its approach to strengthening professional practice, and would continue to give effect to principles including mana tamaiti, whakapapa, and whanaungatanga.[26] However, Oranga Tamariki's advice warned that,

> [w]hile many of the elements covered under section 7AA could continue without a statutory requirement, we anticipate that repeal (either partial or full) would be strongly contested and perceived as a diminution of the Crown partnership with Māori in the care and protection system.

As the advice continued:

> Additionally, there could be a strong perception that the repeal of section 7AA would result in Māori losing the ability to hold Oranga Tamariki to account for not improving outcomes for tamariki Māori.[27]

The briefing also noted the duties under section 7AA that are not reflected elsewhere in the Act and raised as an alternative option a partial repeal of those duties under section 7AA about which the Minister had concerns.[28]

Officials noted that each of the existing strategic partnerships were at different stages of implementation. Nonetheless, it was known from the long standing partnerships with Ngai Tahu Whānau as First Navigators and from Waikato Tainui Mokopuna Ora that these partnerships have significantly reduced tamariki coming into care.[29]

The briefing suggested that some of the duties placed on the Chief Executive not reflected in other sections of the Oranga Tamariki Act could be accommodated

24. Memorandum 3.1.14
25. 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
26. Crown bundle of documents (doc A26(b)), p 5
27. Ibid, p 6
28. Ibid, p 4
29. Ibid, p 6

through other measures such as setting better public service targets and enhancement of Oranga Tamariki's Annual Report.[30]

Following this initial advice, Minister Chhour advised Oranga Tamariki Chief Executive Chappie Te Kani that at this stage she did not support options other than a full repeal. She wrote the following note when signing off the advice on December 19: 'As discussed with Chappie Te Kani, I would like drafting to begin'. Mr Te Kani then instructed the Deputy Chief Executive System Leadership, Phil Grady, to initiate the repeal process.[31] On 12 February, Minister Chhour signalled her preference for the Bill to undergo six months consideration by Select Committee.[32]

1.7.4 Meetings with strategic partners and iwi representatives

Between January and April 2024, Minister Chhour and senior officials held 12 meetings with some of the strategic partners and iwi representatives to discuss the Minister's plans for the repeal of section 7aa. Mr Te Kani stated in his evidence that he and Minister Chhour 'agreed it was important that our Strategic Partners were advised of the proposed repeal of s7aa and assured of our continued commitment to Te Tiriti o Waitangi and their ongoing relationship with Oranga Tamariki.'[33]

During our hearing, Oranga Tamariki's Acting Chief Executive, Darrin Haimona, told us that when meeting with iwi representatives and strategic partners, 'the Minister made it clear about what her intent was about the repeal of section 7aa', she then invited these parties to provide feedback through a select committee process.[34] Mr Haimona's impression of the Minister's comments was that she wanted 'to press ahead' and introduce a Bill to repeal section 7aa, but would 'wait to hear what feedback comes to the Select Committee', and that, if 'there was something significant that she [had] not considered', she 'would reserve that for that process'.[35] Mr Haimona said the reactions from strategic partners and iwi representatives were varied. Some partners and representatives had clear objections to the repeal, other groups were more concerned about what would replace section 7aa.[36]

In response to Tribunal questioning, Mr Haimona accepted that this was not Oranga Tamariki's usual or preferred method of interacting with its partners, noting that '[o]ur process would have been consultation'. While the Minister intends to open formal consultation through the Select Committee submissions process, that would not be the usual process for Oranga Tamariki, 'we probably would have gone into consultation a lot earlier'.[37]

30. Ibid, pp 4–6
31. Te Hapimana Te Kani, affidavit, 10 April 2024 (doc a21), p 2
32. Crown bundle of documents (doc a26(b)), p 12
33. Te Hapimana Te Kani, affidavit, 10 April 2024 (doc a21), p 2
34. Transcript 4.1.2, p 96
35. Ibid, p 108
36. Ibid, p 98–99
37. Ibid, p 101

1.7.5 The Cabinet paper

Oranga Tamariki sent two iterations of a draft Cabinet Paper to the Minister for Children before the final version was lodged with Cabinet on 28 March. The draft paper (dated 5 March) was not accompanied by the Regulatory Impact Statement (RIS). Following consultation with the Minister, an amended version with the RIS attached was sent on 19 March.

In the 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 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.[38]

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.[39] 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'.[40]

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'.[41]

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,

38. Transcript 4.1.2, p 72
39. Crown bundle of documents (doc A26(b)), pp 71, 72–73
40. Ibid, p 69
41. Ibid, p 72

strategic partnerships with iwi and Māori organisations would continue, with the ability to enter into further agreements unaffected.[42]

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 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'.[43]

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 section 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.[44] Te Puni Kōkiri 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.[45]

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;

42. Ibid, pp73–74
43. Ibid, p73–74
44. Ibid, p76
45. Ibid, p42

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.[46]

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. 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.'[47]

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 with that prospect it looks possible, yes.'[48]

We also note that notwithstanding the fact the policy promoted in the Cabinet paper is the repeal of a clause to give effect to the principles of the Treaty, there is no separate consideration in the Cabinet paper of the implications of the policy in terms of consistency with the principles of the Treaty. This appears to be inconsistent with the requirements of both the *Cabinet Manual* and the guidance set out in the Legislation Design and Advisory Committee guidelines.[49]

1.7.6 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.

46. Crown bundle of documents (doc A26(b)), p 77
47. Transcript 4.1.2, p 48
48. Ibid, p 48
49. *Cabinet Manual 2023*, para 7.68; Legislation Design and Advisory Committee, *Legislation Guidelines* (Wellington: Legislation Design and Advisory Committee, 2021), sec 2.5

- 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.[50]

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.[51]

The RIS 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 section 7AA had not explicitly influenced care decisions.[52] 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.[53] Indeed, evidence held by the ministry demonstrated that the problem identified by the Minister, was more likely caused by individual staff practice.[54] 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'.[55]

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.[56]

50. Crown bundle of documents (doc A26(b)), pp 96–98
51. Ibid, pp 79, 100
52. Ibid, p 87
53. Transcript 4.1.2, p 36
54. Crown bundle of documents (doc A26(b)), p 79
55. Transcript 4.1.2, p 35
56. Crown bundle of documents (doc A26(b)), p 86

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.'[57] 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.[58]

Officials noted that the scope of policy options the ministry could consider was necessarily constrained 'by the Government's commissioning'[59] direction:

> The 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 believe would better address the perceived problem. Nor do we consider alternative potential legislative options.[60]

The RIS further noted that tight timeframes had meant officials were 'unable to undertake public consultation with affected stakeholders'.[61] 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.[62] Moreover,

> Given 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.[63]

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.[64]

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.[65]

57. Crown bundle of documents (doc A26(b)), p 86
58. Ibid
59. Ibid, p 90
60. Ibid
61. Ibid, p 79
62. Ibid, p 90
63. Ibid, p 79
64. Ibid, pp 80, 90
65. Transcript 4.1.2, p 24

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.[66]

We pause to note that in his written brief of evidence the Chief Executive acknowledged that the enactment of section 7aa provided clear direction as to a practical commitment to the principles of the Treaty and to reduce disparities to tamariki Māori and rangatahi. He went on to note:

> However, over the past 5 years Oranga Tamariki has made real progress towards improving practice. These improvements and changes are not attributed to section 7aa alone. I do not consider that a repeal of section 7aa will set back the progress and practice improvements we have made over the past 5 years.[67]

On this we prefer the evidence of Mr Grady. The Minister has made the repeal of section 7aa her number one legislative priority for 2024 and officials had been instructed from late 2023 to achieve that goal as soon as possible. It is clear from the totality of the evidence before us that officials are reacting to this directive and have had little time to fully assess the downstream impacts or to properly consult with the strategic partners to fully understand the likely implications of a repeal. The evidence we do have including from some of the strategic partners strongly points towards prejudice that will set back improvements that Oranga Tamariki has achieved over the last 5 years.

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 marginalised 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.[68]

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

66. Ibid, pp 23–35
67. Document a21, para 39
68. Crown bundle of documents (doc a26(b)), p 96

responded: 'I certainly do. You know, to the continuity of that work, yes that would be fair to say.'[69]

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.'[70] The question Mr Grady was asked was: '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.'[71]

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.'[72]

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.'[73]

1.7.7 Cabinet agreement

On 27 March, the Cabinet paper and RIS were lodged with the Cabinet Social Outcomes Committee. The Committee agreed to the recommendations set out in the Cabinet paper.[74]

Following the meeting of the Committee, an amended version of the Cabinet Paper was lodged with Cabinet on 28 March.[75] The Minister's Office had made alterations to the paper's discussion on the compliance of the proposed repeal with domestic legislation and international instruments, notably The New Zealand Bill of Rights Act 1990, the United Nations Declaration on the Rights of Indigenous Peoples, and the United Nations Convention on the Rights of the Child. Cabinet confirmed the recommendations set out in the Cabinet Social Outcomes Committee on 2 April.[76]

69. Transcript 4.1.2, p 49
70. Crown bundle of documents (doc A26(b)), p 98
71. Transcript 4.1.2, p 49
72. Ibid, pp 71–72
73. Ibid, pp 22–23
74. Crown bundle of documents (doc A26(b)), p 107
75. Te Hapimana Te Kani, affidavit, 10 April 2024 (doc A21), p 3
76. Ibid, p 3

1.8 Is the Repeal of Section 7aa Consistent with the Crown's Treaty Duties?

1.8.1 The parties' positions

1.8.1.1 *The claimants' submissions*

The closing submissions of claimants and interested parties shared a number of themes that fell largely into two categories: first, concern with the process the Crown has followed in progressing the repeal of section 7aa and, secondly, concern about the effects on Māori of the proposed repeal.

Claimants noted that the Minister made the decision to repeal section 7aa prior to meeting with strategic partners and iwi representatives. As a result, they argued, any advice from ministry officials or kōrero from Māori was essentially irrelevant to the repeal process.[77] It was further submitted that the obligation to act in a Treaty consistent manner when developing the repeal is not 'avoided simply because its genesis pre-dates the formation of government'.[78] Nor are the Treaty rights afforded to Māori 'contingent on the promises of political parties and/or political agreements'.[79]

Frequently cited concerns were a lack of empirical evidence, poor definition of the policy problem the repeal was seeking to solve, neglect of advice regarding Treaty consistency, and failure to meaningfully consult with those affected by the repeal, including the Crown's strategic partners. As the Māori Women's Welfare League argued in its closing submissions,

> Oranga Tamariki must be evidence based, and the actions by the Crown to repeal section 7aa without sufficient evidential data to support its propositions regarding children in care, and without regard to its Treaty/Tiriti obligations to Māori, is in breach of the Treaty/te Tiriti and its principles.[80]

The League also noted that it as 'the only national Māori women's organisation, has been denied the opportunity for a kānohi-ki-te-kānohi explanation to help understand and therefore mitigate the Crown's concerns regarding section 7aa, despite holding a strategic partnership agreement (spa) under the Act'.[81] We received a similar submission from another strategic partner, Waikato – Tainui.[82] Ngāti Hine, who do not hold a strategic partnership with Oranga Tamariki, observed that the only opportunity they will have to submit their view is through the Select Committee process, which in their assessment, reduces the influence of Treaty partners and denies the exercise of rangatiratanga.[83]

77. Closing submissions for Wai 3309 and Wai 1911 (submission 3.3.8), p10; closing submissions for Wai 2959 (submission 3.3.2), p10
78. Closing submissions for Wai 2959 (submission 3.3.2), p13
79. Closing submissions for Wai 682 (submission 3.3.50), p14
80. Closing submissions for Wai 2959 (submission 3.3.2), p3
81. Ibid
82. Closing submissions for Te Whakakitenga o Waikato Incorporated (submission 3.3.11)
83. Closing submissions for Wai 682 (submission 3.3.50), p13

Ngāti Hine claimants submitted that the most significant question for the inquiry to address is 'whether the Crown can, under Te Tiriti o Waitangi, take action in the manner it has, unilaterally and without agreement from Māori, to remove section 7aa from the Oranga Tamariki Act'.[84] In their submission, the issue raised a number of broader questions, principally whether it was 'consistent for the Crown to impose legislative settings that operate over Māori tamariki and whanau' without their consent.

Closing submissions for interested party Merepeka Raukawa Tait argued that the Minister, in seeking to introduce a Bill with without consultation, had ignored the *Cabinet Manual*. It was argued that, '[w]hile later points in the legislative process can still provide important opportunities for consultation with affected communities, this early stage of drafting the legislation is arguably the most important for consultation with affected Māori communities.'[85]

The Māori Women's Welfare League also raised concern about the Crown's failure to consider the Treaty implications of a repeal or follow advice from Oranga Tamariki officials. The League submitted the Cabinet Paper does not comply with *Cabinet Manual* requirements to draw attention to aspects of a Bill that have implications for or may be affected by the principles of the Treaty.[86]

Claimant counsel for Wai 3309 and interested party Wai 1911, argued that in absence of any alternative explanation from the Crown, the proposed repeal of section 7aa is driven by removing measures that provide for 'positive discrimination'. Counsel relied on alterations made to the Cabinet paper across amended versions, notably the removal of references to ideologically driven practice and changes to the assessment of compliance with international instruments. They argued 'Crown policy today is that removing special measures which provide for the better safety of tamariki Māori 'ends racial discrimination" and this is a misinterpretation of international instruments. Counsel submitted to deny protections under international instruments is to effectively deny active protection and tino rangatiratanga.[87]

Interested party Waikato – Tainui noted that there is no evidence that the Crown gave any consideration to the existing legislative review provisions under section 448b of the Oranga Tamariki Act.[88] They observed that section 448b provides for the Minister to conduct a periodic review of existing legislation, Government policy, or other arrangements, and to report to Parliament on changes that are needed to meet the needs of children and young persons, including Māori.[89] Waikato – Tainui argued that at a minimum, the legislative reform to the Oranga

84. Closing submissions for Wai 682 (submission 3.3.50), p 6

85. Closing submissions on behalf of Merepeka Raukawa-Tait in support of Wai 3350 (submission 3.3.3), p 4; see also closing submissions for Te Whakakitenga o Waikato Incorporated (submission 3.3.11)

86. Closing submissions for Wai 2959 (submission 3.3.2), p 10; closing submissions for Wai 3309 and Wai 1911 (submission 3.3.8); closing submissions for Wai 682 (submission 3.3.5), p 15

87. Closing submissions for Wai 3350 and Wai 1911 (submission 3.3.8), pp 13–14

88. Closing submissions for Te Whakakitenga o Waikato Incorporated (submission 3.3.11), p 18

89. Ibid, pp 16–17

Tamariki Act should have been progressed under section 448B which would have allowed for a careful analysis of the Minister's concerns 'against the purpose, principles and imperatives of the Act'.[90]

Concern with the Treaty implications and effects on Māori of a repeal itself was another recurring theme in submissions and evidence.

We received evidence that a repeal of section 7AA would compromise outcomes for tamariki and mokopuna because the accountability mechanism placed on the Crown to act in a Treaty consistent manner would be removed.[91]

Ngāti Hine claimants argued that removing section 7AA from the Oranga Tamariki Act would undermine rangatiratanga and the Treaty partnership. They stressed the significance of section 7AA, stating it 'is important because it comes back to the need [for] modern day expressions of tino rangatiratanga and mana motuhake'.[92] The Treaty partnership would also be impacted by a repeal because it will likely cause doubt among Māori about the efficacy of culturally specific solutions for the care and protection of tamariki. In the assessment of Waihoroi Shortland, the repeal of section 7AA 'will cause harm to Māori children and whānau' because without a statutory commitment to the Treaty, Oranga Tamariki will not take into account the connection between the tamaiti and their hapū or whānau.[93]

Verna Te Roha Gate alleged that partnerships with the ministry are being prematurely affected. Ms Gate claimed the publicised political intent 'is enough to bring discussions about future partnerships to a halt', which Te Whakaruruhau experienced in December 2023.[94] Strategic partners also raised concern that it is unclear whether Oranga Tamariki will alter the terms of their strategic relationship and funding arrangements.[95]

1.8.1.2 *The Crown's submissions*

Regarding the process followed in progressing the proposed repeal, the Crown acknowledged it did not consult with Māori prior to the coalition government reaching its policy decision.[96] Rather, the Minister for Children instigated the processes required for the Bill to be introduced to Cabinet, in accordance with the coalition agreement. The Crown has since spoken to strategic partners and the Iwi Chairs Forum to communicate the Minister's intention for the Bill.[97] The Crown submitted that it 'acknowledges that what comes next is of importance to Māori',

90. Closing submissions for Te Whakakitenga o Waikato Incorporated (submission 3.3.11), pp 17–18
91. Donna Flavell and Melissa King-Howell, joint brief of evidence, 9 April 2024 (doc A15), p 19; Verna Te Roha Gate, affidavit, 27 January 2024 (doc A1)
92. Waihoroi Shortland, brief of evidence, 17 January 2024 (doc A2)
93. Ibid
94. Verna Te Roha Gate, affidavit, 27 January 2024 (doc A1)
95. Dr Hope Tupara, brief of evidence, 9 April 2024 (doc A17); Donna Flavell and Melissa King-Howell, joint brief of evidence, 9 April 2024 (doc A15), p 18; Crown bundle of documents (doc A26(b)), p 74
96. Crown closing submissions (submission 3.3.1), p 2
97. Ibid, p 6

but the removal of section 7AA 'is not a prescription of what steps must be taken in the future'.[98]

Counsel for the Crown argued the Tribunal had not received sufficient evidence to support the claimants' allegations that Māori would be prejudicially affected by the proposed repeal of section 7AA of the Oranga Tamariki Act 1989. The Crown noted it is not clear whether the potential consequences raised by claimants 'will – or even are likely to – come to pass'.[99]

On the contrary, the Crown argued, evidence from officials demonstrated that changes to Oranga Tamariki since the addition of section 7AA are intended to be sustained. The Crown stated 'there has been no change in Oranga Tamariki policy. Nor will the Oranga Tamariki Act be rendered inconsistent with the principles of the Treaty solely by the absence of this provision.'[100]

The Crown also acknowledged differing perspectives on the validity of the reasoning behind the proposed repeal and its potential impact. However, the Crown stated that this disagreement reflected an essential 'difference in judgement' between Minister Chhour and the Oranga Tamariki officials who had produced the RIS. Ministry staff, including Deputy Chief Executive System Leadership Phil Grady, thought that the issues related to Oranga Tamariki placements were the result of individual social work practice, rather than section 7AA, and it was this individual practice that consequently required remedy.[101] The Minister, however, believed section 7AA had unintentionally led to 'incorrect decisions' to remove tamariki Māori from their long-term caregivers.[102] Counsel for the Crown submitted that the Minister's judgement 'does not purport to be based on or justified by quantitative data, but rather is said to be informed by individual accounts, experiences and opinions'.[103] The Crown continued: 'regardless of who has provided the Minister with those individual accounts, experiences and opinions, the nature of the judgement itself is discernible'.[104]

In its submissions, the Crown also highlighted evidence from Ms Dickson which stated with or without section 7AA, the purposes and principles set out elsewhere in the Oranga Tamariki Act 'provide a strong foundation for decision making in relation to children and young people . . . and are fundamental to the Oranga Tamariki practice approach'.[105] Crown counsel relied on similar statements from Acting Chief Executive Darrin Haimona and Chief Executive Chappie Te Kani, who noted that the ministry is committed to continuing and building on the progress it has made. Specifically, Mr Te Kani stated that existing strategic partnerships will endure and the terms of each agreement will not be affected.[106]

98. Crown closing submissions (submission 3.3.1), p 7
99. Ibid, p 1
100. Ibid
101. Transcript 4.1.2, p 35
102. Crown closing submissions (submission 3.3.1), pp 2, 7
103. Ibid, p 12
104. Ibid
105. Nicolette Dickson, affidavit, 10 April 2024 (doc A22), p 9
106. Crown closing submission (submission 3.3.1), pp 22, 23, 25

An unusual feature of the Crown's closing submissions is the fact that there is no attempt to argue that the decision to repeal section 7aa is consistent with the Treaty and its principles. Crown counsel instead argue that adverse consequences may not come to pass, other policies and provisions remain that will enable the Crown to meet its Treaty obligations, and the Act will not be rendered inconsistent with the principles of the Treaty solely by reason of the absence of section 7aa.[107] For reasons that follow we do not accept these arguments.

1.8.2 Minister Chhour's response

We noted earlier why we had sought evidence from the Minister. We had been told that the policy to repeal section 7aa was the result of a political commitment and not the result of a conventional policy development process. It was clear to us that the Minister was the 'driving mind' behind the policy and was the person best placed to explain it to us. We now set out the responses the Minister provided in her letter dated 26 April 2024. The letter itself is annexed to this report.

Before addressing the specific questions asked of her, the Minister noted the outcome of the High Court proceedings, setting aside the summons and went on to say that she wishes to record that in declining to appear and provide evidence, she considered that the record showed all there is to show in support of the Crown policy under inquiry. The Minister commented:

> I wish to reassure the Tribunal that there is no further information I can materially add, taking into account evidence already before the Tribunal and which is known publicly, and the responsibilities imposed on me by Cabinet confidentiality and collective responsibility.[108]

The following are the Minister's responses to the questions we posed:

Tribunal: What is the policy problem this addresses?

Minister: My Cabinet Paper and the associated Regulatory Impact Statement were the documents that I lodged with Cabinet for Cabinet's consideration.

I cannot speak to the reasoning of Cabinet, which is subject to collective Cabinet responsibility and is protected by Cabinet confidentiality.

Tribunal: Could that policy objective be better advanced by way of amendment rather than repeal of section 7aa? If not, why not?

Minister: My Cabinet Paper and the associated Regulatory Impact Statement were the documents that I lodged with Cabinet for Cabinet's consideration.

I cannot speak to the reasoning of Cabinet, which is subject to collective Cabinet responsibility and is protected by Cabinet confidentiality.

107. Ibid, p 1
108. Memorandum 3.2.18(a)

Tribunal: Has the Minister taken legal advice on the proposed repeal and its effects? If so, please provide.

Minister: I understand that the Crown has asserted its privilege in respect of any legal advice that I have been given on the proposed repeal and its effects

Tribunal: Has the Minister taken policy advice on the proposed repeal and its effects? If so, please provide.

Minister: I understand that senior officials from Oranga Tamariki have provided the Tribunal with the documents recording the policy advice that I have been given on the proposed repeal and its effects. I confirm that I read and considered each piece of this advice as it was provided.

Tribunal: Oranga Tamariki's *Section 7AA Annual Report 2023* lists 10 strategic partnership agreements entered into pursuant to section 7AA and notes a number of other relationships with Post Settlement Governance Entities and Māori Providers. Has the Crown consulted with its partners to these agreements about the proposed repeal of section 7AA? If not, does it intend to do so?

Minister: I understand that senior officials from Oranga Tamariki have provided the Tribunal with information about meetings that I had with various strategic partners and iwi representatives between January and early April this year and my wish for submissions to be made at the Select Committee stage of the passage of the Bill.

I intend to meet with the remaining strategic partners.

I have nothing further of substance that I can add to the information that is before the Tribunal.

Tribunal: For all agreements established under section 7AA, will they endure, or be replaced if section 7AA is repealed?

Minister: I refer to paragraph 20 of the Cabinet Paper. I also understand that senior officials from Oranga Tamariki have testified as to the position of the Chief Executive of Oranga Tamariki in relation to the strategic partnerships and as to the views that I have expressed to the senior officials and to strategic partners.

I have nothing further that I can add to the information that is before the Tribunal.

Tribunal: Has the Crown consulted with Māori more generally on the proposed repeal of section 7AA? If not, does it intend to do so?

Minister: I understand that senior officials from Oranga Tamariki have provided the Tribunal with information about meetings that I had with various strategic partners and iwi representatives between January and April this year and my wish for submissions to be made at the Select Committee stage of the passage of the Bill.

I have nothing further of substance that I can add to the information that is before the Tribunal.

Tribunal: What are the actual and predicted fiscal implications of a repeal of section 7aa in terms of investing in iwi and Māori providers and service contract funding?

Minister: I understand that senior officials from Oranga Tamariki have provided the Tribunal with information as to the fiscal implications of a repeal of section 7aa in terms of investing in iwi and Māori Providers and service contract funding.

I have nothing further of substance that I can add to the information that is before the Tribunal.

On 9 April, we asked the Minister to respond to the following questions:

Tribunal: In regard to the Cabinet paper, can the Minister provide more detail as to the basis for the opinions recorded at paragraphs 12 to 17, and in particular: How many instances the Minister is aware of where it is said that decisions were made concerning care arrangements for Māori children which were not safe or in the child's best interest due to the operation of section 7aa.

Minister: At paragraph 13 of the Cabinet Paper, I stated:

> I am concerned that section 7aa may have been used to justify decision making in relation to care arrangements for Māori children which has not been safe or in the child's best interests. In my view, when a child is primarily considered as an identity group, their individual needs are not prioritised.

My concern is based on the information that I referenced at paragraphs 14 and 16 of the Cabinet Paper, which I address in my responses below.

Tribunal: Who are the 'prominent individuals' and what are the 'several high profile cases' referred to at paragraph 14 of the Cabinet paper?

Minister: At paragraph 14 of the Cabinet Paper, I stated:

> There have been prominent individuals who criticised the role section 7aa may have had in several high-profile cases involving these changes to planned long-term care placements. They noted that this practice was traumatic and stressful for children and young people.

My Cabinet Paper did not name the prominent individuals or the high-profile cases to which paragraph 14 refers. However, the high profile cases are the ones that are well known publicly and which were referenced in the evidence.

Tribunal: How many caregivers have informed the Minister of concerns about section 7AA as noted at paragraph 16 of the Cabinet paper?[109]

Minister: At paragraph 16 of the Cabinet Paper, I stated:

> Section 7AA has likely led to unintended consequences that have negatively impacted caregivers. Some caregivers have suggested that section 7AA has resulted in a requirement for culturally appropriate environments, which is valued more than children's welfare. In my view, some of the changes to planned permanent care arrangements that have occurred are examples of Māori children who were removed from safe and loving homes because the caregivers were deemed the wrong ethnicity.

My Cabinet Paper did not specify how many caregivers informed me of concerns about s7AA. It is not possible for me to recall the number. In my time as an opposition Member of Parliament, I spoke with a number of caregivers from time to time.[110]

1.8.3 Our view of the Minister's response

The Minister's responses (or lack thereof) speak for themselves. We find it particularly surprising that the Minister is not prepared to speak to the first question, which is *what is the policy problem the repeal of section 7AA addresses?* The Minister advocated for this policy whilst an opposition member, then made the repeal of section 7AA a sufficient priority for the ACT party to have it included in its coalition agreement with National and since being sworn in as a Minister has made the repeal of section 7AA her number one legislative priority for 2024. We therefore find her unwillingness or inability to speak to the policy beyond pointing to her Cabinet paper and the accompanying RIS surprising. The Cabinet Social Outcomes committee agreed to the repeal of section 7AA in late March and Cabinet confirmed the recommendations of that committee on 2 April 2024. There is nothing we can see with respect to conventions around Cabinet confidentiality that would prevent the Minister from explaining the policy now confirmed by Cabinet. We are not asking the Minister to breach Cabinet confidentiality. We are asking her to simply explain her reasoning for bringing such a proposal to Cabinet, especially in light of the overwhelming advice from officials not to do so, and the absence of that reasoning in the Cabinet paper.

The Minister's remaining responses confirm the constricted nature of the policy advice given by reason of the Minister's direction to proceed with a repeal of section 7AA in December 2023. They also confirm that the evidential basis for the Minister's concerns in relation to section 7AA is entirely anecdotal. No principled policy development process has yet taken place.

109. Memorandum 2.5.5
110. Memorandum 3.2.18(a)

1.9 Our Findings and Recommendations

1.9.1 The Treaty and the risk of harm

We turn now to our findings and recommendations. The fact that the proposed repeal of section 7aa is inconsistent with the Treaty and its principles is clearly recognised and set out in the advice provided to Cabinet by officials in the RIS. Much of what we said in our interim report holds true and we incorporate relevant parts accordingly.

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.

In that report, we set out in detail why the article 2 guarantee to Māori of tino rangatiratanga over kainga is central. We reviewed the evolution of the care and 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.[111] As we understand it, one of the high profile 'reverse uplift' cases referred to by the Minister is the one that was subject to a Newsroom report and subsequent litigation over what could be published. We have received confidential evidence from the whānau who are now caring for these tamariki, and we are in the process of receiving further evidence from both the Crown and the whānau. Due to the time constraints we are operating under we have not been able to properly consider this evidence, or to hold a hearing to hear from the parties concerned.

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.

111. Ibid, p182

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. The weight of evidence suggests that it is individual social work practice that may be the issue. Even then there is no reliable evidence to suggest this is a widespread problem, let alone one that has any causal link to section 7AA.

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. We cannot understand how 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.[112]

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.[113]

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 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.[114]

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 kāinga 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

112. Cabinet Office, *Cabinet Manual 2023* (Wellington: Department of Prime Minister and Cabinet, 2023), p5
113. Ibid, p1
114. Ibid, p2

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. We therefore find that the Cabinet decision to approve the repeal of section 7AA in the absence of good faith dialogue and engagement with its iwi and Māori partners is a clear breach of the article 2 guarantee to Māori of tino rangatiratanga over kainga and the principle of partnership.

1.9.2 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.

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 Crown's Treaty obligations. This and the associated rhetoric around treating all children the same regardless of ethnicity is the same issue the authors of *Puao-te-Ata-tu* 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'

The learned authors of that report also said:

> That policy is now so ingrained in national thinking that it is difficult for the administrator to conceive of any other, and administrative reaction is invariably to counteract pressure for change with allegations of separatism or privilege. Many cannot conceive that indigenous people have particular rights, or contemplate that the denial of a way of life to the original inhabitants; is itself divisive and destructive.[115]

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.

115. Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare, *Paao-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), p72

The short answer as to why we say it is a false premise to claim the best interests of a child are in tension with honouring the Treaty is succinctly stated by Waihoroi Shortland in his evidence:

> If the coalition government believes that section 7aa is in conflict with the child's best interests, I would like to know what advice that is based on. 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.

The longer answer is contained in our 2021 report and the article 2 guarantee of tino rangatiratanga over kainga.

1.9.3 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 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 commonsense 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. In his brief of evidence Thomas Harris put it this way:

> Overall the removal of section 7aa from the Oranga Tamariki Act has the serious potential to cause further harm and trauma to Māori communities and tamariki by weakening the legal framework that prioritises cultural connections and partnership with whānau, hapū, and iwi in decisions affecting the well-being of Māori children and young people in state care. This will result in perpetuating historical injustices, exacerbating disparities of tamariki Māori in state care, and undermining efforts to promote the well-being and resilience of Māori tamariki and whānau.[116]

116. Thomas Harris, brief of evidence, 9 April 2024 (doc a18), para 25

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 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 framework 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.

As this is an inquiry proceeding under urgency with limited time to report before we will lose jurisdiction, we have not been able to address properly 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. It 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 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 Māori. 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.[117]

1.9.4 The Treaty principle of active protection

We considered in some detail the application of active protection to the legislative and policy settings of Oranga Tamariki in our 2021 report. We said:

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

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

of whānau in ways that are arbitrary or inconsistent, or the result of poor practice, or reflect institutional or personal racism.[118]

With that in mind, we cannot overstate the importance of having in the Act a provision such as section 7AA(2)(b), which requires the Chief Executive to ensure that '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'.

Such a provision is, in our view, a necessary foundation to secure and promote Treaty consistent policy and practice. It is a necessary, but not a sufficient condition. Another aspect of the requirements of section 7AA which we see as a necessary foundation for Treaty consistent policy is the obligation to set expectations and targets and to publicly report against such expectations and targets. Data from section 7AA reports is exactly the kind of data collection and measuring that enables the department and the Minister to assess progress towards reducing disparities and improving life outcomes for tamariki Māori who come into contact with the care and protection system. We would also observe that evidence based policy making, the setting of targets and reporting on them is entirely consistent with other aspects of the coalition government's policy agenda.

The rushed and arbitrary repeal of section 7AA carries a real risk of causing actual harm to vulnerable tamariki. In his evidence Waihoroi Shortland summarised the nature of the problem well when he said:

> The broader issue that removing children into state care, without regard for tikanga and te Tiriti o Waitangi, is the beginning of disconnect for Māori children. The disconnection is such that it follows them their whole life and the child has difficulties. It is that broader innate whanaungatanga that lies at the base of the child's connectivity to their hapū and whānau.
>
> These notions are not in contention with putting the child first. This is what is required by putting a Māori child first. Without statutory obligation, Oranga Tamariki practice has shown us that state intervention will not take into account these things. That is why these statutory provisions are so important.
>
> Section 7AA sits there to strengthen Māori rights. To now extract Section 7AA from the legislation, is to extract Māori tikanga and partnership from the consideration of Oranga Tamariki; it is to reimpose the former state of operation. It is the State assuming authority over Māori children, without regard for te Tiriti o Waitangi and the Tiriti partnership. This is not a progressive aspiration.[119]

We find that a government decision to proceed with the repeal of section 7AA is a clear breach of the article 2 guarantee to Māori of tino rangatiratanga over kainga and the principle of active protection.

118. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua*, p 20
119. Waihoroi Paraone Shortland, brief of evidence, 17 January 2024 (doc A2), p 8

1.9.5 Recommendations

We have found clear breaches of the Treaty article 2 guarantee to Māori of tino rangatiratanga over kainga and of the Treaty principles of partnership and active protection. We have also found that prejudice will arise from the rushed and arbitrary repeal of section 7aa, not only due to the failure to fully analyse likely downstream effects but more importantly due to the significant risk of actual harm to vulnerable tamariki and the risk of erosion of trust amongst Māori whānau and communities. In our interim report, we drew the government's attention to the periodic review of the legislation and policy provided for under section 448b of the Oranga Tamariki Act.

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.

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 recommend that the repeal of section 7aa be stopped to allow it to happen.

We recommend that as a first step in that review the Crown enters into good faith dialogue with all of its section 7aa strategic partners and Māori post-settlement entities with whom it has established relationships under section 7aa.

We recommend that the proposals for legislative amendment set out at appendix iii of our 2021 report be considered in the course of this review.

We recommend that the requirements of section 7aa set out at subsection (2)(b) and to develop strategic partnerships with iwi and Māori organisations be retained and that the requirement to focus on the reduction of disparities by setting and publicly reporting on expectations and targets be retained.

Leave is reserved to the parties to apply for further directions following the release of the decision of the Court of Appeal.

Dated at Wellington this 10th day of May 2024

Judge Michael Doogan, presiding officer

Kim Ngarimu, member

Tā William Te Rangiua (Pou) Temara, member

THE SEAL OF THE WAITANGI TRIBUNAL

APPENDIX I

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

APPENDIX II

MINISTER'S LETTER

26 April 2024
The Registrar
The Waitangi Tribunal
WELLINGTON

Re: Wai 3350 -the Oranga Tamariki (Section 7AA) Urgent Inquiry

Tēnā koe Registrar

Introduction

1. In light of the issues that have been raised by the High Court proceedings in *Minister for Children v The Waitangi Tribunal* [2024] NZHC 931, I wish to take this opportunity to provide the Tribunal with the following information.
2. As you are aware, on 28 March 2024, the Tribunal directed the Crown to provide evidence from me in response to a series of questions that the Tribunal had posed. In response, the Crown notified the Tribunal why it did not intend to call me to respond to these questions and instead provided a significant documentary record and made available senior Oranga Tamariki officials to give oral evidence. On 9 April, the Tribunal raised the possibility of issuing a summons, and indicated it was interested in matters which engaged Cabinet confidentiality and collective responsibility, and on 11 April a summons was duly issued. Ultimately, the process was a matter that was ruled upon by the High Court.
3. I wish to record that, in declining to appear to provide evidence, I considered that the record showed all there is to show in support of the Crown policy under inquiry. The important constitutional issues at stake have now been clarified in the Court proceeding.
4. Now that the High Court has ruled on this constitutional issue and the summons has been set aside, I wish to reassure the Tribunal that there is no further information I can materially add, taking into account evidence already before the Tribunal and which is known publicly, and the responsibilities imposed on me by Cabinet confidentiality and collective responsibility. I do so by addressing each of the questions that the Tribunal posed for me to answer.

Question (a): What is the policy problem this addresses?

5. My Cabinet Paper and the associated Regulatory Impact Statement were the documents that I lodged with Cabinet for Cabinet's consideration.
6. I cannot speak to the reasoning of Cabinet, which is subject to collective Cabinet responsibility and is protected by Cabinet confidentiality.

Question (b): Could that policy objective be better advanced by way of amendment rather than repeal of section 7aa? If not, why not?

7. My Cabinet Paper and the associated Regulatory Impact Statement were the documents that I lodged with Cabinet for Cabinet's consideration.
8. I cannot speak to the reasoning of Cabinet, which is subject to collective Cabinet responsibility and is protected by Cabinet confidentiality.

Question (c): Has the Minister taken legal advice on the proposed repeal and its effects? If so, please provide.

9. I understand that the Crown has asserted its privilege in respect of any legal advice that I have been given on the proposed repeal and its effects.

Question (d): Has the Minister taken policy advice on the proposed repeal and its effects? If so, please provide.

10. I understand that senior officials from Oranga Tamariki have provided the Tribunal with the documents recording the policy advice that I have been given on the proposed repeal and its effects. I confirm that I read and considered each piece of this advice as it was provided.

Question (e): Oranga Tamariki's Section 7aa Annual Report 2023 lists 10 strategic partnership agreements entered into pursuant to section 7aa and notes a number of other relationships with Post Settlement Governance Entities and Māori Providers. Has the Crown consulted with its partners to these agreements about the proposed repeal of section 7aa? If not, does it intend to do so?

11. I understand that senior officials from Oranga Tamariki have provided the Tribunal with information about meetings that I had with various strategic partners and iwi representatives between January and early April this year and my wish for submissions to be made at the Select Committee stage of the passage of the Bill.
12. I intend to meet with the remaining strategic partners.
13. I have nothing further of substance that I can add to the information that is before the Tribunal.

Question (f): For all agreements established under section 7AA, will they endure, or be replaced if section 7AA is repealed?

14. I refer to paragraph 20 of the Cabinet Paper. I also understand that senior officials from Oranga Tamariki have testified as to the position of the Chief Executive of Oranga Tamariki in relation to the strategic partnerships and as to the views that I have expressed to the senior officials and to strategic partners.
15. I have nothing further that I can add to the information that is before the Tribunal.

Question (g): Has the Crown consulted with Māori more generally on the proposed repeal of section 7AA? If not, does it intend to do so?

16. I understand that senior officials from Oranga Tamariki have provided the Tribunal with information about meetings that I had with various strategic partners and iwi representatives between January and early April this year and my wish for submissions to be made at the Select Committee stage of the passage of the Bill.
17. I have nothing further of substance that I can add to the information that is before the Tribunal.

Question (h): What are the actual and predicted fiscal implications of a repeal of section 7AA in terms of investing in iwi and Māori Providers and service contract funding?

18. I understand that senior officials from Oranga Tamariki have provided the Tribunal *w*ith information as to the fiscal implications of a repeal of section 7AA in terms of investing in iwi and Māori Providers and service contract funding.
19. I have nothing further of substance that I can add to the information that is before the Tribunal.

Question (i): In regards to the Cabinet paper can the Minister provide more detail as to the basis for the opinions recorded at paragraphs 12 to 17, and in particular;

a. How many instances the Minister is aware of where it is said that decisions were made concerning care arrangements for Māori children which were not safe or in the child's best interest due to the operation of section 7AA?

20. At paragraph 13 of the Cabinet Paper, I stated:

> I am concerned that section 7AA may have been used to justify decision making in relation to care arrangements for Māori children which has not been safe or in the

child's best interests. In my view, when a child is primarily considered as an identity group, their individual needs are not prioritised.

21. My concern is based on the information that I referenced at paragraphs 14 and 16 of the Cabinet Paper, which I address in my responses below.

b. Who are the 'prominent individuals' and what are the 'several high profile cases' referred to at paragraph 14 of the Cabinet paper?

22. At paragraph 14 of the Cabinet Paper, I stated:

> There have been prominent individuals who criticised the role section 7aa may have had in several high-profile cases involving these changes to planned long-term care placements. They noted that this practice was traumatic and stressful for children and young people.

23. My Cabinet Paper did not name the prominent individuals or the high-profile cases to which paragraph 14 refers. However, the high profile cases are the ones that are well known publicly and which were referenced in the evidence.

c. How many caregivers have informed the Minister of concerns about section 7aa as noted at paragraph 16 of the Cabinet paper?

24. At paragraph 16 of the Cabinet Paper, I stated:

> Section 7aa has likely led to unintended consequences that have negatively impacted caregivers. Some caregivers have suggested that section 7aa has resulted in a requirement for culturally appropriate environments, which is valued more than children's welfare. In my view, some of the changes to planned permanent care arrangements that have occurred are examples of Māori children who were removed from safe and loving homes because the caregivers were deemed the wrong ethnicity.

25. My Cabinet Paper did not specify how many caregivers informed me of concerns about s7aa. It is not possible for me to recall the number. In my time as an opposition Member of Parliament, I spoke with a number of caregivers from time to time.

Yours sincerely

Hon Karen Chhour Minister for Children