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ARTICLE

Safeguarding Tamariki Māori: The Imperative to Strengthen Waitangi Tribunal Powers Amid s 7AA Repeal

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Following the 2023 election, the New Zealand coalition government agreed to repeal s 7AA of the Oranga Tamariki Act 1989—a provision intended to ensure that Oranga Tamariki improves the well-being of tamariki and rangatahi Māori and their whānau, hapū, and iwi. This article contends that the s 7AA repeal illustrates that rights guaranteed under te Tiriti o Waitangi, specifically the rights of tamariki Māori, are vulnerable to political discretion and that an adequate safeguard is necessary to prevent this. This article argues that the Waitangi Tribunal should be empowered to provide a check that binds Parliament's power where Parliament has specifically legislated to give effect, in whole or part, to te Tiriti o Waitangi. The extent of the Waitangi Tribunal's binding power would be determined in context by considering the wording and purpose of the legislation, and may extend to Bills introduced to the House of Representatives. Under this proposal, the Waitangi Tribunal's recommendations would become binding if the Crown and Māori representatives fail to negotiate an agreement within 90 days of the Waitangi Tribunal's initial recommendation.

I Introduction

Section 7AA was inserted into the Oranga Tamariki Act 1989 (the Act) by the National Government, effective July 2019. Section 7AA imposes duties on Oranga Tamariki's chief executive in relation to te Tiriti o Waitangi (the Treaty of Waitangi) to "recognise and

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provide a practical commitment to the principles of the Treaty".[1] Specifically, it mandates the chief executive to ensure that the policies, practices and services of Oranga Tamariki improve the well-being of tamariki and rangatahi Māori and their whānau, hapū, and iwi. Additionally, s 7AA also provides for developing strategic partnerships and mandated reporting to support this objective.

Following the 2023 election, the coalition government—comprised of the New Zealand National Party, New Zealand First, and ACT New Zealand—agreed to repeal s 7AA.[2] Minister for Children, Hon Karen Chhour MP, claimed s 7AA creates a conflict between honouring the Treaty and making decisions in the child's best interests.[3] The Waitangi Tribunal (the Tribunal) found overwhelming evidence that the best interests of the child are not in tension with honouring the Treaty.[4] The practical commitments outlined in s 7AA have been instrumental in promoting the well-being of children, improving trust between Oranga Tamariki and Māori, and reducing disparities between Māori and non-Māori.[5] Conversely, repealing s 7AA will place tamariki Māori at "significant risk of actual harm".[6]

This article argues the rights guaranteed under te Tiriti, specifically rights regarding tamariki Māori, should not be left vulnerable to political action without evidence that such political action is in their best interests. This article contends that the s 7AA repeal illustrates that these rights are vulnerable to political discretion and that an adequate safeguard is necessary to prevent this. This article outlines that the Tribunal should be empowered to provide a check that binds Parliament's power and provides a detailed proposal for how such a mechanism could operate.

Part II argues that the Government has failed in its duty to Māori and that existing safeguards are insufficient to protect the rights guaranteed under te Tiriti. Part III proposes extending the powers of the Tribunal, detailing how this extension would function in the context of s 7AA. Part IV analyses the effectiveness of this proposal, addressing key objections. Part V concludes the article.

A *Positionality statement*

My position as a Pākehā woman fundamentally limits my perspective on this topic. In recognising my position, my proposal seeks to strengthen an institution guided by knowledgeable Māori voices and experts to ensure that issues are approached from both a Māori and a technical standpoint.

For decades, dedicated Māori organisations and individuals have been at the forefront of efforts to protect tamariki and rangatahi against the state. I extend my appreciation and acknowledgment to those who have come before me, as their work forms the foundation for the ideas explored in this article.

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1 Oranga Tamariki Act 1989, s 7AA(1).

2 *Coalition Agreement: New Zealand National Party & ACT New Zealand* (New Zealand House of Representatives, 24 November 2023) at 9.

3 Office of the Minister for Children "Repeal of Section 7AA of the Oranga Tamariki Act 1989" (28 March 2024) at [3].

4 Waitangi Tribunal *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report* (Wai 3350, 2024) [*Section 7AA Final Report*] at 30–31.

5 Oranga Tamariki *Regulatory Impact Statement: Repeal of section 7AA* (12 March 2024) [*RIS*] at [18a]–[20].

6 *Section 7AA Final* Report, above n 4, at viii and 35.

B *Terminology*

In this article, "tamariki" refers to children, young persons and rangatahi. "Tamariki Māori" refers specifically to Māori children. "The Treaty [of Waitangi]" refers broadly to the English and Māori texts, while "te Tiriti [o Waitangi]" refers specifically to the Māori text.

II Duties to the Treaty of Waitangi

A *Section 7AA*

When s 7AA was introduced to the House of Representatives in 2017, seven out of ten children in care were Māori.[7] This section sought to reduce the disproportionate number of Māori children entering state care and improve outcomes for tamariki in care.[8] Section 7AA provided practical measures to reduce this disparity, including:

- setting measurable outcomes for those who come to the attention of Oranga Tamariki;[9]
- having regard to mana tamariki, whakapapa and whanaungatanga responsibilities in all policies, practices, and services of the department;[10]
- developing strategic partnerships with iwi and Māori organisations;[11] and
- requiring the chief executive to publicly report the impact of these measures on improving outcomes for Māori.[12]

Section 7AA has been instrumental in improving children's long-term outcomes and reducing inequality levels between Māori and non-Māori.[13] The *Regulatory Impact Statement: Repeal of section 7AA* (*RIS*) for the repeal explains that the strategic partnerships established under this section have provided early support and prevented Māori from entering care, reducing disparities over time. The duties in s 7AA(2)(b) have helped tamariki Māori to develop a positive connection with their culture and identity, protecting them against adversity and enhancing their well-being. Additionally, s 7AA has helped build trust between Oranga Tamariki and Māori.[14]

The Cabinet paper confirms that strategic partnership agreements with iwi and Māori organisations will continue and that repealing s 7AA will not prevent Oranga Tamariki from entering into future agreements.[15] However, the accountability and reporting mechanisms within s 7AA, which are integral to reducing inequities, will be repealed.[16] This repeal may slow the work to address disparities, significantly affecting the safety, stability, rights, needs, and long-term well-being of children interacting with Oranga Tamariki.[17]

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7 Oranga Tamariki *Improving outcomes for tamariki Māori, their whānau, hapū and iwi – Section 7AA Report 2020* (30 July 2020) at 56.
8 *Section 7AA Final Report*, above n 4, at 1.
9 Oranga Tamariki Act, s 7AA(2)(a).
10 Section 7AA(2)(b).
11 Section 7AA(2)(c).
12 Section 7AA(5).
13 *RIS*, above n 5, at 20.
14 For example, in 2020, the Tribunal heard evidence of mothers avoiding medical care due to fear of Oranga Tamariki intervention: see *Section 7AA Final Report*, above n 4, at 31.
15 Office of the Minister for Children, above n 3, at [20].
16 *RIS*, above n 5, at 20–21.
17 At 21 and 24.

B *Failures of the Crown*

The Waitangi Tribunal reported that Parliament had misunderstood its obligations to the Treaty of Waitangi as Ministers of the Crown.[18] Ministers are also responsible for protecting fundamental social and constitutional values and fulfilling the Crown's Treaty obligations.[19] These obligations cannot be set aside for a coalition agreement.

Fundamental social values in New Zealand inherently include the rights of children. This is evidenced by New Zealand's commitment to the United Nations Convention on the Rights of the Child (UNCROC),[20] establishing the Children's Commissioner,[21] and providing 20 hours of free early childhood education, among other initiatives.[22]

The Treaty obligation requires the Crown to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga.[23] The scheme under the Oranga Tamariki Act never gave effect to tino rangatiratanga. Still, repealing s 7AA will likely harm tamariki—who are taonga that must be protected under art 2 of te Tiriti—and erode initiatives towards Treaty partnership. The Treaty principle of partnership (the duty to consult and act reasonably and in good faith, and the duty of active protection) is breached as the repeal of s 7AA removes a necessary foundation to promote Treaty consistent policy and practice.[24]

Ms Chhour claims, as a basis for the repeal, that the Treaty obligations in s 7AA, namely the requirement to consider a child's cultural background, have led to a conflict between complying with the Treaty obligations and acting in the best interests of a child.[25] The Minister raised concerns that children were treated as an identity group first and a person second, highlighting circumstances of "reverse uplifts" where children were taken from "safe and loving homes because the caregivers were deemed the wrong ethnicity".[26] The Tribunal found that the section contained no conflict between the best interests of children and the Treaty, contrary to the claims made in the Cabinet paper.[27] As Waihoroi Shortland stated in his evidence: [28]

> … putting children first is one that we all subscribe to, and … [t]he requirement to do that work with regard to Te Tiriti o Waitangi and its principles is not in conflict; it is complimentary.

Considering a child's cultural background appreciates that Māori have a right to live here as Māori.[29]

18 *Section 7AA Final Report*, above n 4, at 28.
19 Cabinet Office *Cabinet Manual 2023* at 5.
20 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990); and Ministry of Social Development *United Nations Convention on the Rights of the Child: Sixth Periodic Report by the Government of New Zealand 2021* (2021) at [2].
21 Ministry of Social Development, above n 20, at [92].
22 At [263]–[265].
23 Te Tiriti o Waitangi 1840, art 2.
24 *Section 7AA Final Report*, above n 4, at 33–34.
25 Office of the Minister for Children, above n 3, at [3].
26 At [12] and [16]. See also (21 May 2024) 775 NZPD (Oranga Tamariki (Repeal of Section 7AA) Amendment Bill – First Reading, Karen Chhour).
27 *Section 7AA Final Report*, above n 4, at 30–31.
28 At 31.
29 At 30.

The Treaty obligation is primarily a moral duty rather than a legal one, except when the Treaty has been incorporated into legislation by Parliament.[30] The concept of Parliamentary sovereignty means that nothing, including the Treaty, can limit Parliament's right to legislate.[31] Parliament determines the extent to which the Treaty is adhered to and retains the right to legislate contrary to the Treaty.

There are limited authoritative checks and balances on Parliamentary sovereignty. The Tribunal cannot inquire into a Bill that has entered the House of Representatives,[32] unless the House refers the Bill to the Tribunal,[33] or a new claim is made after the Bill becomes an Act.[34] The Tribunal may only exercise its authority to issue binding recommendations in specific cases. However, no binding power applies to children's rights—the Tribunal can only make general and non-binding recommendations.[35] The courts, by convention of comity, may not read or strike down legislation inconsistent with the Treaty when it is clear what Parliament intended. However, the courts have left open the possibility that some Treaty issues may be justiciable.[36]

The absence of constraints and checks on Parliament's power leaves Māori rights vulnerable to political discretion, resulting in ongoing insecurity and instability.[37] The repeal of s 7AA is not an isolated incident where Māori rights have been jeopardised. Notable examples include the Foreshore and Seabed Act of 2004 and the Government's support in 2006 for a minority party policy that aimed to remove all references to the Treaty of Waitangi from legislation. Furthermore, several other policies in the 2023 coalition agreement threaten Māori rights and Treaty partnership progress.

Specifically addressing s 7AA, it is important to recognise that this section pertains to children's rights, which should be handled with the utmost care and respect. The repeal process has not reflected this level of consideration or integrity through policy, consideration of alternatives, or consultation with Māori.[38] Te Puni Kōkiri expressed:[39]

> We argue strongly that any policy change of such a significant piece of legislation, such as the repeal of section 7AA, must rely on evidence and not on anecdotal evidence, hearsay, and ideological positions and be informed by community consultations.

This perspective was echoed by the Chief Executive of Oranga Tamariki and supported by the Tribunal.

New Zealand's constitutional framework continues to fail to actively protect tamariki Māori and their whānau. While s 7AA has significantly improved the well-being of children in state care, including contributing to halving the number of tamariki Māori entering care,

30 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 596–597.
31 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 665–666.
32 Treaty of Waitangi Act 1975, s 6(6).
33 Section 8(2)(a).
34 Section 6(1)(a).
35 Waitangi Tribunal *Guide to the Practice and Procedure of the Waitangi Tribunal – A Comprehensive Practice Note Issued under Clause 5(9) and (10) of Schedule 2 to the Treaty of Waitangi Act 1975* (August 2023) at [3.58].
36 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [90].
37 James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples* UN Doc A/HRC/18/35/Add.4 (31 May 2011) at 14.
38 *Section 7AA Final Report*, above n 4, at viii.
39 At 18.

tamariki Māori still comprise 67 per cent of all tamariki in care.[40] This underscores the urgent need for protective mechanisms.

Parliament's authority is theoretically limited by fundamental norms and the Treaty. However, there is no effective mechanism to restrain Parliament, and no accountability or recourse when societal norms or the Treaty are breached. New Zealand must introduce a safeguard, as the political sphere alone has not fulfilled its obligations under te Tiriti.

III Proposal

This article contends that enhancing the powers of the Waitangi Tribunal would serve as an effective check on Parliament's power. The Tribunal should have the power to make binding recommendations to Parliament in circumstances where Parliament has specifically legislated to give effect, in whole or in part, to the Treaty (Treaty provision). The extent of the Tribunal's binding power would be determined in context by considering the wording of the Treaty provision and the relevant purpose or provisions in the Act. This authority may extend to Bills introduced to the House of Representatives.

Under this proposal, the Tribunal's recommendations would become binding if the Crown and Māori representatives fail to negotiate an agreement within 90 days of the Tribunal's initial recommendation.

In short, the Tribunal may exercise binding powers where:

- the relevant Act contains a Treaty provision;
- the directions within the Treaty provision, considering the relevant purpose or provisions in the Act, justify proportionate action;
- the Crown and Māori representatives do not reach an agreement within 90 days of the Tribunal's initial recommendation.

This proposal aligns with the recommendations of *He Puapua*, a report to Te Puni Kōkiri by the technical working group on a plan to realise the *United Nations Declaration on the Rights of Indigenous Peoples*.[41] The report to Te Puni Kōkiri includes recommendations for possible changes within the current government structure aimed at achieving co-governance by 2040. Enhancing the Tribunal's role by making their decisions binding rather than recommendatory has been identified as an indicative option to strengthen te Tiriti in the kāwanatanga (Crown governance) sphere.[42]

This proposal is consistent with the United Nations' advice to expand the Tribunal's powers to include legally binding and enforceable authority to adjudicate Treaty matters with the force of law.[43] An extension of powers would ensure that Treaty obligations are upheld rigorously and consistently, offering better protection for Māori rights.

This article continues to detail each prong of the test.

40 Oranga Tamariki *Section 7AA Report 2023: Improving outcomes for tamariki Māori and their whānau, hapū and iwi* (7 December 2023) at 36–37.

41 Declaration Working Group *He Puapua* (Te Puni Kōkiri, 1 November 2019); and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

42 Declaration Working Group, above n 41, at 54–55.

43 Rodolfo Stavenhagen "Conclusions of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: New Zealand" (2006) 10(2) AILR 104 at 106.

A *The relevant statute contains a Treaty provision*

The first prong of the proposal requires the issue put before the Tribunal to have regard to a statute that significantly references the Treaty or Treaty principles.

The Oranga Tamariki Act is an example of a statute that sufficiently references the Treaty. Section 7AA explicitly sets out "[d]uties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)" that the chief executive "must ensure" are exercised.[44]

A 2022 study revealed that of the 894 relevant Acts in force, 74 (8.28 per cent) include the terms "Treaty of Waitangi" or "Tiriti o Waitangi".[45] Of these, 45 Acts (60.8 per cent) contain "substantive mentions" of the Treaty.[46] This proposal applies to Acts with "substantive mentions" and shall not apply to "minimal mentions" of the Treaty. An example of a "minimal mention" is the Contract and Commercial Law Act 2017, which provides that the legal requirements of electronic transactions do not apply to provisions in enactments that relate specifically to the Waitangi Tribunal established under the Treaty of Waitangi Act 1975.[47] It cannot be said that this "minimal mention" conveys an intention by Parliament to give effect to the Treaty or its principles.

Requiring a "legal hook" as a Treaty provision is consistent with the historical development of the Tribunal's binding powers, which currently apply to the return of Māori land in specific circumstances. Parliament extended the Tribunal's powers following the *New Zealand Maori Council v Attorney-General* (*Lands*) case in the late 1980s.[48] The Court of Appeal in *Lands* determined that the strong Treaty provision in the State-Owned Enterprises Act 1986 (SOE Act) necessitated a safeguard to protect Parliament's intentions and ensure that the SOE Act would be administrated per the Treaty.[49] Today, where the Tribunal finds a well-founded claim related to land held by a state-owned enterprise, educational institute, Crown forestry or Crown railways, it must consider exercising its power of resumption—the power to issue a binding recommendation to the Crown for the return of land to Māori.[50] This is the only circumstance where the Tribunal may issue a binding recommendation.

B *The directions within the Treaty provision, taking into account the relevant purpose or provisions in the SOE Act, justify proportionate action*

The strength and scope of Treaty provisions vary in the obligation's rigour and specificity. As with any provision, a Treaty provision is interpreted in light of its purpose. This proposal asserts that the strength and scope of the relevant Treaty provision, the broader Act's purpose, and any other relevant provisions must be considered when determining the Tribunal's power. Proportionate action shall have regard to the Crown's action or policy, the severity of the breach, the Crown's justification, alternative remedies, and what is necessary within the circumstances (non-exhaustive).

This approach aligns with the reasoning in *Lands*. The case regarded a strong Treaty provision, s 9, which states that "Nothing in this Act shall permit the Crown to act in a

44 Oranga Tamariki Act, s 7AA.
45 McGuinness Institute *Working Paper 2023/03 – Appearances of the Treaty/te Tiriti in New Zealand Legislation* (July 2023) at 14.
46 At 15.
47 Contract and Commercial Law Act 2017, sch 5.
48 *Lands*, above n 31.
49 At 660 and 666.
50 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [78].

manner that is inconsistent with the principles of the Treaty of Waitangi."[51] Section 27 of the SOE Act protects land claims lodged with the Tribunal before a certain date. However, s 27 does not address the risk that Crown land may transfer to state-owned enterprises; hence, remedies available are reduced, prejudicing claims.[52] The Court found that s 9 required a safeguard to ensure land could be protected under s 27, and the Court declared that transferring assets to a state-owned enterprise without an adequate safeguard would be unlawful.[53]

This case illustrates the Court considering the strength of the Treaty provision and other relevant sections within the Act when determining necessary actions and restraints on Parliament.

Unlike *Lands*, the repeal of s 7AA involves the Government introducing a Bill to repeal a Treaty provision. Although a general Treaty provision remains, it is weaker than s 7AA. The Tribunal's binding powers must extend to situations where Treaty provisions are repealed, as such repeals could significantly hinder progress under the Treaty. This also reduces the risk of defensive drafting, where Parliament could remove all mentions of the Treaty in legislation. In these cases, the remaining Treaty provision, or the lack thereof, should be given less weight in the analysis.

The analysis at this step considers the Crown's action or policy against its:

(1) Consistency with the Treaty provision (if applicable).
(2) Consistency with the Treaty of Waitangi.
(3) Consistency with the Act's purpose and any other relevant provisions.

Finally, the analysis considers what action is proportionate and justified. Consider the below analysis of s 7AA.

(1) Consistency with the Treaty provision

The Oranga Tamariki Act contains two Treaty provisions, s 4(1)(f) and s 7AA. Section 4(1)(f) applies generally to the Act and it provides:

> The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by … providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) in the way described in this Act.

The phrase "the way described in this Act" primarily relates to s 7AA.

The Bill proposed retains the broad obligation to the principles of the Treaty in s 4(1)(f), but repeals the practical commitments in s 7AA.[54] Section 4(1)(f) is amended to remove "in the way described in this Act". Section 7AA is repealed, and the annual and system reports will no longer need to address s 7AA obligations. However, Oranga Tamariki must still report on outcomes and initiatives for improving outcomes for Māori children, young people and their whānau.[55]

While the amendment to s 4(1)(f) could broaden the application of the Treaty provision, it does not necessarily increase the obligations on Oranga Tamariki. At a minimum, the

51 State-Owned Enterprises Act 1986, s 9.
52 *Lands*, above n 31, at 642.
53 At 643.
54 Oranga Tamariki *Disclosure statement – Oranga Tamariki (Repeal of Section 7AA) Amendment Bill* (1 May 2024) at [3.2].
55 Oranga Tamariki (Repeal of Section 7AA) Amendment Bill 2024 (43-1).

section requires Oranga Tamariki to meet the general Treaty obligations in developing policies, practices, and services as required by all Crown agencies.[56]

The repeal of s 7AA is inconsistent with the retained Treaty provision of s 4(1)(f) as it removes practical commitments to the principles of the Treaty. Repealing the stronger section, s 7AA, would significantly diminish the Act's overall commitment to the Treaty. Since s 4(1)(f) is weak and lacks enforceable actions, this factor should be given less weight in the analysis.

(2) Consistency with the Treaty of Waitangi

This article has outlined consistency with the Treaty in Part II. In short, the mechanisms within s 7AA have been instrumental in improving long-term outcomes for children and reducing levels of inequality between Māori and non-Māori. Repealing these mechanisms will likely cause harm to tamariki Māori and breach the Treaty.[57]

(3) Purposes of the Act

Sections 4 and 5 of the Oranga Tamariki Act outline the Act's purposes and principles, both of which emphasise the well-being of children.[58] The repeal of s 7AA could significantly impact children's well-being, directly contradicting the Act's purpose and guiding principles.

Specifically, s 5(1)(b)(i) provides that an exercise of power under the Act must be guided by the principle that:[59]

> ... the well-being of a child or young person must be at the centre of decision-making that affects that child or young person, and, in particular,— the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld ... .

The *RIS* found that the Bill contravenes UNCROC art 30 (Indigenous and minority rights) and art 5 (Respect to parent's rights, extended family, community or caregivers).[60]

Effectiveness, durability and consistency with the Treaty of Waitangi and UNCROC are all elements explicitly outlined as a purpose or principle of the Act or generally promote the well-being of children. The chart below from the *RIS* illustrates that repealing s 7AA is worse than doing nothing and maintaining the status quo across all five categories.[61]

How do the options compare to the status quo?

	Option One: status quo	Option Two: full repeal of s 7AA	Option Three: partial repeal of s 7AA
Likely effectiveness	0	-	0
Durability	0	-	0

56 *Section 7AA Final Report*, above n 4, at 12.
57 *RIS*, above n 5, at 20 and 24.
58 Oranga Tamariki Act, ss 4 and 5.
59 Section 5(1)(b)(i).
60 Redacted from *RIS*. See Oranga Tamariki, above n 54, at [3.1].
61 *RIS*, above n 5, at [42].

Consistency with the Treaty of Waitangi	0	-	-
Consistency with UNCROC		-	-
Overall assessment	0	-	-

Key:

++	much better than doing nothing/the status quo
+	better than doing nothing/the status quo
0	about the same as doing nothing/the status quo
-	worse than doing nothing/the status quo
--	much worse than doing nothing/the status quo

A full or partial repeal of s 7AA is highly inconsistent with the Act's purposes and principles, negatively impacting children's well-being.[62]

(4) Proportionate action

This action breaches the Treaty and the Oranga Tamariki Act's purposes and principles without justification from competing policy considerations. Research indicates this decision is based on ideology and not on empirical evidence, and the issue identified is caused by individual staff actions rather than by the statute.[63]

There are no effective alternative remedies or actions available to claimants. While the Supreme Court can consider matters of public interest, including Treaty matters, the Court does not have the power to strike down a Bill.[64] Alternatively, the select committee are currently open to public submissions on the Bill.[65] However, this may not yield results. Given these factors, a restraint on Parliament is justified and necessary to protect rights under te Tiriti o Waitangi.

The Tribunal recommends stopping the repeal of s 7AA and undertaking a review of the Oranga Tamariki Act that addresses the Minister's concerns and considers the Tribunal's 2021 recommendations.[66] A review providing an opportunity to consult strategic partners and consider the policy within the broader context of the Act is required by 1 July 2025.[67] Further, the Tribunal recommends against the repeal of:

- s 7AA(2)(b);
- the requirement to develop strategic partnerships; and
- the focus on reducing disparities by setting targets and publicly reporting.

In this case, the proportionate action would likely require a binding recommendation that the Bill is not rushed through the House of Representatives before the Oranga Tamariki Act undergoes a full review with adequate consultation with Māori and strategic partners engaged pursuant to s 7AA. The Tribunal identified that many of the issues in this repeal stem from the lack of thoughtfully considered alternatives that may better address the policy objective of the repeal and a lack of consultation.[68] This recommendation addresses

62 The partial repeal as suggested in the *RIS* would only repeal s 7AA(2)(b).
63 *Section 7AA Final Report*, above n 4, at 28.
64 Supreme Court Act 2003, s 13.
65 As of 29 May 2024.
66 *Section 7AA Final Report*, above n 4, at 35.
67 Oranga Tamariki Act, s 448B.
68 *Section 7AA Final Report*, above n 4, at 35.

the risks associated with a rushed repeal and would effectively protect te Tiriti and tamariki rights until a full review is undertaken.

Greater action, such as a binding recommendation that s 7AA not be repealed, is likely not required at this stage. The Tribunal accepts that the Act is imperfect and has previously proposed amendments. A comprehensive review may produce a Tiriti- and tamariki rights-affirming outcome.[69] The Tribunal's preferred path is less limiting on Parliamentary sovereignty than a binding recommendation on a Bill.

C *The Crown and Māori representatives do not agree within 90 days of negotiations*

This proposal allows Māori representatives or claimants and the Crown to negotiate a settlement with one another to agree on a settlement.

This prong mirrors the current framework for the Tribunal's binding powers, where its recommendations become binding only if the Crown and claimants fail to reach an agreement within 90 days of the initial recommendation.[70] The Tribunal must cancel or modify the initial recommendation to reflect the settlement if an agreement is reached.

Where there is a well-founded claim, the claimant group would negotiate with the Crown unless the group is unable or unwilling to negotiate with the Crown. Where the claimant does not wish to be in negotiations or where the Tribunal has initiated proceedings independently, an appropriate Māori representative should be appointed to negotiate with the Crown. Reversion to the Tribunal's recommendation provides claimants or Māori representatives a foundation to stand on, which is vital as there is a severe imbalance of power and resources in negotiations between the Crown and Māori.[71] This crafts a space within the partnership (relational) sphere between the rangatiratanga (Māori) sphere and kāwanatanga (Crown) sphere,[72] and provides the Crown and Māori political autonomy. Māori can regain control over the proceedings and negotiate for outcomes that are in their best interests—regardless of whether the Tribunal initially recommended that outcome.

There have been occasions where the Tribunal's recommendations have been contested,[73] and it is recognised that while the Tribunal's mission is to uphold the principles of te Tiriti,[74] the Tribunal is a Crown structure. The political autonomy of claimant groups or Māori representatives is vital to promote outcomes that align with those groups' requests and to the effectiveness of this proposal.

69 At 35.
70 Waitangi Tribunal, above n 35, at [3.59].
71 Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and Its Impact on Māori" (2019) 8 Land 152 at 163.
72 See generally Declaration Working Group, above n 41.
73 See *Mercury NZ Limited v The Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142.
74 Waitangi Tribunal *Strategic Direction 2014–2025* (2014) at 1.

IV Evaluation

A Financial considerations

When the Labour government extended the Tribunal's powers in 1985, National Party member Simon Upton raised several concerns, including that the Labour Party had not done their economic homework and that empowering the Tribunal in this way would open the financial floodgates.[75] These arguments remain relevant when considering further extensions of the Tribunal's powers.

Although the Tribunal may take practical and economic considerations into account, they are not its primary focus.[76]

Financially, the recommendations by the Tribunal regarding s 7AA are unlikely to cause significant stress—expenses would be attached to halting the repeal and conducting a full review of the Oranga Tamariki Act. However, the full effect of the proposal may, for example, provide the Tribunal the authority to recommend a Treaty settlement. The Tribunal will likely propose more comprehensive settlements than the Crown has previously provided. Additionally, the proposal would require adequate human and financial resources to enable the Tribunal to fulfil its functions effectively.[77] While this is a positive step towards co-governance and respect for te Tiriti o Waitangi, it could also pose significant challenges to the functioning of the state.

Whether this proposal is within New Zealand's financial constraints requires further analysis and is outside the scope of this article. However, this article submits that the expense is justified.

B Parliamentary sovereignty

This proposal considers a significant restraint on Parliament's power, which contradicts Parliamentary sovereignty and the principle of comity.

Comity requires the separate branches of Government to recognise the other's proper sphere of influence and privileges.[78] There is a real risk that the principle of comity would hinder the Tribunal's use of binding powers, which it has exercised only once so far.[79] However, this may begin to change as the courts have increasingly supported the Tribunal's authority.

In investigating the repeal of s 7AA, the Waitangi Tribunal issued a summons to the Minister for Children. The Minister refused to answer the summons, and the Crown argued during a judicial review at the High Court, and later the Court of Appeal, that the summons contravened the constitutional principle of comity.[80] The Court of Appeal ruled in favour of the Tribunal, stating that the Tribunal was acting within its powers to inquire and make recommendations as Parliament directed. Additionally, the Tribunal's recommendations

75 (18 December 1984) 460 NZPD 2709.
76 Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 406.
77 Declaration Working Group, above n 41, at 54.
78 David Wilson *Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, Wellington, 2023) at [57.7.1].
79 See Waitangi Tribunal *The Turangi Township Remedies Report* (Wai 84, 1998) at 101.
80 See *Minister for Children v The Waitangi Tribunal* [2024] NZHC 931; and *Skerret-White v Minister For Children* [2024] NZCA 160.

are unlikely to breach the comity principle as they are merely recommendatory and cannot limit the exercise of legislative powers.[81]

Issues of comity will arise as this proposal suggests the Tribunal should have binding powers on the legislature. However, in *Haronga v Waitangi Tribunal*, the Court held that Parliament's intention was clear in providing the powers of resumption, and the Tribunal was to consider exercising the powers and not to defer to the political process.[82]

Section 7AA and *Haronga* litigation indicate that issues of comity are minimised where Parliament has legislated to give effect to these powers. Therefore, effectively expanding the Tribunal's powers would likely require Parliamentary approval rather than judicial activism.

Parliament would need to legislate to limit its own supreme authority, which may be an unfavourable policy for a major party to adopt. Consequently, it is unclear how likely it would be for this proposal to come to fruition, which raises the question of whether the government's majority system can adequately protect minority rights.

V Conclusion

The repeal of s 7AA of the Oranga Tamariki Act represents a significant step back in protecting and enhancing the well-being of tamariki Māori. This provision has been instrumental in addressing the disproportionate number of Māori children in state care and fostering strategic partnerships that support Māori families.

The Government's decision to repeal s 7AA, citing conflicts between honouring the Treaty and children's best interests, lacks empirical support and overlooks the positive impact s 7AA has had. The move threatens to reverse the gains made in promoting the rights and well-being of tamariki Māori, placing them at risk of harm and undermining the principles of te Tiriti o Waitangi.

This article argues that Māori rights, particularly those of tamariki Māori, should not be vulnerable to political shifts. The powers of the Waitangi Tribunal should be enhanced to make binding recommendations on Crown actions or policies that impact Māori rights under the Treaty to prevent such occurrences. This would ensure that Treaty obligations are upheld rigorously by offering better protection for Māori rights, contributing to a stable and just legal framework.

In conclusion, while the commitment to repealing s 7AA strengthens the National Party's political position and furthers ACT's political agenda, it ultimately fails to honour New Zealand's obligations under te Tiriti o Waitangi and risks significant harm to tamariki Māori. Strengthening the Waitangi Tribunal's authority is necessary to ensure enduring protection and respect for Māori rights within New Zealand's legal and political systems.

81 *Skerret-White*, above n 80, at [110].
82 *Haronga*, above n 50, at [88]–[93].