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A Jurgens

A critical analysis of how section 7AA of the Oranga Tamariki Act 1989 recognises te Tiriti o Waitangi

I Introduction

The introduction of colonial institutions has caused significant disparity and overrepresentation of tamariki Māori within Aotearoa's state care system. The enforcement of Eurocentric values surrounding family and care has encroached on the rights guaranteed to Māori in Te Tiriti o Waitangi. Section 7AA of the Oranga Tamariki Act 1989 was introduced to rectify these issues, imposing a 'practical commitment' on the Chief Executive of Oranga Tamariki to make decisions aligning with the principles of te Tiriti/Treaty. However, recently, the government has proposed a repeal of the section, posing a serious regression in Treaty policy and jurisprudence surrounding state care. Subsequently, the discourse surrounding Section 7AA is whether the provision gives effect to recognising te Tiriti. This essay will examine the context of tamariki Māori in state care, the efficacy of Section 7AA in recognising te Tiriti with a comparison to Canadian Indigenous policy, and the repeal and its implications.

II Context of Māori in State Care

The overrepresentation and disparity of tamariki Māori in state care are intrinsically connected to the effects of colonisation. As of 2023, Māori children account for 68% of those in care, a disproportionately high number considering Māori represent 20% of Aotearoa's population.[1] The historical context of Māori in state care dates back to the signing of te Tiriti and the Treaty, signalling the start of a tumultuous relationship between Māori and the Crown. Despite te Tiriti guaranteeing Māori authority over kāinga and communities, colonial institutions undermined Māori structures and networks of whānau, hapū, and iwi, limiting and extinguishing their ability

[1] Oranga Tamariki *Section 7AA 2023 Report Improving Outcomes for tamariki Māori and their whānau, hapū and iwi* (2023)

to exercise tino rangatiratanga. Land confiscations and the imposition of assimilationist policies contributed to the large-scale removal of Māori from their whānau.[2] As Dr Moana Jackson points out, the removal of Māori children disrupted the transmission of cultural values, a practice rooted in dispossession, where the assumption of authority over Tamariki Māori became part of a destructive agenda.[3] Essentially, this severed their connections to whakapapa, language and culture – connections many struggled to rebuild as adults.

Consequently, the disparity in outcomes of tamariki Māori in care remains significant. An inquiry into the outcomes of Māori in care from 1950-1999 highlighted that tamariki placed in care returned as adults traumatised and alienated from their culture and communities.[4] Many recall abuse, cultural neglect and the devaluation of Māoritanga.[5] Their loss to their whakapapa and removal from whanau is seen in the negative statistics surrounding Māori health and well-being, with high rates of violence, incarceration, addiction, lack of education, and access to housing and employment.[6] Additionally, the impacts affected whānau and the wider community, with exposure to mental and physical health issues, collective mamae, whakamā, drug and alcohol abuse, and family violence. Ultimately, the crown's encroachment on Tikanga values and Tino rangatiratanga has materially contributed to the structural inequities whānau experience with state care.

The increasing disparity and disproportion of Māori in state care has led to many Māori advocating for reform concerning how tamariki are treated and their cases are handled. In 2017, Oranga Tamariki was established, replacing its predecessor, Child, Youth and Family (CYFS), becoming Aotearoa's child protection agency. The origin of Oranga Tamariki's vision is rooted in partnership, whereby the organisation is called for "a commitment to deliver on our obligations

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[2] Abuse in Care *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* (Royal Commission of Inquiry, December 2021) at 1.2.
[3] At 1.2.
[4] Ihi Research *Hāhā-uri, hāhā-tea Māori Involvement in State Care 1950-199* (Royal Commission, July 2021) at 188-213.
[5] Abuse in Care above n 2, at 1.2.
[6] Dr Fleur Te Aho "State Law is failing tamariki Māori" (17 August 2022) University of Auckland <www.auckland.ac.nz/en/news/2022/08/17/state-law-is-failing-tamariki-maori.html#:~:text=Dr%20Fleur%20Te%20Aho%20(Ng%C4%81ti%20Mutunga)%20is%20co%2Ddirector,Herald%20on%2016%20August%202022.>

under te Tiriti o Waitangi and to create outcomes that all New Zealand Tamariki deserve while reducing the disparities experienced by Tamariki Māori".[7]

III Section 7AA of the Oranga Tamariki Act 1989

The previous National government introduced section 7AA in the Act to reduce the disparity of Māori children within Oranga Tamariki. The Honourable Anne Tolley stated that "the legislation specifically seeks to improve outcomes for Māori, to give a practical commitment to the principles of the Treaty and provide support to those in care and families involved".[8] The provision came into effect in 2019 and imposes a series of duties on the Chief Executive of Oranga Tamariki, providing a practical commitment to the principles of te Tiriti/Treaty. The framework establishes a statutory obligation for the Chief Executive to have a practical commitment to the Treaty, with reporting and accountability measures imposed on the Chief Executive. Moreover, it places a commitment to finding placements for Māori children within their whānau and whakapapa before looking elsewhere, with section 7AA(2) of the Act noting the department is to have regard to the mana tamaiti (the intrinsic value and inherent dignity) and whakapapa of Māori children and the whanaungatanga responsibilities of their whānau, hapu and iwi.[9] In doing so, the department must seek to develop strategic partnerships with iwi, iwi authorities and Māori organisations to reduce the disparity and improve outcomes for Māori children.[10] Ultimately, the provision fosters and strengthens Māori and Crown relations, following the Treaty principles of active protection and partnership with Māori. It aims to provide Māori responsibility and authority over tamariki, providing them with the resources and support needed to do so.

Since the implementation of the provision, entries into care have decreased notably by 57% since 2018, which can be attributed to the practices and provisions fostered through section 7AA.[11] The Oranga Tamariki 2023 Section 7AA report outlines that over 75% of tamariki and rangatahi

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[7] <www.orangatamariki.govt.nz/about-us/vision-and-values/>
[8] Waitangi Tribunal *Oranga Tamariki Urgent (Section 7AA) Inquiry* (WAI 3350, 2024) at 5.
[9] Oranga Tamariki Act 1989 s 7AA
[10] s 7AA(2)(C)
[11] Dr Emily Keddell "Why Section 7AA works just as intended" (2 July 2024) Newsroom <www.newsroom.co.nz/2024/07/02/section-7aa-works-as-intended-to-reduce-child-protection-disparities-for-maori/>

living with caregivers have been consistently placed with whānau over the last years, meeting one of their mana tamaiti objectives regarding placing children with whanau, hapu and iwi. In addition, it noted that in 85% of tamariki in care, their views of whānau, hapu and iwi were identified and considered.[12] Additionally, since June 2023, Oranga Tamariki has continued broad engagement with Kaimahi and Hauora service providers to understand how their gateway process works, and the improvements needed. They have conducted 60 engagements, fostering the rebuilding of trust with tamariki, whānau and rangatahi. One example of a successful strategic partnership is the Mokopuna Ora, the collaboration between Waikato Tainui and Oranga Tamariki. The partnership aims to reduce mokopuna entering state care by supporting and upskilling whānau, hapu and iwi members. Since 2021, the partnership has improved the well-being outcomes for 94 whanau, with 70 of them and 203 mokopuna successfully exiting Oranga Tamariki.[13] The introduction of the section has fostered and strengthened the trust and relationship between Oranga Tamariki and Māori, a notable strength highlighted in Oranga Tamariki's Regulatory Impact Statement. Subsequently, section 7AA provides a small pathway for Māori to exert their tino rangatiratanga, affirming te Tiriti. The collaborative approach undertaken enables Māori to participate in creating frameworks to support Tamariki better, offering the opportunity to develop a Kaupapa Māori to respond to the disparity. In recent years, this has been translated into more effective efforts to fulfil Tiriti obligations with partnership relationships, leading to stronger and more effective services. As Joanne Pera reflects on her experience with Oranga Tamariki, "It is not perfect, but it is better."[14]

However, despite some success, there is criticism concerning the application of section 7AA, in which the continuing power imbalance between Māori and the Crown has hindered its efficacy.[15] As stated by Dr Moana Jackson, although there is good intent between the strategic partnerships, they do not address the power imbalance present in which decision-making still resides with the crown, failing to acknowledge the right inherent in tino rangatiratanga for iwi and hapu. Subsequently, the provision still limits the ability of Māori to exercise their full authority,

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[12] Oranga Tamariki *Section 7AA 2023 Report Improving Outcomes for tamariki Māori and their whānau, hapū and iwi* (2023) at 5.
[13] <www. waikatotainui.com/hapori/mokopuna-ora/>
[14] Waitangi Tribunal above n 8, at 32.
[15] <https://www.abuseincare.org.nz/assets/Evidence-library/Interim-Report-2022-Beautiful-Children-Lake-Alice/Transcript-of-evidence-of-Dr-Moana-Jackson-at-the-Inquirys-Contextual-Hearing-23-June-2021.pdf>

guaranteed in Article 2 of te Tiriti o Waitangi. Moreover, Oranga Tamariki engages with funded agencies in their processes, and the New Zealand Māori Council criticised that there is a lack of any explicit accountability measure to ensure Oranga Tamariki abides by the section, providing evidence that Oranga Tamariki employs no contractual measures to ensure its funded agencies adhere to te Tiriti/Treaty obligations.[16]

Moreover, it does not extend further enough to return care and protection to Māori, with advocates arguing for a 'by Māori, for Māori' solution.[17] In their report, WAI 2915, the Waitangi Tribunal highlighted that the encroachment of the crown into whānau and tamariki was significantly inconsistent with te Tiriti/Treaty, breaching treaty obligations.[18] Moreover, the tribunal noted that the failure of the crown to honour the guarantee to Māori the right of cultural continuity embodied in tino rangatiratanga over their kāinga contributed to the disparity of those in care.[19] Consequently, the State continues to regulate and control how a Tikanga Māori approach is applied and approached, with the interpretation of Māori terms such as 'mana tamaiti' framed to reflect the Eurocentric ethos of state responsibility and care.

Furthermore, the Puao-te-Ata-tu Report of 1988 emphasised the necessity of enacting a series of legislative reforms to address the structural inequities and systemic racism within Aotearoa's child and social welfare system.[20] Waitangi Tribunal found the disparity of Māori in state care was on account of the failure to implement the recommendations of the report to address the systemic racism in state care and protection.[21] Therefore, the provision of section 7AA is not enough to address the embedded dysfunctions that colonial rule has created. It risks operating as a superficial measure rather than a substantive remedy.

A Comparison to Canadian Indigenous Policy

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[16] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīnga Whāruarua* (WAI 2915, 2021) at 79.
[17] Dr Fleur Te Aho "Violent Care and the Law: The Overrepresentation and Harm of Tamariki Māori in State Care in Aotearoa" (2022) 3 Legalities 32.
[18] Waitangi Tribunal above n 16, at 136-138.
[19] Waitangi Tribunal above n 16, at 137.
[20] The Māori Perspective Advisory Committee *Puao-te-Ata-tu The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social* Welfare (Ministry of Social Development, September 1988).
[21] Waitangi Tribunal above n 16, at 36.

In the He Pāharakeke, He Rito Whakakīkīnga Whāruarua report, one of the recommendations sought was that legislative reform be undertaken to follow the Canadian approach.[22] In Canada, the statute '*An Act respecting First Nations, Inuit and Métis children, youth and families (First Nations Act)*' was enacted to recognise Indigenous Peoples' jurisdiction over child and family services as part of a framework for self-determination. The legislation clearly and comprehensively outlines the obligations the Crown must have in meeting its commitment to remedy past harms in state care. The independent statute affirms the right of self-governance, upholding indigenous people's rights, which are recognised and affirmed in their constitution.[23] The Act provides a substantive, culturally appropriate framework for child and family services, allowing Indigenous people to have effective control over their children's welfare, and more importantly, it addresses how the Act interacts with other aspects of the law.

In contrast, section 7AA is substantively weaker in comparison to Canadian legislation. Subsequently, the Waitangi Tribunal recommended that a Māori Transition Authority be established, independent of the Crown and its departments, not constrained by legislative and policy requirements of Oranga Tamariki.[24] Its functions will be to consider legislative and policy changes within care, design and oversee transformative care, and have power, where appropriate, over responsibilities and accountability arrangements. Ultimately, the recommendation is somewhat similar to the approach Canada has undertaken. However, it would be beneficial if the recommendation were tailored to propose an independent statute, providing Māori the right to have full authority over tamariki Māori, with clear objectives and outlines.

IV Repeal

Karen Chhour, ACT MP and the current Minister for Children, wants to repeal section 7AA from the Oranga Tamariki Act. She claims that Section 7AA diverts Oranga Tamariki's focus from ensuring their policies and practices are entirely 'child-centric'.[25] Essentially, the Minister means that Section 7AA overrides child safety and protection principles, influencing decisions detrimental to long-term care and Tamariki Māori. Subsequently, the Minister's opinion on the

[22] Waitangi Tribunal above n 16, at 164.
[23] <www.sac-isc.gc.ca/eng/1568071056750/1568071121755>
[24] Waitangi Tribunal above n 16, at 136-138.
[25] *Oranga Tamariki Urgent (Section 7AA) Inquiry* above n 8, at 12.

Section illustrates the state's misunderstanding of the provision. Child welfare is paramount in all decisions considered, and the principles of child protection and safety are held to the utmost priority. Section 7AA does not encourage overriding those principles, and the misinterpretation is an example of the state's failure to honour Tikanga and uphold Article 2 of Te Tiriti, reinforcing the dominance of Pākehā values in state care. The rhetoric made by the Minister is troubling, as noted by the Waitangi Tribunal; it echoes the same issue established in Puao-te-Ata-Tu, where the traditional Eurocentric policies made it difficult for the law to appreciate Indigenous people having particular rights in a specific way of life.[26]

Moreover, her arguments include that the repeal is to improve the rights and responsibilities of caregivers, providing more autonomy and making it easier to foster safe homes for children.[27] She proposes that removing the section would standardise equal care for all children, promoting a 'colour-blind' approach.[28] The issue with this notion is that it ignores the child's cultural realities and diverse needs, lacking the cultural competency essential in decision-making. In particular, for Māori, overrepresentation in care is attributed to the loss of whakapapa and breaches of mana tamaiti; a 'colour-blind' approach is insufficient in addressing these embedded issues, particularly if the majority of children in care are Māori. Failing to consider cultural well-being, especially when cultures differ, undermines the advancement of adequate and appropriate state care, resulting in poorer outcomes for Māori. Moreover, honouring the rights guaranteed to Māori has no relation to separatism, as this is required for tamariki Māori.

However, the Minister stood firm in her stance despite Oranga Tamariki releasing a Regulatory Impact Statement (RIS) highlighting that neither a complete nor partial repeal of Section 7AA would address policy problems and recommended that retention of the section was critical to continue strengthening practice and operational guidelines.[29] In addition, the RIS stated that there was no empirical evidence that Section 7AA had influenced care decisions regarding child safety and protection. Consequently, the repeal has no empirical basis, demonstrating the

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[26] Waitangi Tribunal above n 8, at 30.
[27] Waitangi Tribunal above n 8, at 12.
[28] Taryn Dryfhout "Whāngai can help fix the foster care system" (25 February 2024) E-Tangata <www.e-tangata.co.nz/comment-and-analysis/whangai-can-help-fix-the-foster-care-system/>
[29] Oranga Tamariki *Regulatory Impact Statement: Repeal of Section 7AA* (March 2024).

Minister's misunderstanding of what the Treaty requires and guarantees. It is incomprehensible how a repeal of the section can occur with only anecdotal evidence for its basis.

A removal of Section 7AA is a complete breach of the treaty and treaty principles of partnership and active protection. In their urgent inquiry, WAI 3350, the Waitangi Tribunal noted that section 7AA is a Treaty clause that puts in issue fundamental article 2 rights reserved for Māori.[30] In particular, it guarantees tino rangatiratanga over kāinga and the right to cultural continuity it embodies. Subsequently, the Waitangi Tribunal has clearly stated that repealing the section is a clear breach of Article 2 of te Tiriti. In Tikanga Māori, children and their well-being are intimately linked to the whanau, hapu and iwi and are not solely in the exclusive care of their parents. Removing the section creates the risk of lacking Māori consultation with whanau, hapu and iwi, creating more harm than good. The provision provides a significant foundation to secure and promote Treaty principles and practices within state care.[31] The section strengthens Māori rights, and repealing it only reimposes the former system.[32] Active protection is not passive, and without a statutory obligation on Oranga tamariki to account for the child's mana tamaiti, whakapapa, and whanaungatanga responsibilities of their whanau, the state will fail to take these into account, given that they have shown to do so in the past. The state will continue to assume authority over Māori, and weakening the legal framework in Section 7AA perpetuates greater historical injustices, harm and risk of exacerbating disparity. It creates more space for the crown to encroach on Māori tino rangatiratanga. Moreover, removing it goes against the very nature and purpose of Oranga Tamariki. However, despite the findings of the Waitangi Tribunal and much criticism, the repeal was passed by Parliament in early April 2025.

V Conclusion

To summarise, Māori have faced historical injustices through colonial rule, creating devastating impacts on whanau, hapu and iwi. State intervention has only harmed tamariki Māori. Section 7AA of the Oranga Tamariki Act 1989 imposes a statutory obligation on the Chief Executive to have a practical commitment to the obligations of te Tiriti o Waitangi. The decision to remove

[30] *Oranga Tamariki Urgent (Section 7AA) Inquiry* above n 8, at 29.
[31] Waitangi Tribunal above n 8, at 34.
[32] Waitangi Tribunal above n 8, at 34.

the section is a significant regression from the purpose of protecting Māori rights and fulfilling Treaty obligations. Instead, the repeal is a complete and serious breach of te Tiriti. The provision recognises te Tiriti and provides Māori a pathway to tino rangatiratanga. Although decision-making power still resides in the crown, and Māori authority is limited, the provision marks a step forward in fulfilling the guarantee of Māori tino rangatiratanga, an advancement for Māori. Instead, the provision and application of it should be strengthened, and perhaps further discussions should be held considering an independent Act akin to Canada in allowing Māori to have full tino rangatiratanga over their tamariki. Although there are flaws, it's a step towards progress.