

30 April 2024

Hon Judith Collins KC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Oranga Tamariki (Repeal of Section 7AA) Amendment Bill

Purpose

1. We have considered whether the Oranga Tamariki (Repeal of Section 7AA) Amendment Bill is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 26234/5.1). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 19 (freedom from discrimination). Our analysis is set out below.

The Bill

4. The Bill repeals s 7AA of the Oranga Tamariki Act 1989 and makes other consequential amendments to the Oversight of Oranga Tamariki System Act 2022 and associated regulations.
5. Section 7AA imposes duties on the chief executive of Oranga Tamariki in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi). Specifically, these duties require the chief executive to:
 - a. Ensure that policies and practices aim to reduce disparities by setting measurable outcomes for Māori children and young people;
 - b. Ensure that regard is given to mana tamaiti, the whakapapa of Māori children and young people, and the whanaungatanga responsibilities of their whānau, hapū and iwi;
 - c. Seek to develop strategic partnerships with iwi and Māori organisations;
 - d. Consider and respond to invitations from Māori organisations to form partnerships; and
 - e. Report on measures taken to carry out these duties, including the impact of measures on improving outcomes for Māori children and young persons who come to the attention of Oranga Tamariki, and steps to be taken in the immediate future.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination

6. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (Human Rights Act). Two factors must be met for discrimination to be identified under s 19(1) of the Bill of Rights Act:¹
 - a. there is a differential treatment or effect as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and
 - b. that treatment has a discriminatory impact (i.e., it imposes a material disadvantage on the person or group differentiated against).
7. Differential treatment will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.²
8. Discrimination may also arise where there is a failure to treat two groups, which are different by reason of a prohibited ground of discrimination, differently.³
9. Section 21(1)(f) of the Human Rights Act lists race as a prohibited ground of discrimination. In 2016 we advised the then Attorney-General on the clause that became s 7AA, prior to its insertion into the Oranga Tamariki Act.⁴ We considered that although the proposed amendments arguably drew a distinction on the basis of race, the distinction did not amount to discrimination for the purposes of s 19(1) of the Bill of Rights Act because it did not involve a material disadvantage for any other group.
10. Conversely, we have now considered whether the Bill's repeal of s 7AA engages the right to freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act. The proposed repeal, by removing a measure that was intended to promote equitable outcomes for a group defined by reference to a prohibited ground, could be seen as withdrawing a relevant advantage for the purposes of the s 19(1) inquiry. Ultimately, however, we consider that the measure does not give rise to discrimination on the basis that it removes, rather than creates, a relevant distinction.⁵
11. We have also considered whether the Bill could be seen as discriminatory on the basis of a failure to treat different groups differently, as it removes a measure intended to promote equitable outcomes for Māori. The duties imposed on the chief executive under s 7AA are imposed to provide a practical commitment to the principles of the

¹ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

² See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

³ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 17.10.42.

⁴ Advice to Hon Christopher Finlayson QC, Consistency with the New Zealand Bill of Rights Act 1990: Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill, 5 December 2016.

⁵ See also our advice on a member's Bill similar to this Bill: Advice to Hon David Parker, Consistency with the New Zealand Bill of Rights Act 1990: Oranga Tamariki (Repeal of Section 7AA) Amendment Bill, 13 October 2022, [20221027-Oranga-Tamariki-7AA-Repeal-Bill-Final.pdf \(justice.govt.nz\)](https://www.justice.govt.nz/20221027-Oranga-Tamariki-7AA-Repeal-Bill-Final.pdf).

Treaty of Waitangi by reducing disparities and setting measurable outcomes for Māori children who come to the attention of the department.

12. We do not consider that repealing s 7AA materially disadvantages Māori to the extent that the Bill gives rise to discrimination under s 19(1) for the following reasons.
13. While the Bill removes the specific reporting obligations and duties on the chief executive of Oranga Tamariki, as well as the explicit pathways for strategic partnerships with iwi and Māori organisations, section 7AA is not the only way in which the needs of Māori are recognised in the principal Act. Although the Bill also amends the purposes of the Act at s 4(1)(f) to align with the repeal of section 7AA, the substantive purpose of “*providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti of Waitangi)*” remains in force.
14. The Bill does not change the other purposes, principles and duties of the Act including those which strengthen cultural connections by recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department⁶ and those which maintain and strengthen the relationship between children and young persons who come to the attention of the department and their family, whānau, hapū, iwi, family group and siblings.⁷
15. In addition, the Minister must report to Parliament at least once every three years, and that report must include whether under existing legislation and government policy the needs of Māori children and young persons with whom the department is concerned are met and whether any amendments to legislation or policies or arrangements are necessary or desirable.⁸
16. The Bill makes consequential amendments to the Oversight of Oranga Tamariki System Act 2022 and to Oversight of Oranga Tamariki System Regulations 2023 to remove the requirement for the Monitor to report on the performance of the chief executive’s section 7AA duties in that report, but still requires an assessment of outcomes being achieved for Māori children and young people and their whānau.
17. The Waitangi Tribunal has released an interim report in their urgent inquiry into the repeal of section 7AA.⁹ The Tribunal indicated concern around the impact on the trust between Oranga Tamariki and vulnerable Māori communities, discussed the benefits that resulted from the Strategic Partnership Arrangements and noted evidence that the removal of the accountability and reporting mechanisms may mean that work to reduce inequities may slow, which could have a material impact on children with whom Oranga Tamariki interacts.¹⁰
18. Oranga Tamariki has made commitments to maintain all current Strategic Partnership Arrangements entered into and intends to continue to enter into new agreements to help tamariki and rangatahi to thrive in the care and protection of their whānau, hapū

⁶ Oranga Tamariki Act 1989, s 4(g).

⁷ Oranga Tamariki Act 1989, s 4(h).

⁸ Oranga Tamariki Act 1989, s 448B.

⁹ Waitangi Tribunal, *The Oranga Tamariki (Section 7AA) Urgent Inquiry Report* (Wai 3350, 2024).

¹⁰ *Ibid* at 1.6.2.

and iwi.¹¹ Noting the potential for a slowdown in work on reducing inequities, in our view, there is limited information that would indicate that the Bill will detrimentally impact outcomes and result in material disadvantage for Māori. We consider that the s 19 right to freedom from discrimination is not engaged.

Conclusion

19. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

¹¹ Affidavit of Te Hapimana Te Kani, Oranga Tamariki (Section 7AA) urgent inquiry, [Wai 3350, A021.pdf \(justice.govt.nz\)](#).