**LEGAL ADVICE**

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15 October 2021

Hon David Parker, Attorney-General

**Consistency with the New Zealand Bill of Rights Act 1990: Oversight of Oranga Tamariki System and Children and Young People's Commission Bill**

## Purpose

1. We have considered whether the Oversight of Oranga Tamariki and Children and Young People's Commission Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21165/24.11). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with sections 14, 19 and 21 of the Bill of Rights Act. Our analysis is set out below.

## The Bill

4. The Bill is an omnibus bill which aims to improve outcomes for children, young people, and whānau in New Zealand, by strengthening the independent monitoring and complaints oversight of the Oranga Tamariki system and advocacy for children's issues generally.

5. The Bill will be divided into two separate Bills at the end of the committee of the whole House stage, creating Bills entitled:

    - Oversight of the Oranga Tamariki System Bill; and
    - Children and Young People's Commission Bill.

6. The Bill applies to the delivery of services or support by agencies or their contracted partners within the Oranga Tamariki system. The Oranga Tamariki system is responsible for providing services and support to children, young people, and their family and whānau in New Zealand.

7. The Bill establishes the Independent Monitor of the Oranga Tamariki system ("the Monitor"), a statutory officer appointed as the chief executive of the Independent Monitoring Agency of the Oranga Tamariki system. The Monitor will have responsibility for providing independent monitoring oversight of the Oranga Tamariki system which includes effective systems performance, service and practice monitoring and review, as well as specific obligations to engage with Māori and iwi.

8. The Bill strengthens the Ombudsman's ability to oversee complaints and investigate matters relating to children and young people arising from services or support delivered through the Oranga Tamariki system by providing an Ombudsman with additional duties and powers when dealing with matters that fall under the Ombudsman Act 1975 (the Ombudsman Act) and relate to services or support delivered by Oranga Tamariki or care or custody providers.

9. The Bill repeals the Children's Commissioner Act 2003 and replaces it with the Children and Young People's Commission, which will largely inherit the duties, functions and powers currently held by the Children's Commissioner.

10. The Bill also amends numerous pieces of legislation and legislative instruments in order to give effect to the Bill.[1]

## Consistency of the Bill with the Bill of Rights Act

### Section 14 – Freedom of expression

11. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.[2]

12. There are several provisions in the Bill that enable the Monitor, Ombudsman and the Children and Young People's Commission to compel information from varying groups of people for reasons related to the respective entity's function.

*Provisions that compel information from providers and individuals*

13. Clause 40 of the Bill provides the Ombudsman with the authority to request any information from Oranga Tamariki and care or custody providers they consider necessary for the purpose of carrying out preliminary inquiries.

14. Clause 41 provides the Ombudsman with access to certain categories of information from Oranga Tamariki or care or custody providers to assist the Ombudsman when they are considering matters that fall under the Ombudsman Act and relate to services or support delivered by Oranga Tamariki or care or custody providers. The Ombudsman may also access any other class of information that the Ombudsman specifies in writing will inform their consideration of matters that relate to any agency delivering services in the Oranga Tamariki system and that may fall under the Ombudsman Act or to assist in carrying out preliminary inquiries.

15. Clause 45 authorises the Monitor to require an agency that delivers services or support to children, young people and their whānau through the Oranga Tamariki system to provide it with information it considers relevant to fulfil its objectives and perform or exercise its functions, duties or powers under the Oranga Tamariki Act 1989 (the Oranga

[1] Children's Act 2014, Coroners Act 2006, Corrections Act 2004, Crimes of Torture Act 1989, Crown Entities Act 2004, Health and Disability Commissioner Act 1994, Human Assisted Reproductive Technology Act 2004, Official Information Act 1982, Ombudsman Act 1975, Oranga Tamariki Act 1989, Public Safety (Public Protection Orders) Act 2014, Remuneration Authority Act 1977, Substance Addiction (Compulsory Assessment and Treatment) Act 2017, Education (Hostels) Regulations 2005, Oranga Tamariki (Residential Care) Regulations 1996, Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018, Family Court Rules 2002 and Ombudsman Rules 1989.

[2] See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

Tamariki Act). Clause 52 enables the Monitor to report any non-compliance with clause 45. The report may also be provided to the House of Representatives and publicly notified on the internet.

16. Clause 107 provides the Commission with special powers to call for information. The Commission may require, in writing, any person to provide any information that the Commission requires or any document, or copies or extracts from any document, under the control of the person. This power to compel information may only be exercised if the Commission believes on reasonable grounds that it is necessary to enable it to carry out an inquiry; and that it cannot reasonably obtain the information from another source or that the information or document it is compelling is necessary to verify or refute information from another source.

*Is the limit on the freedom of expression justified?*

17. These provisions *prima facie* limit the freedom of expression of care or custody providers (clauses 40 – 41), agencies that deliver services or support within the Oranga Tamariki system (clause 45), and any person from whom the Commission may require information (clause 107). However, for the reasons that follow we consider that there are necessary safeguards that make the limits on the right justified.

18. A limit on a right or freedom may be justified if it can be considered reasonably justified under section 5 of the Bill of Rights Act. A limit on a right may be justified where the limit seeks to achieve, and is rationally connected to, a sufficiently important objective, impairs the right or freedom no more than reasonably necessary to achieve the objective, and is otherwise in proportion to the importance of the right.[3]

19. The Bill's key objective is to improve outcomes for children, young people, and their family and whānau who are delivered support or services through the Oranga Tamariki system. This is a highly important objective to which the reporting requirements and information gathering powers are rationally connected. The provision of the reports will help to identify systems for continuous improvement, self-monitoring and assurance.

*The information-gathering power of the Ombudsman*

20. The Ombudsman also requires access to information in order to carry out its investigation functions and responsibilities under the Bill and the Ombudsman Act. Clause 40 is limited to information that the Ombudsman considers *necessary* for the purposes of a preliminary inquiry. Clause 41 limits access to information by the Ombudsman to certain categories such as information relating to critical or serious incidents, information about complaints and information on trends and data that identify patterns of those complaints. These categories of information are limited to situations or complaints about potential serious harm to a child or young person. In addition the application of clauses 40 and 41 is limited to Oranga Tamariki and care or custody providers, who are familiar with working in a regulated environment.

21. Although clause 41 also requires the provision of any other class of information, the Ombudsman must specify in writing that the information will inform consideration of matters that relate to an agency delivering services in the Oranga Tamariki system and that may fall under the Ombudsman Act, or to assist in carrying out preliminary inquiries under clause 40. In this way the information gathering powers under clause 41 are limited and rationally connected to the objective of enabling the Ombudsman to deal with a complaint or investigation involving Oranga Tamariki or a care of custody provider.

[3] See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

*Justification for the information gathering power of the Monitor*

22. The Oranga Tamariki system has been identified as playing a vital role in promoting transparency and building public confidence that the well-being and safety of children and young people are paramount. The requirement for the Monitor to publish the reports enables public scrutiny of the Monitor's findings, and any response, to ensure transparency and public confidence in the system.

23. In order to provide monitoring oversight of the Oranga Tamariki system, clause 45 empowers the Monitor to request sufficient information from any agency that delivers services within the system. The Monitor's power to request information is limited to information that the Monitor considers relevant to fulfil their objectives and perform or exercise their functions, duties or powers under the Bill. The agencies from whom the Monitor is compelling information are agencies that operate in a highly regulated environment and are therefore aware of the requirements necessary for the efficient operation of that environment.

24. It is necessary to note also that whilst a power to compel information exists, the Bill adopts a soft enforcement approach through reports of non-compliance by publishing this on a public website (clause 52).

*The information-gathering power of the Children and Young People's Commission*

25. The Bill also provides for similar information gathering powers for the Children and Young People's Commission (clause 107). Clause 107 provides that the Commission may, by notice in writing, require *any* person to provide *any* information.

26. We consider that the powers in clause 107 are quite broad, however certain conditions must be met in order to exercise those information gathering powers. The Commission may only exercise the power where the following conditions are met: i) the Commission believes on reasonable grounds that it is necessary to enable it to carry out an inquiry and ii) the Commission believes on reasonable grounds that it is not reasonably practicable to obtain the information from another source or for the purposes of the inquiry it is necessary to obtain the information to verify or refute information from another source. Failure to provide the information requested may result in the Commission publicly reporting the non-compliance on the internet.

27. The objective of the Children and Young People's Commission is to promote the interests and well-being of children and young people and to advance the rights of these groups. In order to effectively undertake this, we consider it necessary for the Commission to have access to a wide range of information from a broad group of people across different sectors of society. We note that clause 107 (3) does not permit collection of identifying information and that the inquiry power of the Commission (clause 99 (i)) is limited to systemic matters including any legislation or policy or practice that relates to or affects the rights, interests or well-being of children and young people. We consider that the threshold for which the Commission may require *any* information from *any person* to be sufficiently high and the added prohibition on collecting identifying information provides a safeguard so that this power does not unjustifiably limit the right to freedom of expression of the recipients of a request for information.

28. For completeness, we consider that the above powers to require information can also be considered a search and may also engage section 21 of the Bill of Rights Act, which protects against unreasonable search and seizure. However for the same reasons above, we do not consider that they amount to an unreasonable search in terms of s 21 of the Bill of Rights Act.

*These powers place a justified limitation on the freedom of expression*

29. The information-gathering powers for both the Monitor and the Ombudsman are limited to agencies that participate in the Oranga Tamariki system, which is a highly regulated system. Those agencies can therefore expect to be monitored in this way and to provide information relating to the provision of services under the Oranga Tamariki Act.

30. The information gathering power of the Commission applies to a broad and unknown range of people. However, we are satisfied that the limits provided in clause 107 (3) and read alongside clause 99 (i) are sufficient to safeguard against any unjustified limitations on the rights of persons from whom information may be required.

31. We therefore consider that these information provisions impair the right to freedom of expression no more than is reasonably necessary to achieve the objective of improving outcomes for children, young people and their families and whānau, and is in proportion to the importance of the right.

32. For the reasons above, we are of the view that the limits placed by the Bill on the right to freedom of expression, affirmed by the Bill of Rights Act, are justified.

**Section 19 – Freedom from discrimination**

33. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).

34. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:[4]

    a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act; and, if so

    b. does the distinction involve disadvantage to one or more classes of individuals?

35. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.[5] We have considered whether clauses 17, 19, 38 and 96 treat Māori and non-Māori in a manner that amounts to discrimination on the basis of race.

36. We have concluded that giving greater emphasis to iwi and Māori organisations, including to the extent to ensure that a tikanga Māori approach is promoted in the conduct of work, does not amount to discrimination on the ground of race. This emphasis is necessary to give effect to the Crown's commitment under te Tiriti o Waitangi in a meaningful and practical way.

**Section 21 – Freedom from unreasonable search and seizure**

37. Section 21 of the Bill of Rights Act affirms the right to be free from unreasonable search and seizure. Clauses 32, 33 and 47 are considered as engaging this right.

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[4] See, for example, *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

[5] See, for example *McAlister v Air New Zealand* above n 6 at [40] per Elias CJ, Blanchard and Wilson JJ.

38. Clause 32 of the Bill provides the Monitor with the power to authorise staff members to enter premises that are owned, managed or contracted by Oranga Tamariki. The Bill interprets 'premises' to include a residence or an office that is owned, managed, or contracted by Oranga Tamariki or an approved provider. Clause 33 provides that an authorised staff member may enter premises if they reasonably believe it is necessary for the purpose of observing practice or monitoring the performance of the Oranga Tamariki system.

39. Clause 34 requires written notice of the proposed entry to be given to the person in charge of the premises. The notice must be given within a reasonable time before entry and must state the purpose for which the staff member will be entering the premises. However, the notice need not explain why the authorised staff member reasonably believes entry is necessary or which particular aspect of the monitoring function of the Monitor will be performed.

40. Clause 47 authorises the Monitor, in accordance with their code of ethics, to require a caregiver to facilitate access to a child or young person in their care, without undue delay. This access is to be facilitated when the Monitor is monitoring the performance of the Oranga Tamariki system (under clause 14).

41. We consider that the application of these powers constitutes a search under s 21 of the Bill of Rights Act. Ordinarily, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search cannot be demonstrably justified and therefore the s 5 inquiry does not need to be undertaken.[6]

42. Rather the assessment to be undertaken is first, whether what occurs is a search or seizure, and if so, whether that search or seizure is reasonable. In assessing whether the search powers in the Bill are reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.

43. The entry power applies to residential premises, and so the degree of intrusiveness into privacy is high. The power of entry necessarily includes a residence of an approved provider as this is where services are provided to children and young persons. The Monitor must be able to observe the practice and monitor the performance of the services being delivered in the residence. The power is also exercised in the context of a highly regulated environment in which caregivers can expect the provision of services to be monitored and observed.

44. Although the power of entry is not expressly confined to those areas of the residence where the services are being provided, it is implicit in clause 33(1). The power of entry may only be used for the purpose of observing practice or monitoring the performance of the Oranga Tamariki system. Therefore, the staff member may only enter those parts of the residence necessary to carry out these functions.

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[6] *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

45. The Monitor cannot be expected to fulfil its duties to independently monitor and assess regulatory compliance, the quality and impact of the services, and outcomes for children, young people, families and whānau who receive services or support thorough the Oranga Tamariki system without being able to enter premises, without undue delay, to observe practice and monitor performance, including through access to children or young persons under the care of the Oranga Tamariki system. We consider that the powers of entry and access are reasonably required to allow the Monitor to perform their monitoring oversight function.

46. We are satisfied that the requirement to provide written notice of the entry within a reasonable period of time, and that the staff member must reasonably believe that entry is necessary to observe practice or monitor performance, impose sufficient constraint on the use of the power, which is rationally connected to the purpose of monitoring the services provided within the Oranga Tamariki system. Clause 35 provides safeguards in that the power of entry must not be exercised if the staff member has reason to believe that entry may result in a child being at risk of being harmed or a person in charge of the premises denies entry in exceptional circumstances.

47. The Bill also anticipates, in clause 47, situations where access to children and young persons under the Oranga Tamariki system's care is necessary for the Monitor's ability to monitor the system. We are satisfied that, where necessary, immediate access to children and young persons is vital to enable the Monitor to carry out their monitoring functions in particular by assessing compliance with the Oranga Tamariki Act, the quality and impacts of service delivery and practice on the experiences of children and young people, and then outcomes for children and young people who receive services through the Oranga Tamariki system.

48. We therefore consider that the search powers of clauses 32, 33 and 47 are not unreasonable for the purposes of s 21 of the Bill of Rights Act.

## Conclusion

49. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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