New Zealand Law Society
Te Kāhui Ture o Aotearoa

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By email: legislation@ot.govt.nz

Re: Potential changes to the Oranga Tamariki Act 1989 – Feedback on Options Papers

A. Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the first tranche of Oranga Tamariki's (**OT**) options papers as part of preliminary legislative work on the Residential Care and Other Matters Amendment Bill. The options papers currently available for comment include:
    a. Information sharing;
    b. Special Guardianship Orders; and
    c. Young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences.
2. The Law Society's submission supplements our earlier feedback provided on the issues papers[1] and sets out some additional brief comments in response to the proposed options in each paper identified above.
3. This submission has been prepared with the assistance of the Law Society's Family Law Section and Youth Justice Committee.[2]

B. Options papers for other matters topics

Information sharing

42. This options paper explores whether the right information is available to support young people in care and sets out a range of potential options, proposing cumulative amendments to the information sharing provisions in the Oranga Tamariki Act (sections 65A-66Q) (**OT Act**),

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1 New Zealand Law Society submission, Proposed changes to the Oranga Tamariki Act, 9 September 2022 accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/OT-Potential-changes-to-the-OT-Act.pdf.

2 More information on the Law Society's Family Law Section and Youth Justice Committee can be accessed via the Law Society's website here https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/ and here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/youth-justice-committee/

plus a potential amendment to the duties of the chief executive in section 7AA. The Law Society makes the following brief comments.

43. The Law Society's Family Law Section consider option 4 is the appropriate option as it provides the most comprehensive information sharing arrangements. This option would amend the parties to and the purposes of the voluntary information sharing provisions, include a stronger duty on the Chief Executive to share information with iwi and Māori partners, and extend the information sharing framework.

42. As previously noted, the Law Society considers that the way information is currently exchanged often means there are significant gaps in the flow of information between relevant parties and risks creating "silos" of information. Option four would ensure those gaps are less likely to occur by creating one information sharing group and allowing information to flow freely between the parties. This option would also assist in removing the current OT/Iwi and other partnerships divide as noted in the options paper.

43. While there are inherent risks in creating one information sharing group (for example no limitations on the exchange of information, no consent of the tamariki/whānau is required, limitations on the child/young person's right to privacy), the proposed safeguards to ensure a collective decision is made on who can be added as a partner to the group, rather than resting with individual kaimahi, go some way to ameliorating those concerns. It is paramount that the wellbeing and bests interests of the child continue to take precedence over the duty of confidentiality.

44. Finally, this option aligns most closely with the objectives of the Oranga Tamariki Future Direction Plan and *Te Kahu Aroha* (as outlined in the options paper) for Oranga Tamariki to move towards a future state that allows information to flow freely between the appropriate agencies operating in this space.

44. We have not identified any additional/alternative options.

<u>Special guardianship orders</u>

45. As previously noted, the Law Society is pleased to see a review of the legislation governing special guardianship orders, particularly given the existing inconsistencies with the principles in the Act, the duties of the chief executive in relation to te Tiriti o Waitangi and recent Court decisions which have resulted in divergent views on how special guardianship orders apply to tamariki Māori.[3] In light of this, the Law Society's Family Law Section agrees that option three, amend the special guardianship provisions, is necessary to address the current problems identified in the options paper. However, we do not have a view at this stage on whether amendment to those provisions should be via the proposed adaptive package or the reform package.

46. If option three were to be considered in more detail, the Law Society's Family Law Section would welcome the opportunity to be involved in any further consultation.

[3] See for example *Re I* [2021] NZFC 210 (also referred to as *Chief Executive of Oranga Tamariki – Ministry for Children v BH*), Judge Otene, January 2021 and *Re WH* [2021] NZFC 4090, Judge Southwick, 5 May 2021.

Young people sentenced in the adult jurisdiction and detained in Oranga Tamariki residences

47. This options paper aims to address the current lack of clarity regarding the appropriate legislative framework that should apply to children and young people sentenced in the adult jurisdiction but held in a youth justice facility. As noted in our earlier submission, the Law Society agrees the current framework is not fit for purpose and that the focus should be on ensuring consistency with the principles of the OT Act first and foremost, alongside consistency with relevant international conventions and obligations (such as the Beijing Rules which provide guidance on how children should be treated in the criminal justice system).

48. Against this background, the Law Society considers the most appropriate option is a stand-alone model which would see OT take responsibility for all aspects of the young person's sentence, with flexibility retained to call on Corrections for assistance where necessary. The rationale for this preferred option is that OT are best placed to manage the young person given their primary roles and responsibilities, are obligated to act in their best interests and welfare under the OT Act, have access to appropriate tools and mechanisms to support the young person through their sentence, and allowing one agency to have responsibility would provide consistency for the young person. However, the Law Society recognises that some of the young offenders are serious and as such, it may be appropriate for some Corrections staff to train OT kaimahi around caring for serious offenders. The Law Society also notes this option would require significant investment and resourcing to implement, a matter which the option paper does not address in any detail.

49. Finally, we note the Māori subject matter expert view that "Schedule 1A offences should not be dealt with in the adult jurisdiction, as transferring these 17-year-olds from the youth court leads to inequitable outcomes when young people are subject to more severe penalties that are less effective at reducing offending".[4] The Law Society agrees with this view. At the time the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill was before the House, the Law Society raised concerns that the automatic transfer of proceedings where a 17-year-old is charged with serious offending (under Schedule 1A) undermined New Zealand's commitment to the United Nations Convention on the Rights of the Child and would disproportionately effect rangatahi Māori. [5]

50. While the options paper does not go on to discuss this issue in depth, we consider it is timely to review these provisions in light of the broader discussion on youth crime and the youth justice system as a whole, that is currently taking place.[6] The Law Society would be happy to discuss this issue further at a time that is convenient to OT.

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4 Oranga Tamariki, *Children and young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences*, Options Paper, at p 4.

5 New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017, at pp 43-45, accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0019-109108-CYPF-Oranga-Tamariki-Legislation-Bill-3-3-17.pdf

6 See for example the recent joint agency briefing to the Justice Select Committee, *Youth Crime and Community Wellbeing*, makes reference to the Minister of Justice and Cabinet "considering further options relating to legislative reforms to steer at-risk children and young people away from a lifetime of offending", at slide 10. Accessed here: https://www.parliament.nz/resource/en-NZ/53SCJU_EVI_125229_JU229640/6adff70412d0a4fadeadf3d527d9a33891b1dae7

C. Conclusion

51. We trust the above is helpful and look forward to the opportunity to be involved during the remaining stages of the consultation process and at the point when a Bill is before the House.

52. If you have any questions or comments concerning this submission, contact can be made via Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku noa, nā

Ataga'i Esara
Vice-President