

TIME TO TAIHOA

The need to pause on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill and give effect to te Tiriti o Waitangi and Indigenous rights

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Te Puna Rangahau o te Wai Ariki | Aotearoa Centre for Indigenous Peoples and the Law



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OUR CORE CONCERN

The Government has disregarded both te Tiriti o Waitangi (te Tiriti) and the United Nations Declaration on the Rights of Indigenous Peoples (the Indigenous Declaration) in the process it followed to develop the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (the Bill)¹ and in drafting its substantive provisions.

In short, we are of the view that the Bill fails to recognise:

- the Tiriti guarantee of Māori tino rangatiratanga over kāinga; and
- on issues of shared concern or which require co-governance between Māori and the Crown, the right of Māori to participate in decision-making in a manner that reflects the Tiriti partnership. On matters of especial significance, this includes the obligation to obtain Māori consent to legislative or administrative measures that affect us.

There was a key opportunity – and responsibility – during the Bill's Select Committee stage to address these issues, which were also raised by submitters, and strengthen the Bill to better reflect the guarantees and rights under te Tiriti and the Indigenous Declaration. The Select Committee failed to adequately address these concerns during its consideration of the Bill, however, and recently reported the Bill back to the House with no significant changes from a Tiriti or Indigenous Declaration perspective.²

The Select Committee also failed to address other key concerns raised by submitters, the vast majority of whom strongly oppose the Bill. A minority of Select Committee members from the Green, ACT and National parties also opposed the Bill's progression, highlighting the overwhelming number of submitters against it, and called for its withdrawal.³ The Select Committee's majority decision to report back a largely unaltered bill in the face of this significant public and political opposition has attracted widespread criticism.⁴

We call on the Government to taihoa on the Bill and engage with Māori in a way that recognises our status as Tiriti partner, our rangatiratanga over the care and protection of tamariki Māori and our rights under the Indigenous Declaration.

INTRODUCTION

The New Zealand Government introduced the Bill in late 2021. The purpose of the Bill, as stated in its Explanatory Note, is to improve outcomes for children and young people in New Zealand by strengthening the independent monitoring and complaints oversight of the Oranga Tamariki

¹ The Bill, as reported back by the Select Committee, can be found at:

<https://legislation.govt.nz/bill/government/2021/0094/latest/LMS591372.html?src=qs>

² Social Services and Community Committee (2022), *Final Report (Oversight of Oranga Tamariki System and Children and Young People's Commission Bill)*, https://www.parliament.nz/en/pb/sc/reports/document/SCR_124180/oversight-of-oranga-tamariki-system-and-children-and-young

³ Ibid, pp. 11-17.

⁴ See <https://www.stuff.co.nz/pou-tiaki/128951479/childrens-commissioner-slams-select-committee-over-oranga-tamariki-oversight-bill>; <https://www.scoop.co.nz/stories/PO2206/S00120/barnardos-calls-for-the-oversight-of-oranga-tamariki-bill-to-be-paused.htm>; <https://www.scoop.co.nz/stories/AK2206/S00308/the-oranga-tamariki-oversight-bill-must-be-stopped.htm>

system and advocacy for children's and young people's issues generally. The Bill proposes to do this by:

- establishing a new “Independent Monitor of the Oranga Tamariki System” (the Monitor) to monitor the Oranga Tamariki system;
- replacing the Children's Commissioner with a new board - the Children and Young People's Commission (the Children's Commission) - focussed on advocacy;
- removing the Office of the Children's Commissioner monitoring and complaints oversight functions, both generally and in relation to Oranga Tamariki;
- strengthening the Ombudsman's complaints oversight role in relation to Oranga Tamariki; and
- discontinuing the named role of Children's Commissioner and their statutory powers to report to the Prime Minister on matters affecting the rights of children, with or without request. The Select Committee has since recommended that the Bill be amended to provide for a “Chief Children's Commissioner”, and for the Commission to retain the power to report to the Prime Minister on matters affecting the rights of children with or without request.

The Bill has attracted strong criticism from many quarters. The majority of submitters on the Bill oppose it.⁵ The key concerns raised by submitters during the Select Committee stage centred around:

- the Bill's development and consultation process;
- the lack of independence of the new monitoring system;
- the complexity of the new oversight system;
- the removal of a named Children's Commissioner and some of their key powers (although note the recommendation made by the Select Committee on this above); and
- the failure to give appropriate effect to the Crown's obligations under te Tiriti.

Despite this strong opposition, the Government is steamrolling ahead with the Bill. The Government claims it is simply progressing the Beatie review recommendations;⁶ others say the Government's eagerness to get a “better” monitoring system in place so quickly is because it wants to pre-empt the Royal Commission of Inquiry into Abuse in Care, which is due to make its final recommendations in June 2023.⁷

While it is true that an overhaul of how Oranga Tamariki is monitored and held to account is urgently needed, this is only part of a much bigger problem. As multiple reviews and inquiries into Oranga Tamariki have brought to light, there is something deeply wrong with how Oranga Tamariki operates, especially in relation to tamariki Māori and their whānau, and Aotearoa New Zealand's care and protection needs a complete overhaul.

⁵ The Select Committee received 403 written submissions on the Bill, with only eight submitters supporting the changes proposed.

⁶ See <https://www.beehive.govt.nz/release/oversight-care-our-children-strengthened>. A review of the oversight of the Oranga Tamariki system and consultation on how oversight could be strengthened was undertaken by Sandi Beatie QSO in 2018.

⁷ See <https://www.newsroom.co.nz/oranga-tamariki-changes-deliberately-preempt-royal-commission>

The Waitangi Tribunal has made it clear that this re-visioning of Aotearoa New Zealand’s care and protection system must be led by Māori. The reasons for this are compelling:

- The majority of children involved, and harmed, in the care and protection system are tamariki Māori: 67 percent of children in state care are Māori⁸ and 76 percent of children harmed while in state care were Māori.⁹
- This disproportionate removal of tamariki Māori into state care is a breach of te Tiriti: as the Waitangi Tribunal has recently found,¹⁰ te Tiriti guaranteed Māori tino rangatiratanga over kāinga, which, in simple terms, means that Māori have the right to exercise authority over our communities, including the care and protection of our tamariki, with minimal Crown intervention. The Government failed to honour that guarantee.
- The Government is under an active duty to recognise Māori tino rangatiratanga over the care and protection of tamariki Māori. In the wake of the Waitangi Tribunal’s findings and recommendations, the Government should be fully focussed on working with Māori on how to reconfigure Aotearoa New Zealand’s care and protection system to be Tiriti-consistent and give effect to Māori tino rangatiratanga over kāinga.

Considering this context, we should now be in a “transition” phase, where the Government has taken heed of the Waitangi Tribunal’s recommendations and Māori have appointed an authority¹¹ to lead the transformation of Oranga Tamariki. Once established, this authority should then be left to do its work, which should involve identifying the changes necessary to eliminate the state care of tamariki Māori and fulfil the Tiriti guarantee of Māori tino rangatiratanga over kāinga, how transformation should be achieved¹² and an implementation plan to effect it.

It should be a given that, considering this obvious next stage and the Waitangi Tribunal’s clear recommendation that the Government must “step back from further intrusion”, the Government would put on hold any work it was leading in relation to the Oranga Tamariki system, including the Bill, so that Māori can determine all aspects of the transformed system in relation to tamariki Māori, including how it is overseen and monitored. It would also follow that the Government would hit pause on the Bill to await the Royal Commission of Inquiry on Abuse in State Care’s findings and recommendations, which are expected to speak directly to these issues as well.

⁸ This includes 11% of children who identify as Māori and Pacific. See <https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/quarterly-report/care-and-protection-statistics/>

⁹ This includes 13% of children who identify as Māori and Pacific. See <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/safety-of-children-in-care/2020-21/SOCiC-AR-2021-FA.pdf>

¹⁰ Waitangi Tribunal (2021), *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry*, https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_171027305

¹¹ The Waitangi Tribunal recommended that the governance group for the Māori-led inquiry into Oranga Tamariki be approached to undertake this role and that a claimant voice also inform this group.

¹² We note that Māori have differing views on how the Oranga Tamariki system should be transformed and what form Māori authority over the care and protection of tamariki Māori should take. See Chapter 6.2 of the Waitangi Tribunal’s *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* report, https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_171027305

But it didn't. Instead, not only has the Government decided not to establish a Māori-led transition authority¹³ or provide for Māori tino rangatiratanga over the care and protection of tamariki Māori,¹⁴ it has pushed ahead with the Bill and failed to engage with Māori on its development in a way that reflects our status as Tiriti partner and as Indigenous peoples. The reforms proposed in the Bill also fail to recognise our rangatiratanga under te Tiriti or our rights under the Indigenous Declaration.¹⁵

*"...the Bill does not transform or repair the system, it simply provides who will oversee the broken system, and this will not be Māori. The Bill therefore ignores the overarching recommendation made by the Tribunal that Māori should have tino rangatiratanga over their own whānau and kāinga."*¹⁶

To add insult to injury, the Select Committee (on which the Government holds a majority) has reported back on the Bill, leaving it largely unaltered and recommended it proceed, despite the strong opposition to it both from submitters and Select Committee members from the ACT, Green and National parties. In opposing the Bill, these Select Committee members highlighted the overwhelming number of submitters against it, and called on the Government to either withdraw the Bill or halt its progression until the Royal Commission of Inquiry into Abuse in State Care has reported back and better consultation with children and young people and Māori is undertaken.

*"We share the view of submitters that the Government should withdraw the bill and work on restoring relationships with children's advocates and Te Tiriti partners while they wait for the final report of the Royal Commission into Abuse in State Care."*¹⁷

In this paper, we provide further analysis on how the substance of the Bill, and the process to develop it, fails to meet the standards required by te Tiriti and the Indigenous Declaration. Based on this analysis, we call on the Government to taihoa on the Bill and go back to the drawing board with Māori.

¹³ Office of the Minister for Children, *Direction for Oranga Tamariki*, paragraph 36,

<https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Information-releases/Cabinet-papers/OT-Ministerial-Advisory-Board/Direction-for-Oranga-Tamariki-August-2021.pdf>

¹⁴ In response to the Waitangi Tribunal's recommendations, the Government has developed a 'Future Direction Plan' for Oranga Tamariki, which does not transfer responsibility for the care and protection of tamariki Māori to Māori or outline a process to meet this end. Instead, the Plan states that "there will always be a need for a state care and protection agency for all tamariki in New Zealand". While the Plan commits Oranga Tamariki to "be an enabler and co-ordinator for Māori and communities" and "to empower [Māori] to put in place the support, the solutions and the services that they know will work for their people", any initiatives will be co-designed and co-led with Oranga Tamariki. See <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/News/2021/MAB-report-action-plan-release/OT-Future-Direction-Action-Plan.pdf>

¹⁵ The Government endorsed the Indigenous Declaration in 2010 and is currently developing a plan to implement it. See <https://www.orangatamariki.govt.nz/assets/Uploads/About-us/News/2021/MAB-report-action-plan-release/OT-Future-Direction-Action-Plan.pdf>

¹⁶ Hon. Dame Tariana Turia, Dame Areta Koopu, Dame Iritana Tawhiwhirangi, Merepeka Raukawa-Tait and Lady Tureiti Moxon, *Submission to the Social Services and Community Committee on Oversight of Oranga Tamariki System and Children and Young People's Commission Bill*, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCSS_EVI_116701_SS2847/the-kahurangi

¹⁷ Green Party's differing view, *Final Report (Oversight of Oranga Tamariki System and Children and Young People's Commission Bill)*, p.11, https://www.parliament.nz/en/pb/sc/reports/document/SCR_124180/oversight-of-oranga-tamariki-system-and-children-and-young

We also call on the Government to rethink its position on the future direction of Oranga Tamariki. Its current reform proposals fall well short of what is guaranteed to Māori under te Tiriti and our rights under the Indigenous Declaration. Māori tino rangatiratanga over kāinga must be recognised and Māori must exercise sole authority over the care and protection of our tamariki.

HOW THE BILL FAILS FROM A TIRITI AND INDIGENOUS DECLARATION PERSPECTIVE

The Bill is seriously flawed from a Tiriti and Indigenous rights perspective, both in its substance and the process followed to develop it.

“This Bill misses the opportunity to provide the means to facilitate involving Māori in a meaningful way to address the disproportionate number of Māori tamariki and rangatahi in the care and protection and youth justice systems. Instead it creates another Government agency, an appointed Māori advisory body that has responsibility for the consultation obligations of the Crown, and diminishes the important role of the Office of the Children’s Commissioner in investigating, monitoring, researching and advocating for children.”¹⁸

In this section, we take a closer look at the Bill’s key proposals – to establish a new monitoring system for Oranga Tamariki and a new Children’s Commission – and the Government’s process to develop the Bill, and assess its compliance with te Tiriti and the Indigenous Declaration against the following guarantees and rights.

Te Tiriti

In our assessment of the Bill’s compliance with te Tiriti, we draw on the ‘spheres of authority’ model, as outlined in the Matike Mai Aotearoa and He Puapua reports.¹⁹ These spheres are: the ‘rangatiratanga sphere’, which reflects Māori governance over people and resources; the ‘kāwanatanga sphere’, which represents Crown governance; and, the ‘relational sphere’, where Māori and the Crown work together as equals and share governance over issues of mutual concern.

1. Māori are guaranteed the exercise of tino rangatiratanga over their kāinga, which means to continue to organise and live as Māori. Fundamental to that is the right to care for and raise the next generation.²⁰
2. The Government is under a duty to recognise and actively protect Māori tino rangatiratanga over kāinga.

¹⁸ Māori Women’s Welfare League, *Submission to the Social Services and Community Committee on Oversight of Oranga Tamariki System and Children and Young People’s Commission Bill*, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCSS_EVI_116701_SS2989/maori-womens-welfare-league-inc

¹⁹ Matike Mai Aotearoa (2018), *The Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation*, <https://nwo.org.nz/wp-content/uploads/2018/06/MatikeMaiAotearoa25Jan16.pdf>; Declaration Working Group (2021), *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights on Indigenous Peoples in Aotearoa/New Zealand*, <https://iwichairs.maori.nz/wp-content/uploads/2015/07/He-Puapua-for-OIA-release.pdf>

²⁰ Waitangi Tribunal (2021), *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry*, https://forms.iustice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_171027305, pp. 12, 181.

3. Māori have sole authority to determine the solutions to issues that fall within the rangatiratanga sphere.
4. On issues of shared concern or which require co-governance between Māori and the Crown, Māori and the Crown will work together in good faith and the spirit of partnership. This means that Māori participate in decision-making processes and on governance structures in a manner that reflects the Tiriti partnership.

The Indigenous Declaration

1. Māori, as the Indigenous peoples of Aotearoa New Zealand, have the right to self-determination (Article 3).
2. Māori, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal affairs (Article 4).
3. Māori have the right to participate in state decision-making, particularly on matters which would affect their rights, through representatives they have chosen in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions (Article 18).
4. The Government is under a duty to consult and cooperate in good faith with Māori through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Article 19).

Issues of substance

As outlined at the start, submitters have raised a raft of issues with the substance of this Bill; here we focus on the three issues we find the most concerning from a Māori rights perspective:

- the Bill's Tiriti clauses;
- the proposed monitoring system; and
- the proposed Children's Commission.

The Bill's Tiriti clauses

How the Bill's Tiriti clauses are framed are a key source of many of the Bill's problems.

The Bill contains two Tiriti clauses - one which would apply to the Monitor and the other to the Children's Commission once each entity's governing legislation comes into effect.²¹ Rather than make a general statement about the Crown's obligation to give effect to te Tiriti,²² which is the preferred approach as it allows no wriggle room, each Tiriti clause instead lists which sections of the Bill "recognise and respect the Crown's responsibility to give effect to" te Tiriti and "to improve the well-being of children and young people in the context of their whānau,

²¹ Clauses 6 and 85.

²² For example, s 4 of the Conservation Act 1987 includes a general statement requiring the Crown to give effect to the Treaty principles (although, notably, not te Tiriti per se). It states: "*This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.*"

hapū, iwi, and communities”,²³ and how either the Monitor or Children’s Commission will give effect to this.

The Bill’s Tiriti clauses reflect a trend in more recent statutes to give a greater degree of definition to how te Tiriti principles are to be given effect and a move away from the more general te Tiriti clauses.²⁴ While the Supreme Court has been clear that the courts would not narrowly construe these more definitive types of Tiriti clauses due to the constitutional significance of te Tiriti,²⁵ the Waitangi Tribunal has found these types of Tiriti clauses to be problematic, especially when the legislative provisions that these clauses claim will give effect to the Crown’s te Tiriti obligations fall short of what is guaranteed under te Tiriti or only apply to certain Crown agents rather than the Crown as Tiriti partner.²⁶

As we discuss in more detail below, this is where the crux of the problem with this Bill lies from a Tiriti perspective. The Crown, through the Bill’s Tiriti clauses, has seemingly sought to narrow the extent to which te Tiriti and its principles apply and through its subsequent provisions, limited the role of Māori in the new monitoring system and the Children’s Commission to mere ‘participation’ and ‘contribution’, and failed to provide for Māori tino rangatiratanga or recognise the principle of partnership.

Tiriti clauses should be worded to ensure the Crown is obliged to do its utmost to give full effect to te Tiriti, and can be held to account in the strongest terms possible.

The proposed monitoring system

The Bill proposes a new monitoring system for Oranga Tamariki by establishing the Monitor and outlining its key objectives, monitoring function, duties, and powers.

In respect to Māori, the Monitor:

- must exercise its functions with “particular attention to the need to support improved outcomes for Māori children and young people” and report annually on the performance of Oranga Tamariki in respect of these outcomes;²⁷
- must appoint a Māori Advisory Group to “support meaningful and effective engagement with Māori”;²⁸
- must “collaborate with” and “have regard to the views” of the Māori Advisory Group when it develops priorities, work programmes, and monitoring approaches;²⁹

²³ We note that the Select Committee has recommended this sentence be amended as follows: “to improve the well-being of children and young people within (without limitation) the context of their whānau, hapū, iwi, and communities”.

²⁴ *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*, [2021] NZSC 127 [30 September 2021], paragraph 150, <https://www.courtsofnz.govt.nz/assets/cases/2021/2021-NZSC-127.pdf>

²⁵ *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*, [2021] NZSC 127 [30 September 2021], paragraphs 146-151 and 296, <https://www.courtsofnz.govt.nz/assets/cases/2021/2021-NZSC-127.pdf>

²⁶ Waitangi Tribunal (2019), *Hauora : Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, section 5.5, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_152801817/Hauora%20W.pdf

²⁷ Clauses 13, 14 and 23.

²⁸ Clause 17.

²⁹ Clause 18.

- must also make “reasonable efforts” to develop arrangements with iwi and Māori organisations for the purposes of “providing opportunities to, and inviting proposals on how to, improve oversight of the Oranga Tamariki system”;³⁰ and
- “on their own initiative” carry out reviews of “issues, themes, concerns, or areas of identified practice relating to the delivery of services or support through the Oranga Tamariki system.”³¹

The Bill also provides that whether the Monitor is working “efficiently and effectively” with iwi and Māori organisations will also be subject to an independent review.³²

As stated from the outset, any care and protection system in which tamariki Māori are involved, including its monitoring, should be governed by Māori. The Bill’s current proposal to establish a government-led monitoring entity and for that entity to hold sole responsibility for monitoring Oranga Tamariki, including how it cares for and protects tamariki Māori, in collaboration with a Māori Advisory Board, which it appoints, and possibly in consultation with iwi and Māori organisations, falls far short of what is required under te Tiriti and the Indigenous Declaration.

The Bill breaches te Tiriti and the Indigenous Declaration in the following ways:

- It fails to recognise Māori tino rangatiratanga over kāinga, which includes the right to oversee and monitor any care and protection system that involves tamariki Māori.
- It gives the Monitor the power to decide who will be on the Māori Advisory Group. Māori must decide who will represent them in decision-making bodies in accordance with their own procedures and laws.
- It fails to ensure that the Monitor is completely independent from government. For Māori, it is essential that any body charged with monitoring government action, especially in relation to tamariki Māori, who are overrepresented and highly vulnerable in the current care and protection system, is impartial and sits outside government. While the Select Committee has recommended that the Bill be amended to explicitly state that the Monitor is independent from government, no changes to the Monitor’s governance structure were recommended to guarantee this independence from government. The Monitor will still be a departmental agency hosted by the Education Review Office.

The proposed Children’s Commission

The Bill also proposes to replace the Office of the Children’s Commissioner with a new Children’s Commission and outlines how it will be governed and its functions, duties, and powers. The Bill, as introduced, repeals the Children Commissioner’s Act 2003, removes the role of a named Children’s Commissioner and fails to transfer key powers and accountabilities that come with this position, including monitoring and complaints functions (some, but not all, of which now go to the Monitor and the Ombudsman) and key advocacy powers, such as the

³⁰ Clause 19. We note the Select Committee has recommended that this clause be amended to also include arrangements with hapū.

³¹ Clause 25.

³² Clause 57.

capacity to report to the Prime Minister on matters affecting the rights of children with, or without, request. The Select Committee has since recommended that the Bill be amended to provide for a Chairperson of the Children’s Commission, for that person to also be known as the “Chief Children’s Commissioner”, and for the Commission to retain the power to report to the Prime Minister on matters affecting the rights of children with or without request.³³

In respect to Māori, the Bill provides that the Commission must build and maintain relationships with iwi and Māori organisations, including by:³⁴

- having a strong focus on the rights, interests, and well-being of Māori children and young people within the context of their whānau, hapū, and iwi;
- promoting Māori participation and leadership and te ao Māori approaches in the performance of its functions, as appropriate;
- setting strategic priorities and work programmes that support improved outcomes for Māori children and young people within the context of their whānau, hapū, and iwi;
- undertaking and promoting research into any matter that relates to the rights, interests, or well-being of children and young people, while giving special attention to te ao Māori; and
- making reasonable efforts to consult iwi and Māori organisations when making information rules relating to the collection, use, and disclosure of information by the Commission; and
- having regard to the Convention on the Rights of the Child (which we note contains specific provisions relating to Indigenous children).

Like the Monitor, the Commission’s effectiveness in working with iwi and Māori organisations will also be subject to independent review.³⁵ The Bill also provides that at least half of the Commission’s board members must have “Māori knowledge and experience in and knowledge of tikanga Māori” and that the nominations panel, which recommends board member appointments to the Minister, must also include people with “expertise and experience in Māori leadership”.³⁶ The Select Committee has since recommended that the Bill be amended to also provide that the Commission must collectively have “knowledge and understanding of te Tiriti o Waitangi/the Treaty of Waitangi”.³⁷

Considering the disparity tamariki Māori face in Aotearoa New Zealand and the extent to which their rights under te Tiriti, the Indigenous Declaration and the Convention on the Rights of the Child are systematically ignored and violated, Māori have a significant interest in any body that is charged with critiquing the Government’s performance on tamariki Māori rights and holding

³³ Social Services and Community Committee (2022), *Final Report (Oversight of Oranga Tamariki System and Children and Young People’s Commission Bill)*, p.9, https://www.parliament.nz/en/pb/sc/reports/document/SCR_124180/oversight-of-oranga-tamariki-system-and-children-and-young

³⁴ Clauses 96, 99 and 111. The Select Committee has recommended that these clauses be amended to include hapū organisations as well as iwi and Māori organisations.

³⁵ Clause 118(2)(b).

³⁶ Clause 94.

³⁷ Social Services and Community Committee (2022), *Final Report (Oversight of Oranga Tamariki System and Children and Young People’s Commission Bill)*, p.10, https://www.parliament.nz/en/pb/sc/reports/document/SCR_124180/oversight-of-oranga-tamariki-system-and-children-and-young

it to account, both domestically and internationally. The Office of the Children’s Commissioner is Aotearoa New Zealand’s national child rights institution. The Children’s Commissioner has been a strong advocate for the rights of tamariki Māori (particularly in relation to the disproportionate removals of tamariki Māori by Oranga Tamariki). It is also significant that the current Children’s Commissioner is Māori and that an Assistant Māori Children’s Commissioner was recently appointed. It is concerning that these roles will disappear and the advocacy and monitoring functions of the new Children’s Commission will also be significantly watered down by the Bill.

The Bill’s proposal to replace the Children’s Commissioner with a Commission, which does not have to explicitly include members who whakapapa Māori, that no longer includes a Commissioner role dedicated to tamariki Māori, and will no longer be able to independently monitor Oranga Tamariki or investigate complaints about it, falls short of what is required under te Tiriti and the Indigenous Declaration.

The Bill breaches te Tiriti and the Indigenous Declaration in the following ways:

- It fails to recognise Māori tino rangatiratanga over kāinga, which includes the right to oversee and monitor that the rights of tamariki Māori are respected and upheld. Māori should have participated in decision-making on whether the Office of the Children’s Commissioner should be reconfigured and, if so, what form any new body, as it relates to tamariki Māori, should take and how it should be governed.
- It does not explicitly state that Māori must be represented on the proposed Children’s Commission’s Board. The Bill currently provides that half of the Children’s Commission’s members must have “Māori knowledge and experience in and knowledge of tikanga Māori” (and, as per the Select Committee recommendation, the Commission must collectively have a knowledge and understanding of te Tiriti) but it does not clearly state that these members must also whakapapa Māori. This fails to reflect the Tiriti partnership and Māori rights under the Indigenous Declaration relating to participation and representation in decision-making processes and bodies. Considering the disproportionate numbers of tamariki Māori in state care and the extent to which their rights as tangata whenua, Tiriti partner and Indigenous children are disproportionately affected, it could also be argued that Māori should be represented on the Board in a greater proportion than 50 per cent. We wish to also take the opportunity to address the suggestion that requiring at least half of the Board members to whakapapa Māori could raise issues around discrimination on the basis of race or ethnic origins. The Select Committee asked for the Human Rights Commission’s (HRC) view on this point and it correctly confirmed that the primary rationale for requiring at least half of the Board members to whakapapa Māori is to give adequate effect to the rights and obligations set out in te Tiriti. The HRC also clarified that Tiriti rights are constitutional rights and distinct from special treatment accorded solely on the basis of race, which means they cannot be challenged based on equality grounds. Additionally, as the HRC pointed out, a further argument could be made that such a provision is justifiable to address the discrimination and entrenched disadvantage that

tamariki Māori experience in the Oranga Tamariki system.³⁸ It is surprising that, despite the HRC clarifying that this type of provision is not discriminatory on multiple grounds, the Select Committee ignored the HRC's advice.

- It provides that a nominations panel and the responsible Minister have the power to decide who will represent Māori on the proposed Children's Commission. In line with te Tiriti and the Indigenous Declaration, Māori must decide who will represent them on the Children's Commission in accordance with their own procedures and laws.
- It fails to provide the Children's Commission with any monitoring or complaints oversight functions, both generally and in relation to Oranga Tamariki. Considering the disparity faced by tamariki Māori and the extent to which their rights as tangata whenua, te Tiriti partners and Indigenous children are violated, it is essential that the Children's Commission, as Aotearoa New Zealand's national child rights institution, is independent and effective and has all the necessary powers and functions to monitor, investigate complaints, and promote and protect children's rights in line with international standards.

Issues of process

We also take issue with how the Bill was developed. Māori were not involved in the development of the Bill in a way that recognised our status as Tiriti partner, our rangatiratanga over the care and protection of tamariki Māori or our rights under the Indigenous Declaration.

The care and protection of tamariki Māori is an issue of utmost importance to Māori. For Māori, the care and protection of tamariki Māori is at the core of our culture, it is central to te ao Māori and tikanga Māori. Like the confiscation of our whenua and resources, and the denial of our culture and language, the Government's widescale removal of our tamariki from our care over the last century is a fundamental breach of te Tiriti, is in flagrant disregard for our rangatiratanga, and has caused deep mamae and damage to our mana and culture.

The Government recognises that the Bill involves issues of significance to Māori. To quote the Minister sponsoring the Bill, "I recognise that the Oranga Tamariki system is of particular interest and importance to Māori", and in relation to monitoring that, "I have received a clear and consistent message that if monitoring is to be widely trusted, particularly by Māori, monitoring must be independent." The Minister also acknowledged "that there is a need for greater involvement of Māori in decisions about policy and systems settings related to the Oranga Tamariki system."³⁹

We also note that the Indigenous Declaration provides that the Government must consult and co-operate in good faith with Māori in order to obtain our free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect us.⁴⁰

³⁸ Human Rights Commission (2022), *Supplementary Submission of the Human Rights Commission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill*, https://www.parliament.nz/resource/en-NZ/53SCSS_EVI_116701_SS3430/1980add9c29f2b5b6011fc0a544a236083e89ed6

³⁹ Office of the Minister for Social Development and Employment, *Arrangements for the Monitor of the Oranga Tamariki System*, <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2021/paper-one-arrangements-for-the-monitor-of-the-oranga-tamariki-system.pdf>

⁴⁰ Articles 18 and 19.

Considering how serious the care and protection of tamariki is for Māori, and that the care and protection of tamariki Māori should be within Māori authority, Māori consent to any changes proposed to the Oranga Tamariki system is required.

Despite this, the Government has failed to engage with Māori on the development of the Bill in a way that recognises our rangatiratanga, our right to be involved in decision-making that affects us and to consent to changes, as guaranteed under te Tiriti and further protected under the Indigenous Declaration.

According to the Government, in 2019 it established Te Kāhui⁴¹ – a group of senior Māori who the Government brought together to advise on the Bill and who it claims has assisted with the Bill’s development – and conducted 22 hui with “care-experienced Māori, Māori health and education professionals, academics, and iwi leaders to seek input into policy development for the Bill.”⁴² There is limited information available on who was consulted, how this consultation was framed or a detailed account of what views Māori expressed during the hui. From the documentation available it appears hui with Māori stakeholders focussed on “strengthening independent oversight of the Oranga Tamariki system” were undertaken in July and August 2019 during the very early policy development stages of the Bill and were described as the “first phase of engagement”.⁴³ However, as far as we are aware, no further hui with Māori stakeholders were held as the Bill’s policy was developed and changed or once the Bill was drafted and prior to its introduction. This is concerning considering how the context relating to Oranga Tamariki has significantly changed between when the hui with Māori stakeholders were undertaken and now. When these hui were undertaken, the Hastings uplift had only just occurred (May 2019). Since the hui were undertaken, there have been multiple reviews of Oranga Tamariki, led by Māori, the Office of the Children’s Commissioner and the Ombudsman. The Waitangi Tribunal has also found that the Crown breached the Tiriti guarantee of Māori tino rangatiratanga over kāinga and the Royal Commission of Inquiry into Abuse in State Care has released its interim and redress reports, as well as hosted its Māori public hearing. These key developments have cemented the overwhelming opinion that a complete overhaul of Oranga Tamariki is required, not just a change to how it is overseen, and that Māori must lead this transformation.

The level of consultation undertaken with Māori from 2019 to now fails to recognise our status as Tiriti partner, our rangatiratanga over the care and protection of tamariki Māori and our rights under the Indigenous Declaration. It appears the Minister thought it was enough for the Bill to provide that the Monitor and Children’s Commission, once established, would consult with Māori or, in the case of the Monitor, be advised by a Māori Advisory Group⁴⁴ and failed

⁴¹ See <https://www.icm.org.nz/assets/Uploads/Documents/What-the-Monitors-doing/Kahui-group.pdf>

⁴² Office of the Minister for Social Development and Employment, *Oversight of the Oranga Tamariki System and Children and Young People’s Commission Bill: Approval For Introduction*, paragraph 15, <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2021/oversight-of-oranga-tamariki/paper-oversight-of-oranga-tamariki-system-and-children-and-young-people-s-commission-bill-approval-for-introduction.pdf>

⁴³ See Appendix 1 of the Ministry of Social Development’s departmental report on the Bill. Available at: https://www.parliament.nz/resource/en-NZ/53SCSS_ADV_116701_SS3602/33120a5440ccb786217c0e2bb92f14c05174ff80

⁴⁴ Office of the Minister for Social Development and Employment, *Arrangements for the Monitor of the Oranga Tamariki System*, <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2021/paper-one-arrangements-for-the-monitor-of-the-oranga-tamariki-system.pdf>

to recognise the Government's duties under te Tiriti and the Indigenous Declaration to ensure Māori participated in decision-making processes much earlier, when the Bill was first being considered, and as it changed.

CONCLUSION

The Government has disregarded both te Tiriti and the Indigenous Declaration in the process it has followed to develop this Bill, in drafting its substantive provisions and its consideration at the Select Committee stage. We call on the Government to taihoa on the Bill and engage with Māori on the transformation of Oranga Tamariki, including its oversight, and any reconfiguration of the Office of the Children's Commissioner in a way that recognises our status as Tiriti partner, our rangatiratanga over the care and protection of tamariki Māori and our rights under the Indigenous Declaration.