LAWPUBL 422 Contemporary Tiriti Issues 2024

S Kwan

*A critical analysis of the removal of section 7AA from the Oranga Tamariki Act 1989*

The removal of section 7AA from the Oranga Tamariki Act 1989 is a breach of the Crowns obligations to the Treaty of Waitangi and indicates a backwards step for New Zealand in indigenous policy. This essay will firstly provide some background to the Ministry for Children's scope, then discuss and critique the justifications the Minister for Children has for removal of this section. It will then explore developments in comparative indigenous policy in Australia and Canada and to conclude, discuss improvements New Zealand could be implementing regarding indigenous policy.

## *I Background*

Oranga Tamariki is essentially the Ministry for Children and the Oranga Tamariki Act 1989 is the child protection agency's governing legislation. Oranga derives from the root kupu Māori "ora", meaning health, and the addition of "nga" can translate to healthy or well-being.[1] Tamariki is the kupu Māori for children.[2]

Previously known as Child, Youth and Family or more colloquially, CYFs, the Ministry "would be equipped with the legislation, resources, policies, practices and remit it needed to do what Child, Youth and Family had never been set up for – intervening earlier, supporting whaanau to stay together and breaking intergenerational cycles."[3] They state the origin of their vision is partnership and draws on a landmark 1988 report, Puao-te-Ata-tu, which examined issues of racism and inequity within the Department of Social Welfare

[1] Te Aka Māori Dictionary search "ora" and "healthy'.

[2] Te Aka Māori Dictionary search "children".

[3] <www.orangatamariki.govt.nz/about-us>

(at that time), as well as the 2015 Expert Advisory Panel, which was convened to propose a way to execute a "fundamentally different way of doing things."[4] The directive of these two sources was a commitment to deliver on Oranga Tamariki's obligations under te Tiriti o Waitangi and delivering outcomes that all New Zealand's children deserved, whilst easing the disparities experienced by tamariki Māori.[5]

Section 7AA of the Oranga Tamariki Act 1989 provides for the duties of the chief executive in relation to the Treaty of Waitangi and states that the duties outlined in subsection 2 are imposed in order to recognize and provide practical commitment to the principles of the Treaty of Waitangi.[6]

As the driver behind our Ministry for Children's vision for New Zealand and for tamariki Māori, these commitments were heartening to read. However, they are completely out of alignment with the coalition government's promise to remove section 7AA. It is hard to imagine how state care can be improved for all children with this commitment to partnership, whanaungatanga and manaakitanga, abolished.

*(a) Other Legislative Concerns*

Although the focus of this essay is removal of section 7AA of the Oranga Tamariki Act 1989, it is worth noting that the Treaty of Waitangi is referred to in the Children's Act 2014. Section 4A outlines that the duties of the responsible minister in regard to sections 6D (1)(d) and 7C are imposed in order to provide a practical commitment to the Treaty of Waitangi.[7] If the governing legislation has its treaty obligations removed it follows that related legislation will also suffer removals. It appears the Minister wants to forgo the scope of the Crowns overall commitment to the Treaty.

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[4] <www.orangatamariki.govt.nz/our-beginning>

[5] Above, n4.

[6] Oranga Tamariki Act 1989 s 7AA.

[7] Children's Act 2014 s 4A.

## *II The Minister for Childrens Stance*

Section 7AA came into force on 1 July 2019 under the previous National government. The section requires Oranga Tamariki to improve outcomes for tamariki and rangatahi Māori by ensuring policies and practices have the objective of reducing disparities for Māori children and young people. These policies and practices must also have regard to mana tamaiti (inherent mana tangata of the child/children).[8]

Karen Chhour is a first term ACT Party MP and the current Minister for Children. Chhour has Māori whakapapa and as a child, also spent time in state care. On its face, her background would appear to offer a better perspective and understanding of a childs needs when taken into state care. Chhour believes the current rules can override what's best for Kiwi children in need and argues that removing 7AA would encourage Oranga Tamariki to be "colour-blind" and that "all children that go into care should be treated equally." Whilst I firmly support that all children experiencing removals should be treated equally, colour-blindness is not what is needed here. Colour-blindness could be considered a discretionary exercise that has a place, for example, in policing.[9] Understanding and responding to the cultural needs of a child experiencing removal from their whaanau (regardless of their ethnicity) cannot be achieved by colour-blindness. Perhaps this is just a bad choice of words and doesn't reflect the enormity of the dismissiveness of this statement, and simply means that all children should be looked at the same.

Chhour's stance on placement with whanau is shaped by her childhood experience of not being placed with her grandmother, with the reason given by Child, Youth and Family that her grandmother was too old. When questioned about whether section 7AA would have enabled the placement to go ahead, she replied, "not necessarily" and says "it depends on

[8] Oranga Tamariki Section 7AA Report 2023 – Improving outcomes for Tamariki Maaori and their whanau, hapuu and iwi.

[9] Nahkid, Camille "The coping strategies and responses of African youth in New Zealand to their encounters with the police" (2018) 16 Journal of Ethnicity in Criminal Justice 40 at 45.

which social worker you get, which care giver you get."[10] Whilst it seems doubtful that this was intentional, the Minister is alluding to the fact that social workers within Oranga Tamriki are consistently failing tamariki Māori. The Waitangi Tribunal Report "*He Paaharakeke, He Rito Whakakiikiinga Whaaruarua"* has identified many areas of concern within Oranga Tamariki, including inconsistent culture between work sites, workload and capacity issues, social worker practice, cognitive bias and cultural competency. The Crown response acknowledges these claims in every instance. It is counter-intuitive to remove a legislative provision providing for the cultural and familial needs of the most highly represented population of children within state care, especially when Oranga Tamariki expressly acknowledge the contribution their processes and removals have towards "perpetuating and compounding the issues of structural racism".[11]

In the Oranga Tamariki 2023 Section 7AA report, there are clear mana tamaiti objectives. Of specific relevance is Mana Objective Three: Placing with whanau, hapuu and iwi. The report states that if removal from home is necessary, they will preference placements for tamariki and rangatahi with members of their wider whanau who are safe and able to meet their needs.[12] This section goes on to say that over 75% of tamariki and rangatahi living with caregivers have been placed with whanau consistently over the last few years and they have the subsequent data to show this.[13] Whilst this may have been Chhours experience, her assertions that section 7AA would not likely have provided a satisfactory outcome for her seem lacking in a factual or logical basis.

Karen Chhour claims she has Māori whakapapa but her response to the deficit in care and process inherent within Oranga Tamariki by removing section 7AA is neglectful and does not have a basis in tikanga Māori, whanaungatanga or manaakitanga. The Crown concedes

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[10]<www.1news.co.nz/2021/09/26/Karen-Chhour-all-children-that-go-into-state-care-should-be-treated-equally/>

[11] Oranga Tamariki Urgent Inquiry "*He Paaharakeke, He Rito Whakakiikinga Whaaruarua"* (2021) WAI 2915, Waitangi Tribunal Report at 4.4.3.2.

[12] Oranga Tamariki – Ministry for children Section 7AA Annual Report 2023 – Mana Tamaiti Objective Three: Placing with Whaanau, hapuu and iwi at pg 9.

[13] Above, n13.

that "historically, Māori perspectives and solutions have been ignored across the care and protection system."[14] She undoubtably lacks cultural competency herself. I cannot help but feel that she is ill-equipped to deal with the complexities involved in doing what's best for tamariki Māori (being the population disproportionately represented within state care). She claims non-Māori people have come and told her that they have been told section 7AA does not apply to them but provides no tangible evidence for this claim nor does she acknowledge that tamariki Māori are the children at-risk, tamariki Māori are most affected by uplifts and that structural racism from within the department that she answers for, compounds these issues.

In an unprecedented move, the Minister for Children has been subpoenaed by the Waitangi Tribunal before she repeals section 7AA. The basis for this was the lack of cabinet officials support for the removal and required the minister to explain her thinking, as it seems to be disconnected from the policy analysis of cabinet. Up until now, she has avoided further interviews and requests to explain her reasoning. This will be the first time a minister has been required to give evidence – or she will face a criminal offence.[15]

### *A Removal of section 7AA is a breach of the principles of the Treaty of Waitangi*

Article Two of the Treaty of Waitangi confirms Māori have chieftainship over their lands and treasures.[16] "Treasures" in this sense mean children, whakapapa and future/past generations.

In *Barton-Prescott*, the appellant contended that the Family Court Judge was wrong in law when he failed to interpret the Guardianship Act 1968 in a manner consistent with the Treaty of Waitangi. The basis for this was, the basic social unit in Māori society was the whanau, and an affidavit filed by Professor Hirinui Moko Mead gave a detailed summary of the place of the child within the whanau – there was emphasis on the obligation for care

[14] Above, n12 at 4.4.2.2.

[15]<www.msn.com/en-nz/news/news/high-court-reserves-decision-on-waitangi-tribunal-summons-for childrens-minister-Karen-Chhour>

[16] <https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf>

and protection, but further to that, a necessity to give access to the child accumulated knowledge of the childs inheritance, physical and spiritual, as part of a family extending back through whakapapa to remote ancestors.[17] Māori take their ancestral connections and the access to them very seriously.

This excerpt was delivered to a family law conference in 1991 by Dame Joan Metge. In dealing with children as a concept she said:

*"Children as Taonga*

In Māori thinking, children are not the exclusive possession of their parents. Indeed, the ideas of possession and exclusion, separately and in association, outrage Māori sensibilities. Children belong to the whanau (and beyond that to hapuu and iwi) as members, not as possessions. They are taonga, highly valued 'treasures' held collectively and in trust for future generations. In whaanau which are functioning as they ought, parents are expected and expect to share the care and control of their children with other whaanau members."

The Ministry for Children owes a duty of care to tamariki in general and more specifically, to tamariki Māori as a vulnerable demographic in care. Some may argue that section 7AA gives the state too much power, especially when the agency continues to do such a poor job but without its provision, Māori have no recourse within the act to challenge that state power. The section came into force in 2019, allowing "strategic partnerships" with iwi and other Māori organisations to improve childcare and protection.

In the Oranga Tamariki Action Plan, Oranga Tamariki say they seek to reduce disparities given the over-representation of tamariki and rangatahi Māori in their priority populations. They say that Childrens agencies have "Te Tiriti o Waitangi-related obligations to achieve equity and improve outcomes for tamariki and rangatahi Māori."[18] So as an organization

[17] *Barton-Prescott v Director General of Social Welfare* (1997) HC AP71/96 at 1).

[18] <www.Oranga-Tamariki-Action-plan.pdf>

they are aware of their responsibilities and obligations under te Tiriti o Waitangi and it seems that they are committed to these. Under the Oranga Tamariki Act 1989, the Chief Executive of Oranga Tamariki has specific obligations to improve outcomes for tamariki Māori and uphold and protect the familial structures of whaanau, hapuu and iwi. How can their action plan uphold these directives without section 7AA? Where is the avenue for recourse if these directives are not followed? Nearly every single policy document and tamaiti objective statement include some reference to the Treaty of Waitangi and the agency's commitment to children continues to have its basis in mana tamaiti, confirmed by the Treaty of Waitangi.

The Minister for Children has chosen violence with this decision, and I cannot help but feel that in her current position, has bitten off more than she can chew. I hope the Waitangi Tribunal invoke their full jurisdictional powers in her subpoena and subsequent hearing.

## *III Australian Indigenous Policy*

Australia shares a similar colonial invasion history to Aotearoa New Zealand. Historically, Australia has come under criticism for its treatment of its indigenous population. Between 1910 and 1970, government policies of assimilation led to up to 33 percent of Aboriginal children being forcibly removed from their homes. Researchers have documented at least 270 massacres of Aboriginal Australians during Australia's first 140 years.[19]

Unfortunately, but perhaps unsurprisingly, Indigenous Australian children are almost 11 times more likely to be in out-of-home (read: state) care than non-indigenous children. The Albanese Labor Government is announcing it will establish a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People to help achieve progress under the Closing the Gap agreement. This National Commissioner will focus on working with First Nations People on evidence-based programs and policies to turn these figures around.[20] Statements in Safe and Supported: the national framework for protecting

[19] <www.nationalgeographic.com/culture/article/aboriginal-australians>

[20] <www.pm.gov.au/media/nextsteps/closing-the-gap>

Australia's children echo sentiments within Oranga Tamariki's own framework for child protection.[21]

From a Treaty perspective, this is ideal. It is commendable that the Labor government in Australia has concluded that a partnership between them and the First Nations peoples is something that is needed in modern day Australia. Working with the people who are most at risk within these colonial systems that are placing children is crucial. Perhaps a National Commissioner for Children, Tamaiti and Rangatahi Māori is what is needed here in Aotearoa, picked upon their ability to reconcile care objectives with Treaty of Waitangi obligations whilst having a strong background in childcare as a well as Te Aao Maaori.

That being said, it is still only a small step in the right direction that says, evidence matters, and that indigenous people have a say in what constitutes that evidence and provides a stark contrast with the current governments plan to remove reference to the Treaty from the Oranga Tamariki Act.[22]

In keeping with their commitment to indigenous policy the Family Law Act 2006 amendment includes a subsection breaking down what the right to enjoy an Aboriginal or Torres Strait Islander culture looks like, including to maintain a connection with that culture and to have the support, opportunity and encouragement necessary.[23] It is more descriptive than sections in our Vulnerable Children Act, for example.[24] While data gathered shows that tamariki Māori are the most vulnerable, statutes remain vague on how these populations of concern should be dealt with.

## *IV Canadian Indigenous Policy*

[21] Oranga Tamariki Act 1989 Part 1.

[22] <www.1news.co.nz/2024/03/13/analysis-removing-treaty-from-child-protection-lawrisks-nzs-status/>

[23] Family Law Amendment (Shared Parental Responsibility) Act 2006 (NSW).

[24] Vulnerable Children Act 2014 s 7.

In 2019, the Canadian Parliament passed the *Act respecting First Nations, Inuit and Metis children, youth and families* (Act), which establishes national standards and provides Indigenous peoples with effective control over their children's welfare. Firstly, the Act sets out national standards and principles that establish a normative framework for the provision of culturally appropriate child and family services. The Act also affirms the inherent right of self-government of Indigenous peoples that is recognized and affirmed by section 35 of the Constitution Act 1982. Importantly, the Act specifies how its provisions and Indigenous peoples' jurisdiction to make laws in Cananda will interact with other laws.[25]

The last part of this is interesting because this is precisely what is lacking in New Zealand legislation. For example, under Part 1 of the Childrens Act 2014 Strategy for improving children's well-being and oranga tamariki action plan, section 4A specifically mentions the responsibility of the Minister are imposed […] in order to recognize and provide a practical commitment to the Treaty of Waitangi.[26] This is very strong wording, parliament clearly intended for there to be well thought out actions, cohesive with Treaty obligations. The Oranga Tamariki Act is then listed as a children's agency which will be under the jurisdiction of the Crown and provision of the related (listed) agencies. When there are many references to the Treaty of Waitangi specifically and the Minister wants to remove one reference in one Act, what does this mean for the other parts of related Acts governing the care and protection of children? How did Aotearoa New Zealand start off as pioneer in Indigenous policy yet in 2024 appear to be lacking so far behind? The removal of section 7AA is dangerously short-sighted and regressive policy.

## *V Conclusion*

Oranga Tamariki and the Minister for Children owe tamariki Māori in state care a duty of care that cannot adequately be facilitated without an ongoing commitment to the Treaty of Waitangi and its partnership effect between Māori and the Crown. Removal of section 7AA from the Oranga Tamariki Act is short-sighted, has no evidential basis and the Minister's decision is worthy of reproach. Removal of section 7AA is a devastating step backwards

[25] SCC 5 2024-02-09

[26] Care of Childrens Act 2014 s 4A.

in indigenous policy for Aotearoa New Zealand and I am fearful for our country under this Nact government. Toituu te tiriti!