Departmental Disclosure Statement

Oranga Tamariki Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by Oranga Tamariki – Ministry for Children.

Oranga Tamariki certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

29 October 2021

Contents

Part One: General Policy Statement

This Bill amends the Oranga Tamariki Act 1989 (the **Act**) by—

- partially repealing the subsequent-child provisions:
- repealing a redundant information sharing provision:
- amending technical errors and ambiguities.

Partial repeal of subsequent-child provisions

The subsequent-child provisions (set out in sections 14(1)(c) and 18A to 18D of the Act) lay out a distinct care and protection pathway when a subsequent child comes to the notice of Oranga Tamariki. A subsequent child is defined as any child, born or unborn, who has a parent—

- who has been convicted of the murder, manslaughter, or infanticide of a child or young person (section 18B(1)(a)); or
- who has had a previous child or young person removed from their care and there is no realistic possibility that they will be returned to that person's care (section 18B(1)(b)).

The subsequent-child provisions, which came into effect on 1 July 2016, were intended to introduce an automatic, mandatory response to ensure greater oversight over the safety of subsequent children. However, a first principles review of the provisions in 2019 found that they were not operating in a way that promoted the best interests of children, nor as originally intended. Some of the key concerns with the provisions are that they—

- reverse the normal onus of proof by requiring the parent(s) of a subsequent child to demonstrate that they are unlikely to inflict the same kind of harm that they have previously, arguably setting whānau up for failure:
- predetermine risk and do not leave room for consideration of any positive changes that parents may have made following the removal of a previous child:
- result in additional Family Court proceedings for the older sibling in care:
- restrict engagement with family and whānau because family group conferences are not required prior to subsequent-child court proceedings commencing:
- require the Family Court to have oversight of decisions relating to a subsequent child, even when Oranga Tamariki considers there are no care or protection concerns.

In July 2020, Cabinet agreed to seek repeal of the subsequent-child provisions as they apply to parents who have had a previous child permanently removed from their care (section 18B(1)(b)). Cabinet agreed to retain the provisions as they apply to parents with a conviction relating to the murder, manslaughter, or infanticide of a child in their care (section 18B(1)(a)), given the seriousness of these convictions.

Repeal of section 66D dataset provision

Section 66D of the Act (the **dataset provision**) came into effect on 1 July 2019 as part of a suite of information sharing provisions contained in Part 2. Under section 66D(2), any agency that creates a dataset from more than 1 source of information is required to publicly notify details of that dataset. The notification must include the following information:

- the types of information used in the combined datasets:
- the sources of those types of information:

- the purpose or purposes served by creating or analysing the combined datasets:
- the privacy safeguards relating to the use of the combined datasets.

Oranga Tamariki has found that the dataset provision could place an unnecessary administrative burden on child welfare and protection agencies without achieving the level of public accountability originally envisaged. Concerns with the dataset provision include that—

- monitoring the use of combined datasets by agencies to allow for the level of public scrutiny required by the provision would be difficult
- enforcing compliance with the provision without some form of surveillance of agencies' use of combined data would be challenging:
- surveillance would be resource-intensive and impracticable, and could be in breach of an individual's privacy and human rights.

In addition, since 2016 when the original dataset provisions were proposed, a number of changes across government have effectively rendered the dataset provisions redundant. These include—

- the establishment of the Government Chief Data Steward role in 2017:
- the Social Wellbeing Agency's Data Protection and Use Policy and Data Exchange:
- the publication of Statistics NZ and the Privacy Commissioner's principles for the safe and effective use of data and analytics:
- the Integrated Data Infrastructure.

These allow agencies to safely share and use combined information for operational purposes, and provide the necessary transparency, protections, and safeguards around privacy. Based on these findings, in March 2019, Cabinet agreed to repeal the dataset provision.

Technical amendments

The Bill also makes some minor and technical changes to the Act to add clarity, and to address omissions or ambiguous language. These amendments are not policy changes to the application of the Act.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	**YES**

Subsequent child provisions

A review of the subsequent child provisions in 2019 provided the basis for Cabinet's decision to partially repeal the provisions. Relevant documents related to this partial repeal are listed below, and can be accessed through the links provided:

- Cabinet paper: Taking a Child and Whānau-Centred Approach to Subsequent Children (September 2020) Oranga Tamariki: https://www.orangatamariki.govt.nz/about-us/reports-and-releases/cabinet-papers/partial-repeal-of-the-subsequent-children-provisions/.

Additional evidence supporting the partial repeal of the subsequent child provisions is available at https://www.orangatamariki.govt.nz/about-us/research/our-research/subsequent-children-evidence-brief/, including the:

- Subsequent Children Evidence Brief (September 2020) Allen + Clarke; and
- Review of a Group of Subsequent Children Entering Oranga Tamariki Care in 2018/19 (2020) Oranga Tamariki.

In 2021, the Waitangi Tribunal released a report on Oranga Tamariki, He Pāharakeke, He Rito Whakakīkinga Whāruarua (WAI 2915). Section 5.2.2 of the report relates to the subsequent child provisions of the Act. This is available at https://waitangitribunal.govt.nz/news/tribunal-releases-report-on-oranga-tamariki/.

Information sharing provision

Information relating to this amendment is available on the Oranga Tamariki website at https://www.orangatamariki.govt.nz/about-us/reports-and-releases/cabinet-papers/amendments-to-the-information-sharing-provisions/, including the:

- Cabinet paper: Amendments to the Information Sharing Provisions (August 2019) Oranga Tamariki.

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	**NO**

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	**YES**
A Regulatory Impact Assessment (RIA) was prepared for the Social Wellbeing Committee on the partial repeal of the subsequent child provisions – *Impact Statement: Taking a child and whānau-centred approach to subsequent children*, Oranga Tamariki (6 July 2020). It was submitted at the time that Cabinet approval was sought for the policy decisions relating to the partial repeal. This is available at: https://orangatamariki.govt.nz/assets/Uploads/About-us/Report-and-releases/Cabinet-papers/Subsequent-children-provisions/Regulatory-Impact-Analysis-Subsequent-children.pdf. The repeal of section 66D is exempt from the requirement to have a RIA on the basis that the proposal repeals or removes redundant legislative provisions. The Regulatory Impact Analysis Team at the Treasury has determined that the technical amendments within this Bill are exempt from the requirements to provide a RIA[1]. Clauses 13, 15, 16, 17, 20(2), 21(2), 23, 24, 25, 26, and 30 are also exempt on the basis that they repeal or remove redundant legislative provisions.	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	**NO**
The Treasury's RIA Team considered that quality assurance could be provided for the partial repeal of the subsequent child provisions by a joint Oranga Tamariki and Ministry of Social Development quality assurance panel in this case. The panel considered that the RIA met Cabinet's quality assurance criteria.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	**NO**

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	**NO**

[1] https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/regulatory-impact-statements/regulatory-impact-statements-children-young-persons-and-their-families-oranga-tamariki-legislation-bill.html

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	**YES**
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	**NO**

The subsequent child RIA (link provided in 2.3) includes an assessment of the expected costs and benefits of the partial repeal. The benefits outlined in the RIA are that it:

- will enable Oranga Tamariki to better reflect our Treaty and section 7AA commitments. In their recent report (WAI 2915), the Waitangi Tribunal found that the Crown has continued to breach its Te Tiriti/Treaty obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga by failing to partially repeal the subsequent child provisions
- supports social work practice that recognises mana tamaiti and the whakapapa of Māori children and young people, and the whanaungatanga responsibilities of their whānau, hapū and iwi
- supports the emerging operating model and direction Parliament has set for Oranga Tamariki
- removes tension between applying the purposes and principles of the Act and following the process that the subsequent child provisions set out for the majority of subsequent children
- removes complexity by following the standard legislative pathways for the majority of subsequent children who may require care or protection
- will create annual monetary benefit arising from not incurring the foster care allowance and associated services in meeting needs of children in care

There is a risk that operational policy and practice guidance may not be sufficient to ensure that we are consistently and adequately:

- responding to the needs of subsequent children
- recognising progress and change when a subsequent child comes to our notice.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	**NO**
(b) the nature and level of regulator effort put into encouraging or securing compliance?	**NO**

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
The partial repeal of the subsequent child provisions of the Act will increase New Zealand's alignment with the United Nations Convention on the Rights of the Child (UNCROC), specifically: • Article 2: The child is protected against all forms of discrimination or punishment, including based on race, ethnicity, or disability. • Article 3: The best interests of the child shall be a primary consideration. • Article 5: Respect is given to the responsibilities, rights, and duties of parents, whānau and extended family/hapū to provide, appropriate direction and guidance. • Article 8: Respect the right of the child to preserve their family relations without unlawful interference. • Article 9: A child shall not be separated from his or her parents against their will unless such separation is necessary for the best interests of the child. This partial repeal also more closely aligns the Act with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), particularly Article 23, which focuses on eliminating discrimination based upon disability relating to family matters, including parenthood. Appropriate assistance shall be provided to persons with disabilities in the performance of their child-rearing responsibilities. Several of the proposed technical amendments strengthen children's rights, affirming equality and non-discrimination based around age or ability. These are in keeping with New Zealand's commitments under UNCROC and United Nations Convention on the Rights of Persons with Disabilities.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?
Partially repealing the subsequent child provisions is consistent with the principles of Te Tiriti and reflects section 7AA of the Act. The Waitangi Tribunal report (WAI 2915) found that the Crown has continued to breach its Te Tiriti/Treaty obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga by failing to partially repeal the subsequent child provisions. Repealing section 66D also removes a provision that does not reflect Te Tiriti principles. Māori have an inherent right to exercise control over Māori data and Māori data ecosystems. Under section 66D Māori data is not being stored and transferred in such a way that enables and reinforces the capacity of Māori to exercise kaitiakitanga over Māori data.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	**YES**

The Bill has been submitted to the Ministry of Justice for vetting regarding the New Zealand Bill of Rights Act 1990.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	**NO**
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	**NO**

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	**YES**
The repeal of section 66D of the Act removes provisions around how child welfare and protection agencies use information relating to a child or young person to produce, link or analyse datasets of information and produce combined datasets. The existing legislation allows child welfare and protection agencies to use information relating to a child or young person to produce, link, or analyse datasets of information and produce combined datasets (section 66D(1)). If this is done, under section 66D(2) the agency must notify on an Internet site maintained by that agency, an independent person, or a class of independent persons,— (a) the types of information used in the combined datasets: (b) the sources of those types of information: (c) the purpose or purposes served by creating or analysing the combined datasets: (d) the privacy safeguards relating to the use of the combined datasets. This Bill would repeal this provision.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	**YES**
The Office of the Privacy Commissioner was consulted on this Bill in its entirety, including the repeal of s66D. Their feedback relating to repealing s66D was: • OPC supports clause 8, which proposes to repeal s66D of the Act. This aligns with OPC's submission in relation to the original Bill, which noted that it was unclear what the provision was intended to achieve.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	**YES**
Officials have worked alongside whānau, to develop robust proposals. The review of the subsequent child provisions involved consultation with a small number of whānau and social work practitioners, the Māori Design Group, the Subsequent Children Technical Advisory Group, iwi and Māori providers and other non-governmental organisations, and officials from across the social sector. The Office of the Children's Commissioner and the Principal Family Court Judge were also consulted. Issues relating to subsequent children have also been raised by the Whānau Ora Commissioning Agency, who consulted whānau more widely, in their report *Ko Te Wā Whakawhiti: It's Time For Change*.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	**NO**

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	**NO**

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	**NO**

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	**NO**

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	**NO**
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	**NO**

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	**NO**

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	**YES**
Section 18B(1)(b) currently applies to any child whose older sibling is in care and there is no realistic prospect of that child returning to the parent. Repealing this section will result in these children no longer being automatically subject to Family Court oversight, even when Oranga Tamariki considers there are no care or protection concerns for the subsequent child. The safety and wellbeing of these children will still be protected through other care and protection pathways, and robust assessments will still take place, however, the Family Court involvement will no longer be mandatory.	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	**NO**

4.8. Does this Bill create or amend any other powers to make delegated legislation?	**NO**

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	**NO**