New Zealand Law Society
Te Kāhui Ture o Aotearoa

Oversight of Oranga Tamariki System and Children and Young People's Commission Bill

25/01/22

Submission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill 2021

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (**Bill**).

1.2 The purpose of this omnibus bill is to improve outcomes for children, young people, and whānau in New Zealand. The Bill proposes to strengthen the independent monitoring and complaints oversight of the Oranga Tamariki system and advocacy for children's issues in general. The Law Society supports the Bill in principle.

1.3 The Law Society welcomes the new measures being implemented to monitor the operation and policies of Oranga Tamariki. We are of the view that the Children's Commissioner has been a successful monitor and commentor on children's issues.

1.4 We do, however, recognise that it may no longer be possible for a single individual to cover the broad spectrum of children's issues in society. We are pleased that the proposed Children's Commission will be independent of government policy and able to hold government to account.

1.5 We also note that a longer timeframe for making a submission on the Bill would have been more appropriate, given the length of the Bill and the policies that are to be given effect by the Bill.

1.6 This submission makes recommendations to improve the Bill, particularly in relation to the complaints process, information gathering provisions, the Māori Advisory Group, a code of ethics, and reports and reviews.

1.7 This submission has been prepared with input from the Law Society's Family Law Section, Human Rights and Privacy Committee, Youth Justice Committee and Public and Administrative Law Committee.

1.8 The Law Society wishes to be heard.

2 Role of the Ombudsman and the complaint process

2.1 The Law Society is concerned there is a lack of clarity around the role of the Ombudsman in the complaint process and limited statutory requirements for that process. Practitioners' experience suggests the Ombudsman's complaint process is not child and youth sensitive and is slow, making it a far from effective remedy. We would like to see the Bill require a better complaints process, perhaps by requiring that (in addition to clause 38):

i. Complaints and investigation processes be made publicly available.

ii. All communication with children and young persons is conducted in an appropriate manner.

iii. Consideration of factors like those in section 5 of the Oranga Tamariki Act 1989 (**OT Act**).

iv. Timeliness of complaints handling. This is important for any complaint, but particularly when it involves children or young persons.

v. A code of ethics or similar ethical requirement, as is required under clause 20 for the independent monitor (**Monitor**).

3 Common duties

3.1 Clause 7 sets out the common duties of the Monitor and the Ombudsman when they are carrying out work relating to children or young people who are receiving, or have previously received, services or support through the Oranga Tamariki system.

3.2 Clause 7(2) limits those duties to the specific four duties in clause 7(2)(a) to (d). Whilst the specificity is helpful in setting clear parameters, it also limits the duties to a confined list and does not take into account that those duties may need to be expanded over time.

3.3 We suggest clause 7(2) is amended to provide that the duties of the Monitor and Ombudsmen *shall include* (as opposed to "are"). We also consider it should be a specified duty of the Monitor to seek and obtain all relevant information. Without comprehensive information from a range of sources it will be difficult for an independent review to be undertaken.

3.4 The Bill could be improved by distinguishing the two roles, for example, by clarifying whether the Monitor may initiate a review under clause 25 in response to an individual complaint, or whether such complaints may be directed only to the Ombudsman under clause 38. We therefore invite the select committee to consider whether any amendments are required to better delineate the two roles.

4 Limit on Minister's powers

4.1 Clause 15 provides that a Minister must not direct the Monitor to stop carrying out an activity, or prevent the Monitor from carrying out an activity, that the Monitor considers is necessary to enable them to perform or exercise their functions, duties, or powers under the Bill. This clause is drafted as an important restriction on the ability of Ministers to influence the independent oversight body. However, it is not expressly drafted to override other enactments.

4.2 We note that section 24(1) of the Public Service Act 2020 empowers Ministers to determine or alter the functions, duties, and powers of new and existing departmental agencies. This section could override other legislation (including clause 15) in the absence of any provision which explicitly excludes the application of section 24(1). We therefore suggest inserting a new subclause 15(2) which explicitly states that clause 15 overrides any other enactment or rule of law to the contrary.

5 Māori Advisory Group

5.1 Clause 17 empowers the Monitor to appoint a Māori Advisory Group to support meaningful and effective engagement with Māori. However, the Bill does not prescribe the size of the Group, which could be impracticable. We note that clause 91(1) of the Bill prescribes a minimum and maximum number of members who may be on the board of the Children and

Young People's Commission, and it may be appropriate to similarly prescribe a minimum and maximum number of members for the Māori Advisory Group.

5.2 In our view, it would be appropriate to prescribe that the Māori Advisory Group is to comprise at least half of members who are whakapapa Māori, rather than only requiring members to have Māori knowledge and experience in, and knowledge of, tikanga Maōri.

5.3 The Monitor may not be the most appropriate appointor of the Māori Advisory Group. The Law Society suggests that use of a Nominations Panel would be more appropriate for the Māori Advisory Group (refer to clause 94).

6 Code of Ethics

6.1 Clause 20 requires the Monitor to establish a code of ethics, subject to the requirements in that section and subject also to subsequent requirements which could be established pursuant to regulations enacted at some point in the future.

6.2 Free and open publication of ethics, as provided for in clause 20(5), is important. The inclusion of a Code of Ethics will enhance public confidence, as well as hold the Monitor to account for the manner in which it exercises its powers under the proposed legislation.

6.3 Clause 20(3)(b) requires a review of the code of ethics at least every 5 years. This is a long period before the first review, particularly in light of the code applying to newly established functions. An earlier review period is more appropriate to ensure, following the initial 'bedding in' process, that the code is fit for purpose.

6.4 As addressed in [2.1(v)], the Law Society considers a Code of Ethics is also appropriate for the Ombudsman.

7 State of the Oranga Tamariki System Report

7.1 Clause 21 requires the Monitor to prepare, at least once every 3 years, a 'State of the Oranga Tamariki System' report. Annually, the Monitor will also prepare reports on compliance with national care standards regulations, and outcomes for tamariki and rangatahi Māori and their whānau (clause 22).

7.2 Clause 56 provides that regulations *may* be made prescribing the minimum requirements for the 'State of the Oranga Tamariki System' report, as well as the annual reports required by clauses 22 and 23.

7.3 If regulations are not enacted, there will be no requirements for the contents of those reports. It may therefore be appropriate to specify, within clause 21, 'bare minimum' requirements, such as:

i. Performance of the system against the objectives of s 7(2)(b) of the OT Act.

ii. Oranga Tamariki's compliance with the OT Act and regulations, including (without limitation) the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 and Oranga Tamariki (Residential Care) Regulations 1996.

iii. Whether the rights of children and young persons are being upheld and promoted.

iv. Any identified systemic policies, practises or other matters contrary to the objectives or regulations referred to above.

v. Anything else the Monitor deems of significant relevance and importance.

8 Reports and reviews

Clause 28

8.1 Clause 28 requires the Minister responsible for administration of the OT Act to present a copy of final reports prepared under clauses 21 to 24 to the House of Representatives.

8.2 As currently drafted, clause 28 does not currently require the Minister to present final reports of the Monitor following a review initiated under clause 25(1). Presumably, this is because clause 27 does not require that final reports from own-initiative reviews are provided to the Minister. However, a final report following an own-initiative review must be published on the Monitor's website, in accordance with clause 30.

8.3 The basis for this differential treatment of final reports following own-initiative reviews is unclear. Those reports are to be made publicly available but will not necessarily be afforded the same parliamentary attention and debate. The Law Society recommends the Select Committee consider whether there is a reasonable basis for this current drafting, and whether more consistent treatment of own-initiative reports is desirable.

Clause 29

8.4 Clause 29 requires the chief executive of an agency that is the subject of a Monitor's final report to prepare a response to the report. It is unclear whether this provision is intended to also apply to final reports issued under clause 25(2), following a review that is initiated by the Monitor under clause 25(1).

8.5 We therefore invite the select committee to make appropriate amendments to clarify whether the obligations arising under clause 29 also arise in relation to reports issued under clause 25(2), for example, by inserting a definition of "final report".

8.6 Clause 29(3) provides for the response to be within a timeframe prescribed by the regulations. The clause does not provide an initial timeframe, as is the case with other clauses such as clause 20, relating to the periodic review of the Monitor's code of ethics. The Law Society considers a timeframe for compliance should be set within the legislation rather than being prescribed later by regulations.

Clause 30

8.7 Clause 30 requires the Monitor to publish the final reports, and any responses to reports, made under clauses 21, 22, 23 and 25. At present, this requirement does not apply to reports issued by the Monitor, following a review requested by the Minister, under clause 24.

8.8 We do not see any obvious reason as to why these reports should not also be published on the Monitor's website, particularly given they are required to be presented to the House of Representatives under clause 28 and will then be in the public domain. We therefore suggest amending clause 30 to include any reports issued under clause 24.

Clause 31

8.9 Clause 31 provides that certain types of reports prepared by the Monitor must not contain any "personal information" unless the Monitor has obtained informed consent from the relevant individual(s). It may also be appropriate to extend this provision to cover "information that may identify an individual" (as provided for in clause 52(6)).

9 Information provisions and the application of Information Privacy Principles

Clause 41

9.1 Clause 41 relates to information that is to be "proactively" provided to the Ombudsman. The clause also says that the purpose is to "assist the Ombudsman when they are considering matters that fall under the Ombudsman Act" and that the chief executive of Oranga Tamariki (and care and custody providers) must provide the Ombudsman with information about (among other things) critical incidents.

9.2 As currently drafted, the clause lacks clarity. It is not clear if Oranga Tamariki must provide the Ombudsman with information about every single critical incident, even if the Ombudsman is not considering that particular incident under the Ombudsman Act.

9.3 If the clause is intended as a standing direction to proactively provide information about all critical incidents, this needs to be more clearly stated. Equally, if the disclosure is supposed to only be targeted to matters that the Ombudsman is considering, there needs to be a process so that Oranga Tamariki is notified of what is required. It might be more appropriate if the clause is drafted to provide for the obligation to be to provide information on request.

Clause 45

9.4 Clause 45(4) makes it clear that this provision does not affect legal professional privilege, meaning the Monitor cannot compel lawyers to disclose information received or generated in the course of providing regulated legal services. The Law Society considers this to be appropriate.

9.5 The High Court[1] recently considered the issue of legal professional privilege in the context of information held by a Lawyer for Child. In that case, Justice Palmer noted that complicating issues arise, including who could waive privilege, and whilst the position of lawyers for children was "akin" to that of a solicitor in terms of their privileged relationship with a client, it was not "quite the same". Ultimately, however, Justice Palmer noted[2] that best practice requires a lawyer for child to act in a way the lawyer considers promotes the welfare and best interests of the child in terms of s 9B of the Family Court Act 1980 and that it is important for that purpose that third parties consulted by a lawyer for a child speak freely and frankly. This would leave it to the lawyer for child to exercise judgement about what is relevant, appropriate, and in the best interests of the child to disclose.

9.6 The Law Society recommends clause 45(4) be amended to ensure that information held by lawyers for children is not subject to mandatory disclosure, in the same way that clause 45(4) seeks to protect the confidentiality and integrity of information provided by clients to

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1 *DN v Family Court at Auckland (No 2)* [2019] NZFLR 205.

2 Ibid, paragraph [29].

their lawyers. Likewise, however, it should not preclude lawyers for children from providing information requested pursuant to this clause where the lawyer concerned is satisfied that doing so promotes the best interests and welfare of their client or clients. We suggest amending clause 45(4) to include: "… *or requires the mandatory disclosure of information held by a lawyer appointed for the relevant children or young persons*."

Clause 46

9.7 Clause 46 requires the Monitor to comply with the requirements of the Monitor's code of ethics and to obtain informed consent before collecting information directly from a child or young person. A definition of "informed consent" should be provided, as there is an interplay between this clause and clause 48. It needs to be made clear whether the consent required is just for the Monitor's use of the information or whether the child/caregiver is giving consent to the Monitor to disclose the information under clause 48 if needed.

9.8 Clause 46(2) should be drafted to provide clarity as to what happens to the information if the child/caregiver withdraws their consent. For example, whether this would require the Monitor to return information previously provided.

9.9 The child or young person should also be put in touch with services such as VOYCE (those services being provided for under section 7(2)(bb) of the OT Act).

Clause 47

9.10 Clause 47 places a duty on a child's caregiver to facilitate the Monitor's access to the child or young person without undue delay. The Law Society is concerned about how a child may be interviewed by the Monitor and what protections and support will be provided to them. It may not be appropriate for the social worker (or staff of the agency being monitored) to support the child.

9.11 While engagement with children and young people must occur in accordance with the Monitor's code of ethics, the Bill provides only general guidance on the contents of that code (clause 20), with provision that further specification *may* be made by regulation (clause 56).

9.12 In circumstances where the Monitor is obtaining information directly from a child or young person, legislated 'minimum obligations' may be appropriate. At the very least, the Bill should more clearly specify that the code of ethics must address the support mechanisms that will be provided in the event of direct engagement with a child or young person. There is currently no requirement, in either the Bill or the Monitor's existing code of ethics[3] requiring the provision of a support person (if required) of the young person's choice.

Clause 48

9.13 This clause should refer to the information sharing provision in clause 113. Once the Bill is split in two, the provision in clause 48(1)(f) will be lost.

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[3] https://www.icm.org.nz/assets/Uploads/Documents/Nga-Kete-Rauemi/Ethics-Code-Final-2020.pdf While reference is made to the use of 'connectors', the current Code of Ethics is light on the specifics of the Monitor's conduct.

Clause 113(2)

9.14 The Law Society suggests the chapeau to this provision should also reference the Children's Commission.

Application of the Information Privacy Principles

9.15 The Departmental Disclosure Statement for the Bill identifies a number of clauses which prevail over, and exclude or limit, the application of various Information Privacy Principles in the Privacy Act 2020.[4] The Law Society recommends amending each clause to explicitly identify the relevant Principle over which each clause prevails.

Schedule 1 Clause 3(2)

9.16 This clause expressly excludes Information Privacy Principle (**IPP**) 11 of the Privacy Act. Clause 48 (which is also intended to exclude IPP 11) does not include a similar carve out. Clause 3(2) is permissive ("may disclose") whereas clause 48 is prohibitive ("must not disclose unless"), which may explain the difference. However, section 24 of the Privacy Act (the savings provision) applies to both permissive and prohibitive provisions. We suggest that further consideration is given to these two clauses.

10 Amendments to the Official Information Act 1982

10.1 Clause 59(2)(ia)(ii) seeks to amend the definition of "official information" in the Official Information Act 1982 (**OIA**) to exclude any correspondence and communications which relate to the provision of guidance by an Ombudsman under clause 39 of the Bill. Clause 39 relates to the provision of guidance on complaints systems and continuous practice improvement.

10.2 We do not consider such a provision to be appropriate. It is poor legislative practice to completely prevent the possibility of disclosure under the OIA, particularly where the OIA already protects official information to the extent that release may harm a protected interest, and consistent with the public interest.

10.3 Complaints and investigations information will be protected in accordance with the current definition of official information under the OIA,[5] and by proposed section 2(1)(ia)(i). However, what is proposed to be section 2(1)(ia)(ii) of the OIA is a significant and unwarranted extension of this exclusion. No other non-complaints related guidance provided by the Ombudsman to state sector agencies is protected in this way. It is not appropriate that guidance received by a state sector agency, on best practice complaints processes for the public, is automatically precluded from release under the OIA.

10.4 While it is accepted that there may be circumstances in which parts of that guidance (or communications relating to it) ought not to be disclosed, the OIA provides adequate protection for that. The protection of complaints and investigations information is not premised on the mere involvement of the Ombudsman. Rather, that information is inherently sensitive and confidential, and secrecy facilitates proper resolution and/or

4 At [3.5].

5 Section 2(1)(i) excludes correspondence and communication relating to investigations. Proposed section 2(1)(ia)(i) will extend this to cover pre-investigation communications.

investigation by an Ombudsman. The provision of general guidance and advice, however, does not necessarily require such absolute protection.

11 Children's convention

11.1 We note that while the text of the United Nations Convention on the Rights of the Child is included in Schedule 3 “for information and reference purposes only”, that section does not refer to New Zealand’s obligations as a party to that Convention. It would be helpful to provide more context, such as the date of New Zealand’s ratification.

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