In Confidence

Office of the Minister for Children

Chair, Cabinet Legislation Committee

Oranga Tamariki Amendment Bill: Approval for Introduction

Proposal

1 This paper seeks Cabinet approval to introduce the Oranga Tamariki Amendment Bill (the Bill). The Bill amends the Oranga Tamariki Act 1989 (the Act).

Policy

2 I am seeking Cabinet agreement to introduce this Bill, which partially repeals the subsequent child provisions, repeals a redundant information sharing provision, and amends technical errors and ambiguities. These amendments resolve provisions which are not fit for purpose or are inconsistent with the objectives of Oranga Tamariki—Ministry for Children to support children and their whānau.

3 Partially repealing the subsequent child provisions addresses one of the concerns raised in *He Pāharakeke, He Rito Whakakīkinga Whāruarua*, the Waitangi Tribunal Oranga Tamariki Urgent Enquiry (WAI 2915). I consider that the partial repeal signals the changes in the operating model and direction of Oranga Tamariki. 9(2)(f)(iv) [redacted]

4 The relevant policy approvals for the Bill were obtained from the Cabinet Social Wellbeing Committee (SWC) over 2019/20 [SWC-19-MIN-0017 and SWC-20-MIN-0103 refers]. In accordance with these decisions, the Bill contains:

4.1 the partial repeal of the subsequent child provisions

4.2 the repeal of section 66D dataset provision for information sharing

4.3 remedial amendments to improve clarity and remove errors.

5 s 9(2)(g)(i), s 9(2)(f)(iv) [redacted].

Partial repeal of subsequent child provisions (the provisions)

6 Sections 14(1)(c) and 18A – 18D of the Act set out how Oranga Tamariki must respond when a subsequent child comes to its notice. A subsequent child is any child, born or unborn, who has a parent:

6.1 that has been convicted of the murder, manslaughter, or infanticide of a child (section 18B(1)(a)), or

6.2 that has had a previous child permanently removed from their care (section 18B(1)(b)).

7 The provisions came into effect in 2016. They were intended to ensure greater oversight of the safety of a subsequent child, by requiring a parent to demonstrate that they will not inflict the same kind of harm on them in order to continue caring for that subsequent child. Under the provisions, the Family Court is required to have oversight of all decisions in relation to subsequent children, even when Oranga Tamariki considers there are no care or protection concerns.

8 In 2019, Oranga Tamariki launched a first principles review (the review) of the provisions, based on concerns that they were not meeting their original policy intent or operating in a way that promoted the best interests of children.

9 The review found that the provisions were not ensuring greater oversight of the safety of subsequent children and may in fact be causing harm, particularly for children where there is an older sibling in care. This is because the court must confirm the older sibling has no realistic prospect of returning to their parent, drawing the older sibling into potentially traumatic court proceedings, and setting up conditions for hostility between social workers and parents, family, and whānau. The provisions pre-determine risk and do not leave room for consideration of any positive changes that parents may have made following the removal of a previous child.

10 In July 2020, Cabinet agreed to seek repeal of the provisions as they apply to parents who have had a previous child permanently removed from their care (section 18B(1)(b)). Cabinet agreed to retain the provisions as they apply to parents with a conviction relating to the murder, manslaughter, or infanticide of a child in their care (section 18B(1)(a)) [SWC-20-MIN-0103 refers].

11 The concerns set out in the review were also reflected in the Waitangi Tribunal's findings in *He Pāharakeke, He Rito Whakakīkinga Whāruarua* (WAI 2915) earlier this year. In that report, the Waitangi Tribunal found that the Crown continued to breach its Te Tiriti obligations by failing to partially repeal the subsequent child provisions.

12 Partially repealing these provisions is also necessary to ensure that when children come to the attention of Oranga Tamariki, the agency can make a family and whānau-centred decision regarding appropriate next steps – including the option of the child remaining safely at home with parents, family, and whānau. Repealing these provisions would also signal the changes in the operating model and the new direction for Oranga Tamariki, as proposed in

Kahu Aroha, and, through the Action Plan. It would also signal our commitment to strengthening relationships with families, whānau, hapū, iwi, and Māori.

13 The provisions will continue to apply to parents who have been convicted of murder, manslaughter, or infanticide. I consider, and Cabinet has previously agreed, that presuming risk and expecting these parents to demonstrate that they are unlikely to inflict harm on a subsequent child is appropriate, given the seriousness of these convictions.

Repeal of section 66D dataset provision

14 A number of new information sharing provisions contained in sections 66 to 66D and 66K of the Act were introduced on 1 July 2019 to improve information sharing practices. These provisions give child welfare and protection agencies the ability to request, collect, use, and share personal information for purposes related to the wellbeing and safety of tamariki.[1] The new provisions were designed to put the needs of children and young people at the centre of decision-making and enable the right support and services to be provided to them and their whānau.

15 Section 66D of the Act (referred to as the dataset provision) places a requirement for any agency that creates a dataset from more than one source of information to publicly notify details of that dataset. The notification is to include the following information:

15.1 the types of information used in the combined datasets;

15.2 the sources of those types of information;

15.3 the purpose or purposes served by creating or analysing the combined datasets; and

15.4 the privacy safeguards relating to the use of the combined datasets.

16 The policy intent of the dataset provision was to increase child welfare and protection agency transparency about the linked information they have used.

17 Oranga Tamariki has found that the dataset provision could place an unnecessary administrative burden on child welfare and protection agencies, without achieving the level of public accountability originally envisaged. Concerns with the dataset provisions include that:

17.1 monitoring the use of combined datasets by agencies to allow for the level of public scrutiny required by the provisions would be difficult;

17.2 enforcing compliance with the provisions without some form of surveillance of agencies' use of combined data would be challenging;

17.3 surveillance would be resource-intensive, not practicable, and could be in breach of an individual's privacy and human rights; and

[1] Child welfare and protection agencies are defined under section 2(1) of the Act.

17.4 gaining individuals' consent to the use of their data, if it is not used anonymously, would be problematic.

18 Oranga Tamariki also found that over time the policy intent of the dataset provision could be achieved through cross-government information sharing initiatives, such as the Social Wellbeing Agency's Data Protection and Use Policy.[2] These initiatives are less administratively burdensome and allow for greater and more flexible sharing of information.

19 Based on these findings, in March 2019 Cabinet agreed to repeal the dataset provision [SWC-19-MIN-0017 refers]. This Bill gives effect to that decision.

Technical amendments

20 Oranga Tamariki has processes in place to ensure that technical errors and ambiguities in the Act are centrally recorded and assessed for remedial amendment through the next available legislative vehicle. Since the most recent amendment Act (Oranga Tamariki Legislation Act 2019), a number of technical errors and ambiguities have been identified that would benefit from immediate amendment.

21 The proposed technical amendments do not constitute new policy direction. Rather, they are being introduced to address points of confusion or barriers to practical implementation of the existing policy intent.

22 The proposed technical amendments are set out in detail in Appendix One, but can broadly be described as follows:

22.1 *Payment of lay advocates and youth advocates*: amendments to enable the Registrar of the Court to determine fees and expenses of lay advocates and youth advocates if they are not determined by regulations.

22.2 *Seniority of staff approving placement in police custody*: amendment to align legislation with the policy intent that senior staff approval is needed to place tamariki in police custody, but not for detention in residences.

22.3 *Orders for supervision with residence*: amendments to enable a supervision order to be made on the same date that a young person is released from the custody of the chief executive of Oranga Tamariki.

22.4 *Care and protection proceedings*: amendments to replace incorrect references to the former process for making care and protection orders.

22.5 *Advice and assistance for young people in a youth unit of a prison*: amendment to include detention in a youth unit of a prison as a type of care or custody that a young person may have been in to receive advice and assistance from the Oranga Tamariki transitions support service.

[2] The Social Wellbeing Agency's Data Protection and Use Policy articulates values and behaviours that should underpin the social sectors actions in relation to people's information, and provides guidelines for good information sharing practices within the sector.

The amendment does not impact advice and assistance for young people under remand or a prison sentence in the adult justice system (before turning 18).

22.6 *Child or young person's participation and views:* amendment to reflect that decisions should be explained in a manner that is appropriate to a child or young person's age and level of understanding, in line with the original policy intent.

Impact analysis

23 A Regulatory Impact Assessment (RIA) was prepared by Oranga Tamariki on the partial repeal of the subsequent child provisions, in accordance with the necessary requirements. It was submitted at the time that Cabinet approval was sought for the policy decisions relating to the partial repeal [SWC-20-MIN-0103 refers].

24 The repeal of section 66D is exempt from the requirement to have a RIA on the basis that the proposal repeals or removes redundant legislative provisions.

25 The Regulatory Impact Analysis Team at the Treasury has determined that the technical amendments outlined in Appendix One are exempt from the requirements to provide a RIA on the basis that they have minor impacts on businesses, individuals or not for profit entities. The proposals related to care and protection sections within the Act in clauses 4, 9, 11, 17, and 43 would also be exempt on the grounds that the relevant issues have already been addressed by existing impact analysis, as can be seen in the Regulatory Impact Statement on the Ministry of Social Development website.[3] Clauses 13, 15, 16, 17, 20(2), 21(2), 23, 24, 25, 26, and 30 are also exempt on the basis that they repeal or remove redundant legislative provisions.

Compliance

26 The Bill complies with:

26.1 the principles of Te Tiriti o Waitangi (Te Tiriti) (further detail below);

26.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (further detail below);

26.3 the principles and guidelines set out in the Privacy Act 2020;

26.4 relevant international standards and obligations; and

26.5 the Legislation Guidelines (2018 edition);

26.6 the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper).

[3] Link to guidance here: https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/regulatory-impact-statements/regulatory-impact-statements-children-young-persons-and-their-families-oranga-tamariki-legislation-bill.html.

Te Tiriti o Waitangi

27 The subsequent child provisions are not ensuring the safety of subsequent children or enabling connection and whakapapa between current children in care and their parents and whānau. The Tribunal report (WAI 2915) found that the Crown has continued to breach its Te Tiriti obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga by failing to partially repeal the subsequent child provisions.

28 Alongside the partial repeal of the legislation, Oranga Tamariki is developing alternate mechanisms to ensure the safety of future children, including the development of whānau-centred supports for parents who are not in a position to provide long term stability for their tamariki 9(2)(f)(iv) [redacted]

29 The partial repeal, and development of alternate mechanisms to ensure the safety of future children supports an approach that reflects section 7AA of the Act and Te Tiriti commitments. The continued existence of the subsequent child provisions negatively impacts on the ability of Oranga Tamariki to meet its commitments under section 7AA of the Act.

30 While *Kahu Aroha* and the Action Plan did not explicitly recommend the partial repeal of the subsequent child provisions, the provisions have been shown to damage the relationship that Oranga Tamariki has with families, whānau, hapū and iwi. These relationships will be core as Oranga Tamariki moves towards a new operating model. Partially repealing these provisions will be necessary to show commitment to the rebuilding and strengthening of these relationships.

31 A full analysis assessing the partial repeal against each article of the Treaty is contained within the subsequent child Cabinet paper [SWC-20-MIN-0103 refers].

The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

32 I consider the Bill to be consistent with the rights and freedoms of the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990 (NZBORA). In addition, the Bill gives effect to New Zealand's commitments under the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities.

33 Tamariki Māori and Pacific children are over-represented within the subsequent child cohort. Partially repealing the provisions, alongside the development of alternate mechanisms to ensure the safety of future children, will reduce disparities between tamariki Māori and Pacific children, and other children.

34 A number of subsequent children who entered care during the 2018/19 financial year (not via the sections 18A – 18D pathway)[4] were in the care of a disabled

[4] Due to the low number of subsequent child applications, officials used proxy data from 'home for life' placements to better understand the broader population group of 'subsequent child'.

parent.[5] Partially repealing the provisions, alongside the development of alternative mechanisms to ensure the safety of future children, may support disabled parents' relationship with their children.

35 Although the proposed technical amendments do not constitute new policy direction, several strengthen children's rights, affirming equality and non-discrimination based around age or ability. For example, clause 4 ensures that decisions are to be explained to a child or young person in a manner appropriate to their age and level of understanding, and clause 17 amends section 144(1) to reflect that consent can be acquired in a variety of ways not just 'in writing.'

36 Clause 29 clarifies when bail breaches reset within section 214A, affirming rights around lawful arrest and detention within New Zealand Bill of Rights Act 1990.

Consultation

37 This paper was prepared by Oranga Tamariki—Ministry for Children. The following agencies have been consulted: the Accident Compensation Corporation, Ara Poutama Aotearoa - Department of Corrections, Department of Internal Affairs, Ministry of Education, Ministry of Health, Ministry of Justice, Ministry of Business, Innovation, and Employment, Ministry for Pacific Peoples, Ministry for Women, Ministry of Social Development, Ministry of Youth Development, Office for Disability Issues, Office of the Privacy Commissioner, Parliamentary Counsel Office, New Zealand Police, Public Service Commission, Te Arawhiti, Te Puni Kōkiri, and the Treasury. The Department of Prime Minister and Cabinet were informed.

38 The review of the subsequent child provisions involved consultation with an expert advisory group made up of members with experience working with whānau, the Oranga Tamariki Māori Design Group and a small number of whānau and social work practitioners. The Office of the Children's Commissioner and the Principal Family Court Judge were also consulted.

Binding on the Crown

39 The Bill amends the Oranga Tamariki Act 1989, which is binding on the Crown.

Creating new agencies or amending law relating to existing agencies

40 The Bill does not create a new agency. It does not amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Associated regulations

41 Regulations will not be needed to bring the Bill into operation.

[5] Identified impairments included intellectual disabilities, impaired learning, developmental delay, or cognitive disabilities

Other instruments

42 The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

43 The Bill will come into force on the day after the date of Royal Assent.

Parliamentary stages

44 The Bill would be introduced in November 2021 and passed by late 2022.

45 It is proposed that the Bill be referred to the Social Services and Community Select Committee for consideration following the first reading.

Proactive release

46 This Cabinet paper will be released proactively within 30 business days of consideration by Cabinet.

Recommendations

The Minister for Children recommends that the Committee:

1 s 9(2)(g)(i), s 9(2)(f)(iv) [redacted]

2 **note** that the Bill amends the Oranga Tamariki Act 1989;

3 **approve** the Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives;

4 **agree** that the Bill be introduced in November 2021; and

5 **agree** that the Bill be:

5.1 referred to the Social Services and Community Committee for consideration; and

5.2 enacted during 2022.

Authorised for lodgement

Hon Kelvin Davis

Minister for Children

Appendix One: Technical amendments included in the Oranga Tamariki Amendment Bill[6]

Clause in Bill	Intent
4	Amendment to section 11(2)(f) to indicate that decisions are to be explained to a child or young person in a manner and in language appropriate to their age and level of understanding.
5	Amendment to section 17 to ensure consistency with changes previously made to the section 16 heading.
8	Amendment to section 83, which specifies the orders that the court may make when satisfied that a child or young person is in need of care or protection. The amendment clarifies that the court may make an order for special guardianship under section 113A at the same time as it makes an order for guardianship under section 110.
9	Amendment to section 87(1) to make it clear that where there are existing care and protection orders in place, a fresh application under section 68 is not required for a restraining order to be granted under section 87.
10	Amendment to section 95 to replace redundant reference to repealed section 67.
11	Amendment to section 104(3)(c), which gives effect to custody orders, to make the section clearer by incorporating the search powers in section 105 without having to reference and interpret how section 105 relates to section 104.
12	Repeals section 110(4) as the text from section 110(4) has been moved to section 113 under clause 13.
13	Amendment to section 113A to include text from section 110(4) making it clear that the jurisdiction to make a special guardianship order arises under section 113A.
14	Amendment to section 121 to make the provision more specific by limiting the type of interim guardianship orders that may be accompanied by an access order to only those orders that appoint a person as a sole guardian, not an additional guardian.
15	Amendment to section 126 to replace redundant reference to repealed section 67.
16	Amendment to section 137 to replace redundant reference to repealed section 67.
17	Amendment to section 144(1) to replace redundant reference to repealed section 144(2), and to reflect that consent can be acquired in a variety of ways, not just 'in writing', as this does not account for children and young people who cannot write.

[6] Note this table does not include amendments concerning the subsequent child provisions, or the section 66D dataset provision.

Clause in Bill	Intent
18	Amendment to section 158 to restrict the circumstances in which the court may make a determination when the order being discharged is an order conferring custody.
19	Amendment to section 165 referred to in paragraph 22.1 of the LEG paper, to provide that the Registrar of the Court may determine the fees and expenses for a lay advocate appointed under section 163 in the absence of relevant regulations.
20	Amendment to section 186 to streamline the section and make it easier to understand. The amendment also replaces the redundant reference to repealed section 67.
21	Amendment to section 187 to simplify the provision and to replace redundant reference to the repealed section 67.
22	Replaces section 196, as the specific privilege relating to the disclosure in proceedings of protected communications to a medical practitioner or clinical psychologist set out in section 32 of the Evidence Amendment Act (No 2) 1980 no longer applies as it has been repealed. New section 196 provides that if a court is, in relation to a child or young person, asked to exercise its discretion under section 69 of the Evidence Act 2006 (overriding discretion as to confidential information), the court must give the lawyer, appointed under section 159 to represent the child or young person, an opportunity to be heard on the matter.
23	Amendment to section 198(2) to replace redundant reference to repealed section 195.
24	Amendment referred to in paragraph 22.4 of the LEG paper to replace redundant reference to repealed section 67 in section 207B.
25	Amendment to section 207O, which concerns appeals against an order for transfer, to provide that an appeal must be brought within 10 working days after the day on which the order was made, and to remove obsolete cross references.
26	Amendment to section 207U, which concerns an appeal against an order for transfer, to provide that the appeals must be brought within 3 working days after the day on which the order was made.
27	Amendment to section 207C to correct a cross-reference created by 1 July 2019 changes.
28	Amendment to section 214 to clarify that the requirements in section 214(1) do not need to be complied with when a child or young person is arrested for breach of bail conditions under section 214A.

Clause in Bill	Intent
29	Amendment to section 214A to clarify that a child or young person may be arrested without warrant if bail conditions are in breach or have recently been breached for a third time. The amendment provides that if a child or young person appears before a court and the court considers the child's or young person's bail, no breach of a bail condition that occurred before the appearance may be used to support a subsequent arrest under section 214A. The amendment also clarifies that section 214A does not apply if the child or young person is arrested without warrant under section 35 of the Bail Act 2000.
30	Repeals section 239A because it has expired.
31	Amendment to section 242 to align legislation with policy intent that senior staff approval is needed for placing tamariki in police custody, but not for detention in residence. The amendment resolves an incorrect change made by the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Act 2016 which applied senior staff approval to 242(1)(a) and 242(1)(b).
32	Amendment to section 248A to clarify that if a child or young person wishes to use their own lawyer, the chief executive should not be required to appoint one.
33	Amendment to section 258(1) to allow Youth Justice Family Group Conferences to make decisions and formulate plans when the child or young person is not considered to be in need of care or protection but still needs assistance. Decisions could therefore be made even where there is no agreement to a care or protection ground. This change aligns section 258 and 261 with previous changes made to Care and Protection Family Group Conferences in section 28(b). The changes were meant to also apply to Youth Justice Family Group Conferences.
34	Amendment to section 261 up allow Youth Justice Family Group Conferences to make decisions and formulate plans when the child or young person is not considered to be in need of care or protection but still needs assistance. This change aligns section 258 and 261 with previous changes made to Care and Protection Family Group Conferences in section 28(b). The changes were meant to also apply to Youth Justice Family Group Conferences.
35	Amendment to section 272 to replace redundant reference to repealed section 67.
36	Amendment to section 273(1) to clarify that section 273, which concerns the manner of dealing with offences, applies to certain young persons who are charged with certain offences.
37	Amendment to section 311(3) to provide that a supervision order may be made on the same date that a young person is released from the custody of the chief executive.

Clause in Bill	Intent
38	Amendment to section 325 to provide that the Registrar of the Court may determine the fees and expenses for a youth advocate in the absence of relevant regulations.
39	Amendment to section 328A to provide that the Registrar of the Court may determine the fees and expenses for a lay advocate appointed under section 326 in the absence of relevant regulations.
40	Amendment to the heading of section 350 so that it matches the content of the provision.
41	Amendment to section 365 so that when placing a child or young person in a residence, the chief executive must comply with the requirements in regulations. Section 35 is also amended to clarify that this section applies to sole guardianship. This amendment also aids interpretation and increases consistency with section 361.
42	Amendment to section 386A to extend advice and assistance to young persons in a youth unit of a prison. This amendment is in-line with the original policy intent of changes made to ensure young people detained in a residential setting under a Youth Justice order should receive ongoing advice and assistance from Oranga Tamariki to enable them to successfully transition to adulthood. The amendment does not impact advice and assistance for young people under remand or a prison sentence in the adult justice system (before turning 18) under section 386A(1)(d).
43	Amendment to section 447, which provides for the making of regulations under the Act. The amendments add the power to make regulations for assessing the safety and suitability of caregivers and other persons and for providing for the training and support of caregivers and care providers.
44	Amendment to Schedule 1AA, to correct cross-references.