

Departmental Disclosure Statement

Oversight of Oranga Tamariki System and Children and Young People's Commission Bill
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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 the Ministry of Social Development (MSD).

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

5 November 2021

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Part One: General Policy Statement

The overall policy objective of this Bill is to improve outcomes for children and young people in New Zealand by strengthening:

- the independent monitoring and complaints oversight of the Oranga Tamariki system; and
- advocacy for children's issues generally.

Independent monitoring and complaints oversight of the Oranga Tamariki system

The Oranga Tamariki system is intended to support the wellbeing of children and young people in New Zealand. Cabinet has described the 'Oranga Tamariki system' as not only the early intervention, statutory care, protection, youth justice and transitions support systems provided to children and young people by Oranga Tamariki under the Oranga Tamariki Act 1989, but also other agency services provided to children and young people under that Act (for example health, education and disability services, including by NGOs).

Historical systemic failings in the Oranga Tamariki system have been acknowledged, particularly in relation to tamariki and rangatahi Māori. There is a strong desire to improve outcomes for children and young people in the Oranga Tamariki system.

Independent monitoring oversight

Independent monitoring of the Oranga Tamariki system has been identified as playing a vital role in:

- providing assurance that outcomes for children and young people are improving, and providing independent scrutiny of the use of coercive powers, particularly in regard to the removal of children from whānau.
- strengthening the resilience of systems through supporting improvements in services, practice and processes.

Independent monitoring also promotes transparency and builds public trust and confidence that the wellbeing and safety of children and young people is paramount.

From 1 July 2019 the Ministry for Social Development (MSD) was appointed on an interim basis as the independent monitor of the Oranga Tamariki system, with the intention that the monitoring function be transferred to a new person or entity once the new legislative framework to be established by this Bill and strengthening the function is in place.

Key components of the functions of the independent monitor include:

- ensuring effective systems performance, service and practice monitoring and reviews, drawing on a range of information sources, including the voices of children, young people, families and whānau
- providing for the Crown's commitment to Te Tiriti o Waitangi in a meaningful and practical way.

Complaints oversight

Children, young people, families and whānau in the Oranga Tamariki system are often reluctant to raise concerns. Complaints can take a long time to resolve, and it can be challenging to find the right support to resolve issues involving multiple agencies.

The Ombudsman Act 1975 is generally considered sufficient for the Ombudsman to deal with complaints and undertake investigations in respect of children, young people and families and whānau in the Oranga Tamariki system.

The Bill seeks to strengthen the complaints oversight function performed by the Ombudsman by ensuring that where an Ombudsman is conducting an investigation relating to the Oranga Tamariki system, they do so in a way that:

- will further the Bill's ultimate purpose of improving outcomes for children and young people
- supports the agencies in the Oranga Tamariki system in resolving complaints
- and will give practical effect to te Tiriti o Waitangi.

Advocacy for children's issues generally

The Children's Commissioner currently has the following key functions under the Children's Commissioner Act 2003:

- monitoring, assessing and reporting on services provided to children and young persons in the Oranga Tamariki system
- investigating decisions, recommendations, acts or omissions in respect of individual children and young persons
- inquiring generally into, and reporting on, any matter that relates to the welfare of children
- advocating on issues that affect all children and young people in New Zealand.
- raising awareness of and advancing the United Nations Convention on the Rights of the Child (the Children's Convention).

In recognition of the importance of children's issues generally in society and that it is no longer possible for a single individual to be across the broad scope of issues, the Commissioner sole model will be replaced with a Children and Young People's Commission (the Commission). To this end, the Bill will repeal the Children's Commissioner Act 2003 and create a new Act (separate from the parts of the Bill that govern the independent monitoring and complaints oversight and investigations of the Oranga Tamariki system) to set out the governance, functions, duties, powers, and principles of the Commission.

The Commission will be an Independent Crown Entity with the mana and flexibility to hold government to account when necessary and be independent of government policy.

The Minister responsible for the Oranga Tamariki Act is specified in the Children's Commissioner Act as the responsible Minister for the administration of that Act. However, in recognition of the conflicts that exist with this Minister (who is currently the Minister for Children) also being responsible for Oranga Tamariki, administrative responsibilities have previously been delegated to the Minister for Social Development. The Bill provides that the appointment of a responsible Minister for the administration of the part of the Bill governing the Commission to be at the discretion of the Prime Minister. Therefore, in future the Prime Minister, rather than the Minister responsible for the Oranga Tamariki Act will determine who will be the Minister responsible for the administration of the Commission.

The new Bill does not intend to substantially change the functions presently carried out by the Commissioner and to be inherited by the Commission, with the exception that the powers to investigate decisions, recommendations, acts or omissions in respect of individual children and young persons will not carry over. The reason for this is that the Ombudsman already conducts a similar investigatory function and will continue to do so.

Notably, the function of inquiring generally into, and reporting on, any matter that relates to the welfare of children will be strengthened by the Bill with the ability of the Commission to require the provision of information from agencies to enable the effective discharge of this function.

The Bill provides for five yearly reviews

The Bill provides for the review of the way in which the Monitor is operationalising the parts of the Bill relating to independent monitoring, and the Monitor's working relationship with Ombudsmen, no later than 5 years following its commencement. The way in which the Commission is operating in respect of its part of the Bill (to become a separate Act) will also be reviewed no later than 5 years following its commencement. These reviews will provide assurance that the entities with functions under the Bill are operating in a manner that is achieving the purpose of the Bill.

Claims relating to abuse in state care

Since responsibility for the Oranga Tamariki Act transferred from MSD to Oranga Tamariki, both agencies have been developing improved arrangements for the resolution of claims relating to abuse in state care.

The Bill makes a minor amendment to schedule 1AA of the Oranga Tamariki Act so that MSD will be responsible for resolving claims about events prior to 1 April 2017.

A complaints mechanism established under section 7(2)(bad) of the Oranga Tamariki Act applies to any act or omission that occurred on or after 1 Jan 2008.

The Bill amends the following legislation

This Bill is an omnibus Bill introduced under Standing Order 267(1)(a). That Standing Order provides that an omnibus Bill to amend more than one Act may be introduced if amendments deal with an interrelated topic that can be regarded as implementing a single broad policy.

Amendments to other enactments by parts of the Bill that relate to the independent monitoring and complaints oversight of the Oranga Tamariki system

- Official Information Act 1982
- Ombudsman Act 1975
- Oranga Tamariki Act 1989
- Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018
- Oranga Tamariki (Residential Care) Regulations 1996
- Family Court Rules 2002.

Amendments by the part of the Bill that relates to the Commission

- Children's Act 2014
- Children's Commissioner Act 2003 (to be repealed)
- 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
- Ombudsmen 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
- Family Court Rules 2002
- Oranga Tamariki (Residential Care) Regulations 1996.

Existing provisions relevant to the purpose and intent described for each function that are contained in the Oranga Tamariki Act, the NCS Regulations, the Residential Care Regulations 1996, and the Children's Act 2014, will be transferred to the new Acts and related regulations

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
<p>The Expert Panel Report was commissioned in April 2015 by the Minister for Social Development. The Panel sought to explore the question: <i>How can we transform the lives of our vulnerable children once and for all?</i> This review was different from its predecessors because alongside caregivers, families and front-line staff, it prioritised the voices of children and young people throughout its reflections and design processes. Children and young people were viewed as vital participants in delivering the solution that determines their lives.</p> <p>The Panel's Review gave rise to further work by MSD which focused on strengthening independent oversight of the Oranga Tamariki system. A consultation document Strengthening Independent Oversight of the Oranga Tamariki System and of Children's Issues in New Zealand was consulted on by MSD between May and July 2018. The consultation document was published on MSD's website along with the accompanying Cabinet paper. That information was also sent directly to a wide range of interested parties including NGOs, Māori, Judges, academics, Pacific Peoples, health professionals, past Children's Commissioners, statutory bodies such as the Children's Commissioner, Chief Ombudsman and the Privacy Commissioner and chief executives of the relevant public sector agencies.</p> <p>A Post Consultation Report prepared by Sandi Beatie was published in August 2018.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	YES
<p>Like the Children's Commissioner Act 2003, the Children and Young Person's Commission Act will include the full text of the United Nations Convention on the Rights of the Child (Children's Convention) under Schedule 3.</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO
<p>Clause 87 clarifies that the Children's Convention is set out for information and reference purposes only and does not affect the legal status of the Children's Convention in New Zealand.</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	NO
<p>The Treasury's Regulatory Impact Analysis team has determined that the proposed new oversight arrangements are exempt from the requirement to provide a Regulatory Impact Statement on the grounds that they have no or only minor impacts on businesses, individuals, and not-for-profit entities. Providers within the Oranga Tamariki system are subject to a cost recovery funding model, and any regulatory burdens on providers associated with the new oversight arrangements would be passed on in full as a cost to Government.</p>	

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
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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
Budget and population group considerations were considered in the March 2019 Cabinet Paper .	

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?
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In developing the policy we have worked closely with the Children's Commissioner, the Ministry of Justice and the Ministry for Social Development to ensure the policy that underpins the Bill is consistent with relevant conventions such as the Children's Convention and the Optional Protocol to the Convention Against Torture.

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?

Te Arawhiti and Te Puni Kōkiri were consulted throughout the process of developing the policy proposals and the Bill.

A dedicated Māori advisory group (Te Kāhui) was established specifically to ensure that the policy and resulting legislation will support active participation of Māori to support improved outcomes for tamariki and rangatahi. Te Kāhui Group conducted 21 Hui throughout New Zealand and we subsequently engaged with Te Kāhui Group regularly as the Bill was developed.
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MSD also engaged a team of Māori legal experts to provide advice on how to support the development of the Tiriti provision in the Bill.

In order to recognise and respect the Crown's responsibility to give practical effect to the Treaty of Waitangi (te Tiriti o Waitangi), the Bill creates a number of specific duties to engage with Māori and iwi, these duties are signposted in the following clauses:
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| <ul style="list-style-type: none">• In clause 7, in relation to the Monitor and the Ombudsman• In clause 85, in relation to the Commission. |
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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

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website .
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?
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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
<p>The following clauses have been identified as prevailing over, excluding or limiting the application of the information privacy principles (IPPs) in section 22 of the Privacy Act 2020:</p> <ul style="list-style-type: none"> • Clause 31(2) and (4) (Duty to protect individuals' privacy in relation to reports) prevail over IPP 10 in that they prevent the Monitor from including, in any report prepared by the Monitor under clause 21, 22, 23, 24(4), 25(2), or 27, any personal information about the individuals referred to in those subsections unless a circumstance referred to in those subsections that permits inclusion of the personal information applies. • Clause 41(2) (Information to be proactively provided to Ombudsman) prevails over any limitation in IPP 11, in relation to disclosure by Oranga Tamariki and care or custody providers to an Ombudsman, of personal information falling within the categories of information referred to in the subsection. • Clauses 43 (Purpose for which information to be collected, used, and disclosed) prevails over IPP 1, IPP 10, and IPP 11, in relation to collection, use, and disclosure of personal information by the Monitor to the extent of any inconsistency between section 43 and these IPPs. • Clauses 45(1) (Monitor's power to require information) prevails over: <ul style="list-style-type: none"> ○ IPP 1, in relation to collection by the Monitor of personal information, to the extent of any inconsistency between section 45(1) and IPP 1: ○ IPP 2, in relation to collection by the Monitor of personal information from agencies delivering services or support to children, young people, and their family and whānau through the Oranga Tamariki system (instead of from the individual concerned). • Clause 48 (Disclosure of information by Monitor) prevails over and excludes the application of IPP 11, thereby preventing disclosures not permitted by clause 48 that might otherwise have been permitted by IPP 11 – based on feedback from OPC to avoid doubt of relationship to Privacy Act 2020. • Clause 51(2) (Sharing of information between Monitor and Ombudsman) prevails over and limits IPP 10, in relation to use by the Monitor of personal information obtained under the Act, to the extent of any inconsistency between clause 51(2) and IPP 10. • Clause 113 (Sharing of information with Monitor and Ombudsman) prevails over and limits IPP 10, in relation to use by the Commission and Monitor of personal information obtained under the Act, to the extent of any inconsistency between clause 113(2) and IPP 10. • Clause 114(4) (Commission may report interference or non-compliance) prevails over IPP 10 in that it prevents the Commission from including, in a report under clause 114, any personal information about the individuals referred to in clause 114(4), unless a circumstance referred to in that subclause that permits inclusion of the personal information applies. • Clause 3(2) of Schedule 1 provides that IPP 11 does not apply to the transfer of information from MSD to the Oranga Tamariki System Monitoring Agency under subclause (1) - based on feedback from OPC that the exemption was previously too broad. 	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>MSD received feedback from the Office of the Privacy Commissioner (OPC) on draft versions of the Bill and LEG paper. We also met with the OPC to discuss this feedback further. We have noted where the Bill addresses concerns raised by OPC in our response to 3.5.</p> <p>OPC consider that Bill is broadly compliant with the purposes and principles of the Privacy Act 2020. However, it overrides the Privacy Act 2020 in a number of respects. OPC have been clear that they do not have significant concerns with the Bill. However, it is important to note that some parts of the Bill interact directly with the protections afforded by the Privacy Act 2020, providing greater privacy protections to acknowledge the particular vulnerabilities of children, young people and whānau in the Oranga Tamariki system.</p> <p>MSD has commissioned a privacy, human rights, and ethics assessment, and this has not identified any outstanding issues with the Bill.</p>	

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
<p>Since the publication of the March 2019 Cabinet decisions there has been further consultation during the policy development process, including with the Children's Commissioner, the Office of the Ombudsman, the Independent Police Conduct Authority, Te Kāhui group and with Māori organisations and individuals that represent a range of interests and expertise across the Oranga Tamariki system. This has also included strategic Treaty/Iwi partners, medical professionals, providers, care experienced individuals, caregivers and other relevant stakeholders.</p> <p>This consultation informed development of the 2019 December Cabinet paper.</p>	

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?	YES
<p>Significant work has been undertaken with the Ombudsman and the Office of the Children's Commissioner on the refinement of the legislative proposals, and consulting with a wider set of agencies on the issue of the scope of monitoring and long-term home of the Monitor. While remaining within the policy intent, details of some policy proposals were refined, and informed the development of the May 2021 Cabinet papers.</p> <p>Although there has been consultation on the proposal for the Ombudsman to lead the complaints and investigation function in respect of the Oranga Tamariki system, iwi and community partners have not been consulted on the specific proposal to broaden the Ombudsman's jurisdiction than set out in the Bill.</p> <p>Discussions with Oranga Tamariki and MSD's Te Kāhui group have highlighted there is likely to be in principle support from Oranga Tamariki partners for broadening the Ombudsman's jurisdiction to encompass at least the approximately 60 providers delivering care and custody under Section 396 of the Oranga Tamariki Act 1989. However, some care partners may raise concerns about the lack of consultation, a lack of a partnership approach, and the potential administrative burden (especially for smaller providers). MSD has proposed that the Select Committee Process provides a suitable opportunity for care partners to express their views on this proposal.</p>	

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
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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
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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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
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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?	NO
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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
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Governor-General is empowered by clauses 56 (in relation to parts 1 to 4 of the Bill) and clause 117 (in relation to part 5 of the Bill) to make, by Order in Council, regulations for the all or any of the purposes specified in those clauses. The regulations are secondary legislation.</p> <p>Under clauses 49 and 111 respectively the Monitor and the Commission must make information rules relating to their collection, use and disclosure of information to ensure protection of the privacy of persons to whom personal information relates, and the confidentiality of other information. The information rules are secondary legislation.</p> <p>See Appendix One for further information.</p>	

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?	YES
<ul style="list-style-type: none"> • Clause 12 refers to the Independent Monitoring Agency of the Oranga Tamariki System. This agency has yet to be established but will be established under the Public Service Act 2020 by the time the Bill commences. • Clause 24(2) prevents the Minister responsible for monitoring from stopping or preventing the Monitor from undertaking any monitoring activity that the Monitor deems necessary. The intent is to balance the need for trust and confidence in the Monitor from both the public and Ministers, by ensuring that Ministers do not interfere with the Monitor's functions. • Clause 33 provides staff authorised by the Monitor with a power to enter premises. The power of entry is unusual in that there is no judicial oversight of the use of the power. • Clauses 45 and 107 respectively create powers for the Monitor and Commission to require information. These powers are unusual in that there is no offence committed by a person where they do not provide the information required. Non-compliance is unusually addressed by reporting to the responsible chief executive and Minister (see clauses 52 and 114). • Clause 62 amends schedule 1 of the Ombudsman's Act 1975 to extend an Ombudsman's jurisdiction to investigate complaints into relation to non-government agencies, namely approved providers under section 396 of the Oranga Tamariki Act 1989, to the extent that they are providing services under that Act 	

Appendix One: Further Information Relating to Part Four

Powers to make delegated legislation - question 4.8

Regulations

The Governor-General is empowered by clauses 56 (in relation to parts 1 to 4 of the Bill) and clause 117 (in relation to part 5 of the Bill) to make, by Order in Council, regulations for all or any of the purposes specified in those clauses ("the purposes").

The purposes relate to prescribing matters of implementation contemplated by this Bill, necessary for its administration or for giving it full effect. The regulations are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Information rules

Under clauses 49 the Monitor must make information rules relating to their collection, use and disclosure of information to ensure protection of the privacy of persons to whom personal information relates, and the confidentiality of other information. The information rules are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

The Monitor's power to make information rules is controlled by the legislation in the following ways:

- Clause 42(2) defines the purpose of the rules
- Clause 42(3) states that the power to make the rules cannot be delegated by the Monitor
- Clause 42(4) sets out consultation requirements
- Clause 50 sets out what rules must be contained.

Similarly, under clauses 111 the Commission must make information rules relating to their collection, use and disclosure of information to ensure protection of the privacy of persons to whom personal information relates, and the confidentiality of other information. The information rules are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

The Commission's power to make information rules is controlled by the legislation in the following ways:

- Clause 111(2) defines the purpose of the rules
- Clause 111(3) sets out consultation requirements
- Clause 112 sets out what rules must be contained.