New Zealand Law Society
Te Kāhui Ture o Aotearoa

Oranga Tamariki (Repeal of Section 7AA) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

2 July 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**the Law Society**) welcomes the opportunity to comment on the Oranga Tamariki (Repeal of Section 7AA) Amendment Bill (**The Bill**).

1.2 The Law Society does not support the repeal of section 7AA, nor the reason for its repeal, as set out in the explanatory note to the Bill: that the section has led 'Oranga Tamariki staff to prioritise cultural factors over the safety and stability of children.'

General comment

1.3 The Law Society agrees that Māori overrepresentation in the care and protection system is problematic. Despite comprising only a quarter of all children, tamariki Māori represent the majority of children in care. We also agree that tamariki and rangatahi Māori in care experience poorer lifetime outcomes than their non- Māori counterparts.[1]

1.4 The Government has recognised that these inequities are associated with greater lifetime costs and that failure to invest in reducing the overrepresentation and inequities experienced by Māori in the care system is likely to significantly worsen outcomes and increase the cost of future social investment.[2]

1.5 The Regulatory Impact Statement (**RIS**) states that 'despite decades of reviews, reports, and subsequent departmental changes, the overrepresentation of tamariki Māori in care has persisted, only improving slightly since the introduction of section 7AA.'[3] In addition to that slight improvement, the introduction of section 7AA has:[4]

(a) 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;

(b) reduced disparities between Māori and non-Māori in care;

(c) supported tamariki and rangatahi Māori to connect with their culture and develop a positive sense of identity; and

(d) played a pivotal role in strengthening trust and relationships between Oranga Tamariki and Māori.

1.6 In the Law Society's view, repealing section 7AA would be a retrograde step, because it:

(a) breaches the Treaty of Waitangi Te Tiriti o Waitangi;[5]

(b) is inconsistent with Articles 5 and 30 of the United Nations Convention on the Rights of the Child (**CRC**);

(c) will undermine efforts to address disparities and improve outcomes for Māori; and

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1 Paragraph 14 of the Regulatory Impact Statement (RIS).
2 Paragraph 14, RIS.
3 Paragraph 15, RIS.
4 Page 20, RIS.
5 Waitangi Tribunal, *Oranga Tamariki (Section 7AA) Urgent Inquiry Report.*

(d) removes the accountability of Oranga Tamariki to set measurable outcomes for Māori who come to the attention of the department and to publicly report annually on the measures taken and the impact of those measures.

1.7 In addition, the repeal of section 7AA will not achieve its intended purpose to reprioritise the safety and well-being of children and young people in care arrangements. It may in fact undo some of the progress that has been made in this respect.

Structure of this submission

1.8 This submission is structured as follows:

(a) Legislative context and history leading to the introduction of section 7AA.

(b) Comment on the Cabinet Paper.

(c) How the law is applied: safety, welfare and best interests of children.

(d) Implications of repealing section 7AA.

(e) Impact of the Bill on the Youth Justice system.

1.9 This submission has been prepared with assistance from the Law Society's Family Law Section.

1.10 The Law Society **wishes to be heard**.

2 Context and history of section 7AA

2.1 Section 7AA of the Oranga Tamariki Act 1989 (**the Act**) came into force in July 2019, and was intended to recognise and provide for a practical commitment to the principles of the Treaty of Waitangi Te Tiriti o Waitangi. It places duties on the chief executive of Oranga Tamariki to:

(a) ensure that the policies and practices of Oranga Tamariki have the objective of reducing disparities by setting measurable outcomes for tamariki Māori who come to the attention of Oranga Tamariki.

(b) ensure that the policies, practices and services of Oranga Tamariki have regard to mana tamaiti (tamariki), whakapapa, and the whanaungatanga responsibilities of whānau, hapū and iwi.

(c) develop strategic partnerships with iwi and Māori organisations.

(d) report at least annually on the measures taken to carry out the above duties, including the impact of these measures on improving outcomes for Māori.

2.2 Below we set out an overview of the legislative history, which illustrates the concerns around disparities for tamariki and rangatahi Māori and why there was a need to introduce section 7AA of the Act.

2.3 The **Child Welfare Act 1925** established the Child Welfare Branch of the Education Department, which was responsible for 'orphaned, destitute, neglected and out of control children'. It contained no reference to the Treaty of Waitangi Te Tiriti o Waitangi or any targeted provisions that assured equity for Māori or outcomes that would reduce disparities for Māori.

2.4 The **Children and Young Persons Act 1974** replaced the Child Welfare Act 1925 without introducing any radical change.[6] The Children's Court, the formal status of foster care, and a positive duty on the department to undertake preventative work and to investigate complaints were areas of change.[7] However, like its predecessor, it contained no reference to the Treaty of Waitangi Te Tiriti o Waitangi nor any targeted provisions that assured equity for Māori or outcomes that would reduce disparities for Māori. It faced criticisms around its institutional care as disproportionately high numbers of Māori and Pacific Island residents were placed into institutions, and did not address the increasing occurrence of child abuse.[8]

2.5 **Puao-te-Ata-tu (Day Break), the Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare** (1988). Some of the key points of this report include:

(a) Cultural racism manifests in negative attitudes toward minority cultures and the domination of those cultures, including by seeking to define those cultures. Majority cultures often selectively accept aspects of minority cultures while discarding essential dimensions, to the detriment of minorities.

(b) The report emphasises the insidious nature of institutional racism, which stems from monocultural institutions that exclude minority cultures. This form of racism is deeply entrenched in national structures and systems, requiring minorities to subjugate their own values for participation. Examples in tourism, education, and advertising underscore how these practices perpetuate and reinforce cultural inequality.[9]

(c) The difference in how care is perceived and enacted for tamariki Māori versus non- Māori children can reflect cultural racism and institutional biases. For Māori children, care involves a holistic approach that considers their whakapapa, connection to whenua, and the collective responsibility of the whānau. Non-Māori perspectives, influenced by majority cultures, may overlook or undervalue these aspects of care, instead focusing more on individualistic approaches or Eurocentric ideas of child welfare. This discrepancy can result in the marginalisation of Māori values and practices in caregiving, perpetuating cultural inequality and institutional racism.

(d) '*Māori people have raised concerns that social work practices, especially in court procedures, adoption, and family case work, have led to the breakdown of the whānau system and traditional tribal responsibilities in Māori life*.'[10]

(e) A concern that the Department had profoundly misunderstood the place of the child in Māori society and the relationship of Māori children with whānau, hapū

6 Wendy Parker, "Social Welfare residential care 1950-1994" (Historic Claims Team, Ministry of Social Development), October 2006, https://www.msd.govt.nz/documents/about-msd-and-our-work/contact-us/complaints/social-welfare-residential-care-1950-1994-volume-1.pdf at 14.

7 Above, n 6, at 14-15.

8 Above, n 6, at 16.

9 Puao-te-Ata-tu (Day Break): The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare" (1988), at 19.

10 Above, n 9, at 23.

and iwi structures.[11] '*When considering the welfare of a Māori child, it is important to prioritize maintaining the child within their hapu (sub-tribe) whenever possible*.'[12]

2.6 The **Children, Young Persons and their Families Act 1989** repealed the Children and Young Persons Act 1974. The 1989 Act provided a comprehensive set of tools with which to start to redress the inequities for tamariki Māori. It introduced tikanga principles, including participation of whānau, hapū and iwi in decision-making; strengthening and maintaining the relationship between a child and young person and their whānau, hapū, iwi and family; and the consideration of how decisions would affect the stability of a child or young person and their whānau.[13]

2.7 **United Nations Convention on the Rights of the Child** (CRC). Aotearoa New Zealand became a signatory to this convention in 1993 and in doing so, agreed to promote, respect, protect and fulfil the rights of all children. The CRC sets out the rights children and young people can expect from their parents, school, government, and society in general. State agencies consider the rights of children in the context of the Treaty of Waitangi Te Tiriti o Waitangi, and a child's connection with their family, whānau, hapū, iwi and communities.

2.8 The **Expert Advisory Panel Report of 2015** found the system to be lacking accountability, fragmented, and disjointed in its approach to meeting children and young person's needs.[14] It noted the need to address the over-representation of tamariki Māori in the system. It found that tamariki and rangatahi Māori were twice as likely to be reported to Child, Youth and Family compared to the general population. Potential causes of this over-representation included higher levels of deprivation in Māori families, both conscious and unconscious bias within the system, and a lack of strong, culturally appropriate models for family support and child development.[15] The report recommended sweeping changes to the children's system including a stronger focus on prevention, developing strategic partnerships, and giving emphasis to the voice of the child in care decisions.[16] These recommendations were instrumental in developing section 7AA.[17]

2.9 **Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.** New section 7AA came into force in July 2019. It introduced the first statutory provision under the Oranga Tamariki Act 1989 to recognise and provide a practical commitment to the principles of the Treaty of Waitangi te Tiriti o Waitangi and impose new duties on the chief executive to reduce disparities by setting measurable outcomes for tamariki Māori.

2.10 Section 7AA introduced mandatory reporting provisions requiring the chief executive to report publicly at least once a year on the measures taken to carry out the specified duties in section 7AA(2) and (4), including the impact of those measures on improving outcomes

11 Above, n 9, at 7.
12 Above, n 9, at 11.
13 Sections 4, 5 and 13.
14 Ministry of Social Development, "Expert Panel Final Report: Investing in New Zealand's Children and their Families" (2015) at 7.
15 Above, n 14, at 7.
16 Above, n 14, at 7.
17 Paragraph 13, RIS.

for tamariki and rangatahi Māori. Progress is assessed against several measures, known as the "mana tamaiti" objectives. The four section 7AA reports published between 2020 and 2023, showed incremental improvements reported across the five mana tamaiti objectives.[18]

2.11 The Waitangi Tribunal's 2021 report **He Pāharakeke, He Rito Whakakīkinga Whāruarua** found that the Crown committed serious breaches of the Treaty of Waitangi te Tiriti o Waitangi, both before and after the 2017 legislative changes, which have contributed to the significant disparity between the number of tamariki Māori and non-Māori children taken into State care. The tribunal received evidence that between 2000 and 2018, the incidence of tamariki Māori aged 16 and under in State care rose from one in every 125 Māori children, to one in every 64. By 2012, tamariki Māori were five times more likely than their non- Māori counterparts to enter State care. Māori were 54.7 per cent of children in care in June 2013, climbing to 61.2 per cent in 2017.[19]

2.12 The Crown conceded that the care and protection system in New Zealand failed to fully implement the recommendations of Pūao-te-ata-tū in a comprehensive and sustained manner, which impacted on outcomes for tamariki Māori, whānau, hapū and iwi and undermined the trust and confidence Māori had in the Crown as well as belief in the Crown's willingness and ability to address disparities.[20] The Crown further conceded that structural racism was a feature of Oranga Tamariki and its predecessors,[21] and acknowledged the role that poor practice, lack of engagement and poor cultural understandings had played to create distrust throughout the care and protection system.[22]

2.13 This history clearly shows the ongoing need to address the concerns around the significant disparity between the number of tamariki Māori and non-Māori children taken into State care.

3 Comment on the Cabinet Paper

3.1 The Minister for Children, Hon Karen Chhour, proposed to repeal section 7AA in a Cabinet paper of 10 May 2024 (**the Cabinet Paper**) on the basis that it:

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18 Section 7AA Report 2020, https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/Section-7AA/S7AA-Improving-outcomes-for-tamariki-Maori.pdf
Section 7AA Report 2021 https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/Section-7AA/s7AA-Annual-Report-2021.pdf
Section 7AA Report 2022, https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/Section-7AA/Section-7AA-2022-accessible-version-20230815.pdf
Section 7AA Report 2023, https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/Section-7AA/7AA-Web_V5.pdf

19 Waitangi Tribunal, He Pāharakeke, he Rito Whakakīkinga Whāruarua (Wai 2915, 2021) at chapter 4.2, page 46.

20 Above, n 19, at chapter 1.5, page 5.

21 Above, n 19, at chapter 1.5, page 5.

22 Above, n 19, at chapter 1.5, pages 5-6.

(a) creates a conflict for Oranga Tamariki between the requirement to make decisions in the best interests of a child or young person and the duties on the chief executive;[23] and

(b) is influencing Oranga Tamariki practice to the detriment of the safety of children.[24]

3.2 The Law Society does not agree that repeal of section 7AA will improve the well-being and best interests of children and young people. Nor will it address any perceived undermining of welfare and best interests due to cultural considerations.[25] There is no evidence that section 7AA is responsible for undermining the safety of children.

3.3 The Cabinet Paper concludes that section 7AA creates a conflict for Oranga Tamariki when making decisions in the best interests of the child or young person.[26] In our view, there is no evidence to support this proposition. Section 4A makes it clear that in all matters relating to the administration or application of the Act the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13. It is clear from these sections that Oranga Tamariki has a duty to ensure the safety of children and young people and that this duty is not overridden by the requirements in section 7AA.

3.4 The Cabinet Paper expresses concern that 'section 7AA is influencing Oranga Tamariki practice to the detriment of the safety of Māori children' and notes 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".[27] This position appears to be supported by anecdotal evidence and the pressure being brought to bear by some "prominent individuals" in some "high profile cases". By comparison, the RIS prepared by Oranga Tamariki states that these high-profile cases are small in number and are cases that deviated significantly from best practice.[28]

3.5 While we agree that outcomes of Oranga Tamariki cases are sometimes distressing (because children are in need of care and protection), they are not limited to only cases where section 7AA was a relevant consideration. But more significantly, the proposed repeal is a reaction to a small and isolated number of poor outcomes for which the explanation is a failure to meet best practice. Accordingly, what evidence there is (including the Chief Executive Reports discussed below) points the other way.

3.6 In the Cabinet Paper, the Minister states that section 7AA has 'negatively impacted on caregivers', and that 'some caregivers have suggested that section 7AA has resulted in a requirement for culturally appropriate environments, which is valued more that children's welfare.'[29] The Law Society is not aware of evidence to support the notion that there have

23 Cabinet Paper, paragraph 11.
24 Cabinet Paper, paragraphs 9 and 12.
25 Cabinet Paper, paragraph 12.
26 Cabinet Paper, paragraph 25.
27 Cabinet Paper, paragraphs 12-14.
28 Paragraph 7, RIS.
29 Cabinet Paper, paragraph 16.

been a significant number of removals of children from caregivers because the caregivers were "deemed to be the wrong ethnicity".

3.7 The Cabinet Paper also states that the repeal of section 7AA does 'not alter the purposes outlined in section 4 of the Act, which include a practical commitment to the principles of the Treaty of Waitangi te Tiriti o Waitangi, recognising mana tamaiti, whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department.'[30] The Law Society does not agree.

3.8 First, the fundamental principles of mana tamaiti, whakapapa, and whanaungatanga are inextricably linked to section 7AA and its application.

3.9 Second, when section 7AA came into force on 1 July 2019, section 4 (purposes) was also replaced. Section 4(1)(f) now provides that one of the ways to promote the well-being of children, young persons, and their families, whānau, hapū, iwi and family groups is by providing a practical commitment to the principles of the Treaty of Waitangi te Tiriti o Waitangi *in the way described in this Act*. Section 4(1)(f) relates back to section 7AA, which imposes duties on the chief executive of Oranga Tamariki to provide a practical commitment to the principles of the Treaty.

3.10 The Bill proposes to amend section 4(1)(f) by deleting the words 'in the way described in this Act.'[31] If section 7AA is repealed, the purpose in section 4(1)(f) becomes a purpose that has no effective way of being implemented nor monitored for effectiveness as was initially anticipated when it was enacted.

3.11 Section 7AA is about accountability. It imposes duties on the chief executive as to how the purpose in section 4(1)(f) will work in practical terms. If legislation sets out a purpose, but later removes the duties imposed in order to give effect to that purpose, it calls into question the purpose. In other words, it removes Parliament's expectations as to how the chief executive should act in order to meet that commitment.

3.12 Three out of four Chief Executive Reports under s 7AA (2021, 2022 and 2023) since the introduction of section 7AA show incremental improvements to outcomes for tamariki Māori across five mana tamaiti objectives.[32] Paragraph 20 of the RIS states:

> *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 toward honouring the principles of the Treaty of Waitangi through the current practice approach and operating model.*

4 How the law is applied: safety, welfare and best interests of children

4.1 Before repealing section 7AA, consideration should be given to the context in which the chief executive applies the duties that recognise and provide a practical commitment to the principles of the Treaty of Waitangi te Tiriti o Waitangi.

30 Cabinet Paper, paragraph 18.
31 Clause 4 of the Bill.
32 Paragraph 17, RIS.

4.2 Sections 4 (Purposes), 4A (Well-being and best interest paramount), 5 (Principles) and 13 (Principles under Part 2: care and protection) set out in detail the purposes of the Act and the principles that must be taken into account by any court or person exercising powers under the Act. These require Oranga Tamariki staff to take into account the purposes and principles of the Act when determining the most appropriate care arrangement for a child or young person. It is the combination of these sections which ensure that a child's safety is paramount.

4.3 The duties listed in section 7AA(2)(b) are perceived to be the cause of unsafe or high-risk care decisions, leading to the proposal to repeal section 7AA. However, section 7AA is not one of the sections that must be considered or taken into account when exercising care and protection powers under the Act. Oranga Tamariki is of the view that it is more likely that non-regulatory changes, such as further strengthening of practice guidelines, would better address the problem.[33] We agree with the view of Oranga Tamariki that repealing section 7AA will not remove the considerations of mana tamaiti, whakapapa and whanaungatanga in placement decisions,[34] as these considerations are found in section 4(1)(g), section 5(1)(b)(iv) and section 13(2)(b)(ii).

4.4 The Law Society also notes the following additional advice contained in the RIS:

(a) the lack of robust empirical evidence to support the view that section 7AA causes harmful changes to long-term care arrangements.

(b) repeal of section 7AA will not have a significant impact on how care decisions are made.

(c) the evidence of Oranga Tamariki demonstrates that the problem more likely stems from flaws in the practice of individual staff.

(d) some social workers may perceive the repeal of section 7AA as a signal to give less regard to cultural considerations.

4.5 In addition, there was no time to fully analyse further non-regulatory options; analyse the impact of repeal on the youth justice system; or undertake public consultation with affected stakeholders.

4.6 Section 7AA has only been in force since 1 July 2019. It has had little time for its effects to be understood, but to the extent that this is possible the evidence is that it is having a positive effect. In the Law Society's view, more time and a clear and detailed analysis is required, including on the benefits and implications of removing the section, before repeal is considered. Such an analysis should also focus on the positive outcomes for tamariki Māori and how section 7AA has assisted in those outcomes.

5 Implications of repealing Section 7AA

Practical considerations

5.1 The exercise of powers and decision-making under the Act are subject to the provisions set out in sections 3, 4, 4A, 5 and 13 of the Act. The primary focus of decision-making is the

33 Paragraph 21, RIS.
34 Paragraph 33, RIS.

safety and well-being of children. The assessment of safety is often a fact-based enquiry which leads to a risk assessment of whether a child will be safe from violence. The assessment of a child's well-being includes consideration of the family context. For tamariki Māori, this examination may include reference to whānau, hapu and iwi. A number of factors are considered when addressing the well-being of a child, including identity, relationships and recognising the role of a child's family in determining the future care of a child.

5.2 The purpose of repealing section 7AA is to 'reprioritise the safety and well-being of children and young people in care arrangements.'[35] In our view, the repeal of section 7AA will not achieve this purpose.

5.3 Safety is at the forefront of all decisions due to the definition of a 'child or young person in need of care or protection' under section 14 of the Act. The well-being of children is also clear in the section 4 and 13 principles. It is well established in those sections that the well-being of tamariki is linked to recognising mana tamaiti (tamariki), whakapapa and the practice of whanaungatanga.

5.4 In the care and protection system, assessments and decisions regarding safety begin at an early stage in terms of assessment and support work with families, and continue when the court is considering whether the level of safety concerns meet the threshold of whether a child is in need of care and protection.

5.5 Section 7AA provides clear obligations on Oranga Tamariki to work with iwi and Māori organisations in strategic partnership. It is these strategic partnerships that can provide successful assistance pre-proceedings by assisting whānau to meet the safety needs of children without court or Oranga Tamariki intervention. These partnerships also assist in providing culturally appropriate placements that meet the long-term needs of tamariki if removal from their home is required. Section 7AA is an important tool that allows iwi and Māori organisations to step forward and take an active part in the protection of tamariki.

5.6 Section 7AA does not decrease the emphasis on safety. Oranga Tamariki has typically relied on community organisations to provide assessments, whānau support and appropriate foster placements. Section 7AA simply places a duty on the chief executive of Oranga Tamariki to develop iwi and Māori strategic partnerships. This is appropriate given 67 percent of children in care are Māori.[36]

5.7 It is worth noting that section 7AA has not resulted in a devaluing of the criteria of safety and the statutory requirement of care and protection. The high-profile "reverse uplifts" and the issues raised by the Minister around section 7AA have been more about placement decisions once care and protection concerns have been established. We note again that it is the view of Oranga Tamariki that the small number of high-profile cases are ones that have deviated significantly from best practice.

5.8 In our view, the care and protection system is failing both Māori children and whānau in terms of the number of tamariki Māori in care. It is the experience of family lawyers who work in this area of law that there are a number of placements failing, and that children

35 Paragraph 9, RIS.
36 Section 7AA report 2023, at 1.

are being moved through frequent placements, unable to form attachments. They often leave the care and protection system without a whānau support structure. They are often isolated and moved into independent living situations at a young age.

5.9 This illustrates the need for more for intervention, more support of whānau within the community, and greater monitoring to ensure there are improved and measurable outcomes for tamariki Māori. Repealing section 7AA will only remove the positive obligations and duties on Oranga Tamariki to work with iwi and Māori organisations and to effect policies to address the needs of tamariki.

Special guardianship

5.10 In considering the proposed repeal of section 7AA and its implications, it is relevant to consider the development of the law in relation to special guardianship, which came into force at the same time as section 7AA. Special guardianship is seen as a more secure mechanism for caregivers of children in long-term care.

5.11 Section 113A(1) of the Act allows the court to appoint a special guardian of a child if the appointment is made for the purpose of providing a long-term, safe, nurturing, stable, and secure environment that enhances the child's interests where a child has no other guardian, or the special guardian either replaces, or is additional to an existing guardian.

5.12 The court has had to consider the application of te ao Māori principles where special guardianship is sought in respect of a Māori child. Justice Doogue in the case of *McHugh v McHugh* endorsed the reasoning of Judge Otene in *Chief Executive of Oranga Tamariki – Ministry of Children v BH* that the court should substantively apply te ao Māori principles rather than merely recognising and respecting them. The task for the court in an application for special guardianship of tamariki Māori is:[37]

(a) A substantive application of the principles (te ao Māori values) in sections 5 and 13 as they relate to tamariki Māori as constituent elements of well-being and best interests.

(b) Requiring adequate whakapapa research.

(c) Identifying the many people who may play a role in the child's life.

(d) Recognising a special guardianship order can exist alongside mana tamaiti, whakapapa and whanaungatanga, where whānau have been involved in decision-making.

(e) Reconciling the above matters and the other principles to determine whether the order is in the child's best interests.

(f) Recognising the threshold for making an order is high.

5.13 Since the introduction of section 7AA, case law has further developed the interpretation of the principles and purposes of the Act and their application to tamariki Māori. As Judge Otene said in *BH* when referring to section 7AA, 'contextualising matters between Māori

37 *McHugh v McHugh* [2022] NZHC 1174, Doogue J who approved the approach taken by Judge Otene in *Chief Executive of Oranga Tamariki – Ministry for Children v BH* [2021] NZFC 210.

and non-Māori is not unique and section 7AA is an example of that.' She also referred to examples in other legislation to illustrate her point.

5.14 The positive developments that have followed the introduction of section 7AA, as seen through the special guardianship jurisprudence, shows the need to retain section 7AA to continue to address the inequities and negative outcomes for tamariki Māori.

5.15 Section 110 of the Act allows for an iwi or cultural social service to be appointed as an additional guardian. The appointment of an additional guardian is a pre-requisite for a special guardian to be appointed. In our view, if section 7AA is repealed, it may result in a decrease in iwi and cultural social services being appointed as additional guardians. This would be to the detriment of tamariki Māori who require a special guardian to provide a long-term and secure environment if they are to thrive.

Strategic partnerships

5.16 Section 7AA (2)(c), (3) and (4) creates a positive obligation for Oranga Tamariki to engage with iwi and Māori organisations. It is a tangible recognition of the partnership between the Crown and Māori and encourages and endorses the creation of strategic partnerships. There are no comparable requirements for such strategic partnerships elsewhere in the Act.

5.17 The Law Society is concerned that repeal of section 7AA will lead to the diminished involvement of iwi and Māori organisations, to the detriment of tamariki and rangatahi Māori (and ultimately society as a whole).

5.18 The Law Society agrees with the comments in the RIS in respect of the positive achievements made due to the iwi and Māori strategic partnerships with Oranga Tamariki, including the:[38]

(a) significant and positive impact the roles and services have had on Māori;

(b) reduction in the number of tamariki Māori entering care;

(c) increased trust between Māori and Oranga Tamariki;

(d) improvement of cultural capability and confidence of Oranga Tamariki staff;

(e) greater pride Māori have expressed in their cultural identity and sense of belonging;

(f) improved experiences of whānau that have showed greater participation and empowerment to change through early interventions and support; and

(g) increase in Māori organisations facilitating transition support services that have provided positive support for Māori transitioning out of care.

5.19 We also note the likely negative impacts of the repeal of section 7AA in respect of these strategic partnerships, including a decrease in confidence among strategic partners of Oranga Tamariki and the communities with whom Oranga Tamariki has the greatest contact, and a decrease in trust among Māori whānau and communities. This could affect

38 Paragraphs 18(a) to 18(e), Cabinet Paper.

levels of engagement between Oranga Tamariki and strategic partners, which may affect the long-term wellbeing of children.[39]

5.20 Part 8 of the Act contains provisions relating to iwi social services, cultural social services, child and family support services, and community services. The connection between this part of the Act and section 7AA is an important one and the involvement of these services in the lives of tamariki at an early stage cannot be underestimated.

5.21 Dr Allan Cooke was requested to give expert evidence at a Waitangi Tribunal urgent inquiry on 8 April 2024 into the removal of section 7AA of the Act. He expressed concern about the connection between section 7AA and section 396 and the approval of iwi and cultural social services and section 7AA and the partnerships with Māori organisations that exist at a site level. He said:[40]

> *A significant umbrella of support - both real and intangible (through being simply being there and present) will be removed. This "on the ground" impact of this is likely to see greater social dislocation amongst vulnerable families in society and the inevitable focus of Police and OT on those families.*

5.22 We note the Cabinet Paper's suggestion that repeal of section 7AA would not discontinue Oranga Tamariki's existing strategic partnerships with Māori and would not prevent Oranga Tamariki entering further strategic partnerships with iwi or Māori organisations.[41]

5.23 We question whether there is a commitment to fund, retain and build on these strategic partnerships if section 7AA is to be repealed. We also note the concern of Oranga Tamariki, that:[42]

> *While certain processes related to section 7AA that are delivery positive outcomes for children, such as strategic partnerships, will likely continue in its absence, a full repeal may remove oversight and potentially affect the level of resourcing that these processes receive. This may, for example, diminish the capacity of our strategic partnerships to connect with communities that have low trust in Oranga Tamariki. A consequence of this may be that at-risk whānau and communities show lower engagement in services that have been shown to improve the safety and stability of children.*

5.24 In addition, Oranga Tamariki's view is that 'certain factors (for example, mana tamaiti, whakapapa and whanaungatanga) may receive less priority and resourcing in policies and practices over time' and that social workers may perceive the amendment to suggest they should give less regard to cultural considerations.[43]

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39 Paragraph 18, RIS.

40 Brief of Evidence of Dr Allan Cooke in support of :Merepeka Raukawa-Tait as an Interested Party in the Oranga Tamariki (Section 7AA) Urgent Inquiry, 8 April 2024 at para [25].

41 Paragraph 20, Cabinet Paper.

42 Paragraphs 17 and 18, RIS.

43 Paragraph 18, RIS.

Accountability and annual reporting

5.25 As noted above, section 7AA(5) places a duty on the chief executive to report to the public annually on the measures taken to carry out the duties contained in section 7AA, including the impact of those measures on improving outcomes for Māori.

5.26 This duty creates, for the first time, a foundation upon which Oranga Tamariki can undertake meaningful assessment and review. Again, these obligations are not reflected elsewhere in the legislation.

5.27 The Cabinet Paper suggests in respect of reporting that 'there are other approaches already in use that assist with this, including the Oranga Tamariki annual report which covers two impacts specific to tamariki Māori,' and that to help ensure that any disparities for tamariki Māori are still monitored, 'additional measures could be added to the Oranga Tamariki annual report.'[44]

5.28 The Law Society does not agree that Oranga Tamariki's annual report could adequately replace the current section 7AA report. There is no other reporting requirement that replicates the section 7AA report, which assesses the measures (across five mana tamaiti objectives) taken by the chief executive to fulfil the duties in section 7AA.

5.29 In our view, the removal of the section 7AA reports will lead to a lack of transparency and make it more difficult to hold Oranga Tamariki accountable for its specific duties in respect of tamariki Māori. This lack of accountability was a significant concern of the 2015 Expert Advisory Panel expressed in its report:[45]

> *…. there is no accountability to Māori children and their whānau by CYF to publicly report against those obligations. Accountability is an important mechanism to measure and improve performance. The section and department should invite scrutiny by being collectively accountable for their performance to their customers – Māori children, young people and their whānau and those people who have a vested interest in their performance – the public and the Government of New Zealand.*

5.30 In addition, the repeal of s7AA (2)(a) and (b) would undermine the usefulness of any reports which purport to assess outcomes for tamariki and rangatahi Māori because the underlying objectives and measures would no longer be based in statute.

6 Implications for the Youth Justice system

6.1 Tamariki and rangatahi Māori are increasingly overrepresented in the youth justice system. Rangatahi Māori make up nearly two-thirds of all young people in the Youth Court, despite being one-quarter of the total youth population.[46] This is not surprising given the

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44 Paragraph 19, Cabinet Paper.

45 Above, n 14, at 60.

46 Ministry of Justice, Youth Justice Indicators (April 2023). It is important to note that the vast majority of tamariki and rangatahi Māori do not have any contact with the youth justice system. Over 98% of tamariki Māori and 95% of rangatahi Māori had no police proceedings against them in 2021/22.

overrepresentation of tamariki and rangatahi Māori in care: rates of offending are significantly higher for children and young people with care experience.[47]

6.2 The duties of the chief executive under section 7AA also apply in respect of youth justice matters. An example of how this can operate is set out in the Chief Executive's 2023 Section 7AA report, which includes reference to Oranga Rangatahi, an iwi-led preventative programme aimed at reducing youth offending. The report notes that Oranga Tamariki is working with six Oranga Rangatahi programmes across the North Island, and the findings emerging from these programmes suggest they are achieving success.[48] In addition, several iwi and Māori organisations hold delegated power to provide youth justice services and a range of community homes are run by Māori organisations. Greater partnerships with iwi and Māori have shown that when Māori lead processes, whānau have better experiences and their early intervention and support leads to fewer Māori in state care and custody.[49]

6.3 The RIS notes that the limited timeframe to assess the potential implications of the Bill has meant the impact of repealing section 7AA on the youth justice system has not been considered.[50] It notes this presents a significant limitation to the analysis, given the implications a repeal may have for short-and long-term justice and well-being outcomes.[51] Given the success indicated in current strategic partnerships, the Law Society is concerned that the Bill is progressing despite the lack of analysis of potential implications. As with care and protection matters, the Law Society is concerned that repeal of section 7AA signals a reduced commitment to fund, retain and increase strategic partnerships, ultimately leading to the diminished involvement of iwi and Māori organisations. This would be to the detriment of tamariki and rangatahi Māori, and society as a whole.

Frazer Barton
President

47 Above, n 36, at 38.
48 Above, n 36, at 13.
49 Paragraph 18(b), RIS.
50 Page 2, RIS.
51 Page 2, RIS.