

***Te tāpaetanga o Te Kahui Tika
Tangata ki te pire arotake i a
Oranga Tamariki me Te Kahui
Taitamariki.***

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

26 January 2022



Human Rights Commission submission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill

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Introduction

1. The Human Rights Commission (**the Commission**) welcomes the opportunity to make a submission on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (**the Bill**).
2. The Commission welcomes the Bill’s purpose to improve outcomes and wellbeing for taitamariki and taiohi¹ in Aotearoa New Zealand by strengthening the independent monitoring and complaints oversight of the Oranga Tamariki system, and advocacy for taitamariki and taiohi generally. The Commission also supports the intention to recognise and respect the Crown’s commitment to give effect to Te Tiriti o Waitangi in a meaningful and practical way.
3. This submission first sets out general principles relating to Te Tiriti o Waitangi and human rights and as they apply to the Bill as a whole. It then focuses on specific recommendations relating to the Children and Young People’s Commission and Independent Monitor. Finally, it makes recommendations on incorporating the work of the Royal Commission of Inquiry into Abuse in Care.
4. At the outset, the Commission notes with concern the limited timeframes allowed for taitamariki and taiohi and their whānau to participate in making of submissions, as was raised in a letter from the Children’s Convention Monitoring Group to the Committee.
5. The Commission’s view is that while the Bill has many strengths, more work needs to be done on the legislation to ensure compliance with te Tiriti o Waitangi and Aotearoa New Zealand’s human

¹ The Commission refers to taitamariki and taiohi as an inclusive term to incorporate children and young people.

rights obligations. Our recommendations are set out below and collated together in the appendix to the submission.

Te Tiriti o Waitangi

The Crown's obligations under Te Tiriti o Waitangi

6. The bill must be assessed against the Tiriti o Waitangi principles identified by the Waitangi Tribunal in its recent report on Oranga Tamariki. In 2021 the Waitangi Tribunal released its *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report, which raised concerns about the failure of Oranga Tamariki to ensure the rights of Tangata Whenua under the Tiriti o Waitangi and its principles were being protected and upheld. The report applied te Tiriti principles when assessing whether the Crown's legislative and policy framework governing and administering Oranga Tamariki meet its obligations under te Tiriti, including the principles of:

***Tino Rangatiratanga over kainga** or the guarantee of authority over the land, resources and people. The guaranteed right to organise and live as Māori, the fundamental right to care for and raise the next generation.*

***Active protection**, which applies to the promotion, maintenance, and restoration of tino rangatiratanga over kainga.*

***Partnership** between the Crown and Māori to determine how kawanatanga and tino rangatiratanga can co-exist. A relationship in which both partners owe each other a duty to act honourably and in good faith.*

***Options**, which vests in the obligation upon the Crown to protect the availability and viability of kaupapa Māori solutions, and to constructively engage with those currently engaged in the provision of services to Māori whānau and with those seeking to build and restore the strength of whānau.*

The United Nations Declaration on the Rights of Indigenous Peoples

7. As a supporting party to the United Nations Declaration on the Rights of Indigenous Peoples (**the Declaration**), the government is responsible for ensuring that the rights of taitamariki and taiohi Māori are upheld and realised in the protection and care of children within New Zealand. The government is also responsible for supporting Tangata Whenua to develop and determine their own care systems for taitamariki and taiohi Maori, and to participate in and be consulted on the development and delivery of policy measures relating to the care of taitamariki and taiohi within New Zealand. The Commission's analysis of this Bill (below) identifies areas in which the Bill upholds these rights and responsibilities and any areas that need strengthening to give full effect to these rights and responsibilities.

Children's rights must be at the centre of the Bill

8. We support the Bill's purpose to uphold the rights and interests and improve the well-being of taitamariki and taiohi in Aotearoa. To achieve this purpose, it is essential that taitamariki and taiohi and their rights are at the centre of the proposals. Aotearoa New Zealand's compliance with children's rights has been criticised by the United Nation's Committee on the Rights of the Child.
9. The United Nations Convention on the Rights of the Child (**the Children's Convention**) sets out Aotearoa's international human rights obligations in relation to taitamariki and taiohi, including four general principles:
 - 1) the obligation of States to respect and ensure the rights to each child without discrimination of any kind;²
 - 2) the best interests of the child as a primary consideration in all actions concerning children;³
 - 3) the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child - embracing the child's physical, mental, spiritual, moral, psychological and social development;⁴ and
 - 4) the child's right to express his or her views freely in "all matters affecting the child", those views being given due weight.⁵
10. The rights of taitamariki and taiohi Maori need to be considered within Te Tiriti o Waitangi, with particular attention to the tikanga and kawa of iwi, hapu and whanau.
11. The Committee on the Rights of the Child (**CRC Committee**) has expressed concerns about New Zealand's compliance with the Children's Convention, particularly in respect of the right of the child to freedom from all forms of violence and abuse (Article 19) and torture (Article 34). In 2016, in its Concluding Observations to New Zealand, it noted:⁶

The difficulties faced by child victims of abuse and neglect in State care to seek redress including inadequate knowledge among children about complaints mechanisms and the insufficient support provided to child victims who report incidents of abuse.
12. The CRC Committee urged New Zealand when reforming the care system to ensure that the best interests of the child were taken into account as the primary consideration, ensure a common understanding of a child-centred approach across the care system and regularly monitor the

² Article 2.

³ Article 3(1).

⁴ Article 6.

⁵ Article 12.

⁶ Committee on the Rights of the Child, *Concluding Observations on the fifth periodic report of New Zealand*, (21 October 2016) UN Doc CRC/C/NZL/CO/5 at [22].

implementation of the reform and its impact on children's outcomes, with particular attention to Māori children and children with disabilities.⁷

13. The CRC Committee also noted with serious concern the '*[e]nduring inadequate cultural capability of the State care system, despite recent efforts, which has a disproportionate impact on Māori families and children, who make up over half of the children in State care.*'⁸
14. Although the comments of the CRC Committee are useful, the Commission supports the position of Tangata Whenua that a state care system for taitamariki and taiohi Māori, regardless of its cultural capability, is an inadequate approach to care and protection that is inconsistent with the right of Tangata Whenua to exercise their self-determination over the care and protection of taitamariki and taiohi Māori and their tino rangatiratanga over kainga.
15. New Zealand also has obligations to disabled taitamariki and taiohi under the United Nations Convention on the Rights of Persons with Disabilities (**Disability Convention**).⁹ Human rights law requires that disabled taitamariki and taiohi, including tāngata whaikaha Māori, have access to the oversight of Oranga Tamariki system, complaints and investigations system and the Children and Young People's Commission on an equal basis with others, without discrimination. Accessibility means effective support and assistance are provided and appropriate measures are available.
16. Appropriate measures for disabled taitamariki and taiohi could include, for example, accessible physical environments, that information is communicated in accessible formats and technologies

⁷ *ibid* [28]. Further relevant recommendations included improving the data collection on children's outcomes, (including regarding education, health and well-being) while they are in care and after they leave care, and adopting evidence-based approaches to improving the care and protection system. It also recommended that all professionals and staff working with and for children are provided with the necessary training and supervision and are subjected to the necessary background checks. Incidents of violence and abuse of children in State care should be investigated promptly, suspected prosecuted suspects and perpetrators duly sanctioned perpetrators. Child victims should have access to child-friendly reporting channels, physical and psychological rehabilitation and health services, including mental health services (at [23]).

⁸ *ibid* [27].

⁹ The general principles of the Disability Convention are set out in Article 3. Article 7 of the Convention affirms the rights of children with disabilities on an equal basis with others with reference to the Children's Convention. Article 12 recognises the legal capacity of disabled people on an equal basis with others. Article 14 guarantees the right to liberty and security of the person and unambiguously states that the existence of a disability shall in no case justify a deprivation of liberty. The Disability Convention represents a significant shift from a medical and paternalistic approach to disability towards a human rights-based approach that considers persons with disabilities as active rights holders, rather than passive recipients of protection, rehabilitation or welfare (the social model). This social model thus focuses on the barriers within society that prevent disabled children from participating in society and developing their full potential.

appropriate to different kinds of disabilities, supported decision-making, communication tools, interpreters, translators, assistants¹⁰^[OBJ] As highlighted¹¹^[OBJ]

underlying processes must value disabled people and diversity, accept difference, and strive for equality and equity. This includes challenging ableism – the assumptions and omissions that can make disabled people, the tūkino and neglect they experience and their needs for restoration of mana and oranga, invisible.

Children and Young People’s Commission

17. The Bill sets out that the purpose of the Children and Young People’s Commission is to promote and advance the rights, interests, and participation of taitamariki and taiohi and to improve their wellbeing within the context of their families, whānau, hapū, iwi and communities. The Commission welcomes the additional aspects included in the Bill in Part 5 to strengthen the new Children and Young People’s Commission’s promotion and advocacy functions from what is currently set out under the Children’s Commissioner Act 2003.¹² Adequate funding will be essential to ensure these expanded duties can be realised.¹³
18. Unfortunately, some aspects of the Bill have the potential to significantly diminish the ability of the Children and Young People’s Commission to undertake its promotion and advocacy function. This includes the lack of a named Children’s Commissioner and the absence of reporting to the Prime Minister. Moreover, while the bill includes a general inquiry function for the Children’s and Young People’s Commission,¹⁴ it removes the investigations and complaints function that the Office of the Children’s Commissioner currently has. This could also negatively impact taitamariki and taiohi by diminishing the availability of bespoke redress avenues for them.

Reporting to the Prime Minister should be retained.

19. The proposal to remove the Children’s Commissioner’s reporting function to the Prime Minister will diminish the office’s ability to advocate for children. Currently, one of the functions under the Children’s Commissioner Act 2003 is to report, with or without request, to the Prime Minister on

¹⁰ As set out in Recommendation 25 of the Royal Commission of Inquiry into Abuse in Care’s report: *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānu* (Dec 2021) available at <https://www.abuseincare.org.nz/our-progress/reports/from-redress-to-puretumu/>

¹¹ Royal Commission of Inquiry into Abuse in Care, *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānu* (Dec 2021) 269.

¹² This includes expanded functions to promote and advance the rights of children, extending the age of young people covered by the Bill to 25 years if they are or have been in care, making explicit reference to the rights set out in the Children’s Convention, expanded function in relation to children’s participation and voices and additional powers in relation to inquiries.

¹³ The Royal Commission’s redress report noted that the Office of the Children’s Commission highlighted the persistent lack of adequate funding had impacted and restricted its ability to effectively monitor the system: Royal Commission of Inquiry into Abuse in Care, *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānu* (Dec 2021) 248.

¹⁴ Clause 99(i).

matters affecting the rights of children.¹⁵ The Human Rights Act 1993 gives a similar function to the Human Rights Commission relating to matters affecting human rights.¹⁶ The ability to report directly to the Prime Minister on matters relating to rights is an important accountability mechanism. It also speaks to the mana of the Children's Commission and importance placed on children's rights in Aotearoa. Unfortunately, this function to report to the Prime Minister is absent from the Bill.

20. The Commission recommends the function of reporting to the Prime Minister is included in the Bill to strengthen the Children and Young People's Commission's ability to hold the state accountable to its duty to promote, protect and advance the rights of taitamariki and taiohi.

There should be a titled Children's Commissioner.

21. There is no individual office-holder with the title of Children's Commissioner in the Bill. Instead, the Bill sets up a Board of between 3 and 6 people to govern the Children and Young People's Commission. While the Commission supports the diversity of views that a range of board members can enable, the title of Children's Commissioner should be retained. The Children's Commissioner, as a visible and prominent public facing position, plays a crucial role in promoting and advocating for the rights and interests of children and young people. Many taitamariki and taiohi know the current Children's Commissioner by name, as do politicians, government officials, advocacy groups and members of the public. A governance board is unlikely to have this same visibility and, as a result, will be unable to undertake the much-needed promotion and advocacy functions. Further, it is important for taitamariki and taiohi to know that they have a person who publicly advocates for them.

22. The Commission recommends the explicit inclusion of a titled Children's Commissioner as the chair of the board in the Bill to ensure the strengthening of promotion and advocacy of children's rights.

The investigations and complaints functions should continue.

23. The Bill should retain the specific investigations and complaints functions that the Office of the Children's Commissioner currently has. An investigations and complaints function must be child-centred and uphold the rights of taitamariki and taiohi, including participation rights. The existing Office of the Children's Commissioner, as the principal monitor of the Oranga Tamariki system and through its other monitoring roles, is an expert on State monitoring and working with care-experienced taitamariki and taiohi.¹⁷ The Bill proposes to remove the investigations and

¹⁵ Section 12(1)(k).

¹⁶ Section 5(2)(k).

¹⁷ Its current mandate covers three areas of monitoring: a statutory responsibility to "monitor and assess" the politics and practices provided under the Oranga Tamariki Act 1989; as a designated "National Preventative Mechanism" under the Crimes of Torture Amendment Act 2003 and having responsibilities for children and young people in detention under the Optional Protocol to the United Nations Convention Against Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); and overseeing the grievance panel system, Whāia

complaints function of the Children and Young People's Commission and place it solely with the Ombudsman.

24. While the Commission understands that this proposal aims to avoid duplicating the function between the Children and Young People's Commission and the Ombudsman, the child-centred focus and expertise of the Children and Young People's Commission is also needed. While a general inquiry function into system matters is included in the Bill, the new Children's Commission no longer has the ability to investigate specific matters in relation to any child or to establish complaints mechanisms for children. This significantly dilutes the protections given to children and deprives the system of much-needed expertise.
25. Child-centred expertise is crucial when it comes to ensuring that complaints mechanisms are accessible. Taitamariki, taiohi and whānau in the Oranga Tamariki system are often reluctant to raise concerns, and face a range of barriers when they try. This means that the avenues to making complaints of violations of rights must be accessible and known to those who need to make them. The Office of the Children's Commissioner is widely known to taitamariki, taiohi and whānau. Moreover, the Office of the Children's Commissioner has extensive expertise in working with care-experienced and vulnerable taitamariki and taiohi. This should be drawn on in undertaking the investigations and complaints functions.
26. The Office of the Children's Commissioner and Ombudsman have shared investigation and complaints functions in the past, enabling the different types of expertise within each organisation to be utilised. The Commission recommends that this continues and that the Children and Young People's Commission should retain the investigations and complaints functions.

The Bill's commitment to te Tiriti o Waitangi should be strengthened.

27. The government has an obligation to ensure that the Children and Young People's Commission proposed in this Bill upholds the rights of taitamariki and taiohi Māori. It is critical that this Bill provides the adequate foundations and powers for the Children and Young People's Commission to realise and protect these rights as a formal Tiriti o Waitangi based organisation.
28. While the Bill provides some mechanisms for the Children and Young People's Commission to advocate for and protect the rights of taitamariki and taiohi Māori, some of the core composition and function provisions within the Bill require enhancement to ensure that the Children and Young People's Commission is best placed to uphold the rights of taitamariki and taiohi Māori as set out in Te Tiriti o Waitangi and the Declaration. Specifically, the Bill should ensure that Tangata Whenua are responsible for guarding and exercising Māori knowledge and experience, or knowledge in tikanga Māori, within the governing board of the Children and Young People's Commission. The Bill should also require that half of the board be of whakapapa Māori. These board members should be nominated, selected, and appointed by a tino rangatiratanga authority in accordance with their procedures. The functions of the Children and Young People's Commission should be extended to include advocating for the advancement of rights under Te Tiriti o Waitangi and the

te Māramatanga, used within the nine youth justice and care and protection residences to allow those in these residences to make complaints about their treatment.

Declaration. The chief executive of the Children and Young People’s Commission should be required to work in equal partnership with iwi and Māori organisations to recognise and give effect to the tino rangatiratanga and data sovereignty of Tangata Whenua when making information rules relating to the collection, use, and disclosure of information by the Commission. The Bill should provide for a comprehensive review of whether the functions, duties and powers set out in the Bill enable the Commission to give full effect to its commitments and obligations under Te Tiriti o Waitangi.

29. The primary clause of the Bill that provides the most effective and comprehensive foundation for the Children and Young People’s Commission to uphold these rights is clause 96. This clause outlines the primary duties of the board of the Children and Young People’s Commission. These duties include: building and maintaining relationships with iwi and Māori organisations, having a strong focus on the rights, interests, and well-being of Māori children and young people within the context of their whānau, hapū, and iwi, and promoting Māori participation and leadership, and te ao Māori approaches, in the performance of its functions. Furthermore, the clause also requires the board to set strategic priorities and work programmes that support improved outcomes for Māori children and young people within the context of their whānau, hapū, and iwi.
30. These provisions give effect to the obligation on the state to develop and maintain partnerships with Tangata Whenua by requiring that the board build relationships with iwi and Māori organisations to support and protect the rights, interests, and well-being of taitamariki and taiohi Maori within the context of their whanau, hapū, and iwi. They also support the right of Tangata Whenua to self-determination by placing stringent requirements on the board to incorporate te ao Māori approaches and leadership models in performing its functions and engaging hapū, and iwi when developing its strategic priorities as a Commission. These provisions demonstrate a clear adherence and consistency with the rights and obligations set out in in Te Tiriti o Waitangi and the Declaration.
31. Regarding composition, clause 92 (2) proposes that at least half of the board of the Commission should be required to have Māori knowledge and experience or knowledge in tikanga Māori. Although the Commission supports these requirements, it is critical that Tangata Whenua, specifically, are responsible for guarding and exercising this knowledge and experience within the context of the governing board of the Children and Young People’s Commission.
32. Tangata Whenua are entitled, under Te Tiriti o Waitangi, to exercise their tino rangatiratanga over the mechanisms designed to advocate for and protect the rights of their taitamariki and taiohi. They also have the right to participate, under the principle of partnership and good faith, in these mechanisms and the decisions they make with regard to taitamariki and taiohi Māori. In recognising the right of Tangata Whenua as kaitiaki over their knowledge and its application within the context of the board, and to provide an avenue for Tangata Whenua to participate in and exercise their rangatiratanga over this mechanism, the Commission recommends that clause 92(2) is amended to also require the specified half of the board to be of whakapapa Māori.
33. For the state meet its obligations under article 18 of the Declaration, and ensure that Tangata Whenua participate effectively in decision-making in matters which would affect their rights through representatives chosen by themselves in accordance with their own procedures, the

Commission also recommends that the board members required under clause 92(2) are nominated, selected, and appointed by a tino rangatiratanga authority in accordance with their procedures. These board members should be exempt from any other appointment processes.

34. The Commission welcomes the explicit recognition and affirmation of the rights of taitamariki and taiohi under the Children’s Convention. However, the state has an obligation to ensure that the rights of taitamariki and taiohi Māori set out in Te Tiriti o Waitangi are also promoted and advanced by the Children and Young People’s Commission. The Declaration is a critical tool that the Children and Young People’s Commission should employ to identify and advance the rights of taitamariki and taiohi Māori. The Commission recommends that the functions of the Children and Young People’s Commission are extended to include promoting and advancing the rights of children and young people by raising awareness and understanding of the rights of taitamariki and taiohi Māori as set out in Te Tiriti o Waitangi and the Declaration. The functions should be extended to include advocating for the advancement of the application of the Te Tiriti o Waitangi and the Declaration, including (without limitation) by departments, other instruments of the Crown and the public.
35. Clause 111(3)(a) requires the chief executive of the Children and Young People’s Commission to make reasonable efforts to consult iwi and Māori organisations when making information rules relating to the collection, use, and disclosure of information by the Commission. This provision does not provide Tangata Whenua with adequate assurance that their voices, as equal partners with the state under Te Tiriti o Waitangi, will be heard and reflected in the rules being developed. Any commitment by the Children and Young People’s Commission to engage Tangata Whenua regarding the management of their data must also recognise the rights of Tangata Whenua to exercise their tino rangatiratanga and sovereignty over information gathered regarding taitamariki and taiohi Māori and their whanau.
36. To strengthen the requirements on the chief executive to engage Tangata Whenua as equal Tiriti o Waitangi partners with the state, and to ensure that Tangata Whenua are guaranteed an effective avenue to exercise a degree of tino rangatiratanga over their data, the Commission recommends that clause 111(3)(a) should be strengthened to specifically require the chief executive of the Children and Young People’s Commission to work in equal partnership with iwi and Māori organisations to recognise and give effect to the tino rangatiratanga and data sovereignty of Tangata Whenua when making information rules relating to the collection, use, and disclosure of information by the Commission.
37. In ensuring that the Children and Young People’s Commission is accountable to, and delivering on, its commitment to Te Tiriti o Waitangi, the Commission recommends that the independent review process provided under clause 118 should be extended to require a comprehensive review on whether the functions, duties and powers set out in the bill enable the Commission to give full effect to its commitments and obligations under Te Tiriti o Waitangi. The Commission also recommends that the Bill specifically require the Children and Young People’s Commission have its obligations and responsibilities under Te Tiriti o Waitangi upheld in all its policies, processes, and actions.

38. As a Tiriti o Waitangi based organisation, it is critical that the Children and Young People's Commission is situated within the relational sphere, as outlined in the Matike Mai Report on Constitutional Transformation.¹⁸ This sphere is a space *"in which rangatiratanga and kāwanatanga would then make joint decisions"* and *"have to take account of the same interdependence and sense of belonging."*¹⁹ It is also the sphere in which organisations such as the Human Rights Commission and the proposed Children and Young People's Commission can operate as rights advocates whilst engaging in partnerships and relationships with both tino rangatiratanga and kawatanga.
39. Positioning the Children and Young People's Commission in the relational sphere recognises the degree of independence the Commission will have from government while also clarifying its role as a supporting ally to tino rangatiratanga. The Commission recommends that clause 85 should explicitly identify the Children and Young People's Commission as being situated in the relational sphere as specified in the Matike Mai models on constitutional transformation. The clause should give specific reference to the report.

Recommendations: Children and Young People's Commission

The Commission recommends:

- a. The Children and Young People's Commission's ability to promote and advance children's rights should be strengthened by a reporting to the Prime Minister function, a named Children's Commissioner, and the incorporation of the investigations and complaints function.
- b. Clause 92 (2) is amended to also require the specified half of the board to be of whakapapa Māori.
- c. The board members required under clause 92 (2) are nominated, selected and appointed by a tino rangatiratanga authority in accordance with their procedures. These board members should be exempt from any other appointment processes.
- d. The functions of the Children and Young People's Commission are extended to include promoting and advancing the rights of children and young people by raising awareness and understanding of the rights of taitamariki and taiohi Māori as set out in Te Tiriti o Waitangi and the UN Declaration on the Rights of Indigenous Peoples. The functions should be extended to include advocating for the advancement of the application of the Te Tiriti o Waitangi and the UN Declaration on the Rights of Indigenous Peoples, including (without limitation) by departments, other instruments of the Crown and the public.
- e. Clause 111(3)(a) should be strengthened to specifically require the chief executive of the Children and Young People's Commission to work in equal partnership with iwi and Māori

¹⁸ *Report of the Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation* (January 2016) available at <https://nwo.org.nz/resources/report-of-matike-mai-aotearoa-the-independent-working-group-on-constitutional-transformation/>

¹⁹ *ibid* 112.

organisations to recognise and give effect to the tino rangatiratanga and data sovereignty of Tangata Whenua when making information rules relating to the collection, use, and disclosure of information by the Commission.

- f. Clause 118 should be extended to require a comprehensive review on whether the functions, duties and powers set out in the bill enable the Commission to give full effect to its commitments and obligations under Te Tiriti o Waitangi. The Commission also recommends that the bill specifically require the Children and Young People’s Commission have its obligations and responsibilities under Te Tiriti o Waitangi upheld in all its policies, processes, and actions.
- g. Clause 85 should explicitly identify the Children and Young People’s Commission as being situated in the relational sphere as specified in the Matike Mai models on constitutional transformation. The clause should specifically refer to the report.

The Independent Children’s Monitor

The Independent Monitor should be an independent Crown entity.

40. Independence is crucial for the Independent Children’s Monitor to achieve its objectives of providing objective and impartial monitoring of the Oranga Tamariki system. It is a core human rights and constitutional law principle. However, the bill currently proposes that the Independent Monitoring Agency is located within an existing departmental agency (the Education Review Office) with the Independent Monitor being the person appointed as its chief executive. The Commission has significant concerns with this proposal.
41. The Independent Monitoring Agency needs to be and, as importantly, perceived to be independent of government. Aotearoa New Zealand has a history of widespread abuse and systemic failures in the care of taitamariki and taiohi.²⁰ A monitor that is not completely independent of government will struggle to gain the public trust and confidence – particularly of and taitamariki, taiohi and their whanau – that is necessary to address these failures. True independence is also crucial to avoid the perception of bias and for any potential conflict of interest which can arise from an agency investigating itself.²¹

²⁰ Royal Commission of Inquiry into Abuse in Care, *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānu* (Dec 2021) 138.

²¹ This includes the employment obligations that agencies owe to existing staff and the impact this can have where agencies are investigating themselves.

42. The Beatie review in 2018 also stressed the need for independent oversight of the care and protection system.²² The report noted that:²³

*The importance of the quality of systematic monitoring can't be understated – it must provide credible evidence based assessments, be a respected **source of independent advice** and add value to Oranga Tamariki as well as contributing to a learning system of improvement in practice and service delivery. It must also be a **trusted source of independent reporting** that provides assurance to Ministers, Parliament and to the public. [emphasis added].*

43. Lessons can also be learned from the recent findings of the Royal Commission of Inquiry into Abuse in Care. Many survivors of abuse told the Royal Commission of Inquiry that they did not trust the organisations responding to their complaints to treat them fairly, or to investigate and hold people to account. This was because these organisations were the same organisations who were responsible for the abuse they had suffered.²⁴ For survivors of abuse, this was a conflict of interest as organisations were effectively investigating themselves.²⁵ Many survivors have a deep distrust of government and authority.²⁶ For many, making a complaint to the same organisation where they were abused was retraumatising.²⁷
44. Children currently in care have similar concerns and face similar challenges to the survivors who gave evidence to the Royal Commission. Taitamariki, taiohi and whānau, do not typically distinguish one government department from another; rather, they see the government and those working for it as a single entity. The Independent Monitor needs to be clearly distinct from existing government departments to ensure people feel confident in the Monitor's assessment of the performance of Oranga Tamariki and to avoid the perception that the Monitor is not independent, fair or transparent.

²² Sandi Beatie QSO, *Strengthening independent oversight of the Oranga Tamariki system and of children's issues in New Zealand | Ko te whakakaha i te tirohanga motuhake ki te pūnaha a Oranga Tamariki me ngā take tamariki | Aotearoa: Post Consultation Report* (August 2018) 5-7 available at <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/strengthening-independent-oversight/post-consultation-report-independent-oversight.pdf>

²³ *ibid* 19-20.

²⁴ Royal Commission of Inquiry into Abuse in Care, *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowānu* (Dec 2021) 276.

²⁵ *ibid* 156.

²⁶ *ibid* 68

²⁷ *ibid* 216.

45. To address these concerns around independence, we recommend that the Independent Monitor is an independent crown entity.²⁸ The Royal Commission noted the strengths of this model in the context of care:²⁹

Properly independent, it would avoid the need for survivors to approach the organisations they distrusted, an interaction many found distressing or traumatising, and it would also eliminate the inherent conflict of interest these organisations face in investigating themselves.

46. There are two options for this independent Crown entity model. The Independent Monitor could be: 1) a stand-alone independent Crown entity; or 2) be located under the umbrella of another independent Crown entity (namely, the new Children and Young People’s Commission). Under the second option, the Independent Monitor would still retain its separate functions and distinct role. An example of this option is the Office of Human Rights Proceedings, which is an independent part of the Human Rights Commission and is headed by the Director of Human Rights Proceedings. Two clear advantages arise from this second option. First, it avoids the potential confusion created by the current proposals as to who is the overarching statutory monitor given that the new Children’s Commission retains its specific OPCAT monitoring function. Secondly, it avoids the concerns raised by the Minister in the Cabinet paper around fragmentation and the cost of establishing and operating new corporate systems.³⁰ These systems would be those of the Children and Young People’s Commission. This structure would also help to address the Minister’s concerns around one organisation being both advocate and monitor.³¹

The monitoring functions and powers should be broadened to include wider system analysis and thematic reviews.

47. The monitoring functions in the Bill are overly narrow and specific. The monitoring functions set out in clause 14 of the Bill enable the Monitor to: assess compliance with the Oranga Tamariki Act 1989, national care standards regulations and other standards made under that Act; assess the quality and impacts of service delivery, service mix, service resourcing and practice on the experiences of taitamariki, taiohi and their whānau; and assess outcomes for taitamariki, taiohi

²⁸ We note the Cabinet papers suggestion of an autonomous, rather than independent, Crown entity under the Crown Entities Act 2004 (Office of the Minister for Social Development and Employment, *Cabinet Paper to Social Wellbeing Committee* (June 2021) p.13). However, we recommend that the Independent Monitor is an independent Crown entity to be sufficiently independent in performing its functions and duties.

²⁹ Royal Commission of Inquiry into Abuse in Care, *He Purapura Ora, he Māra Tipu: From Redress to Pūretumu Torowhānu* (Dec 2021) 276. A previous review of the Oranga Tamariki system has also emphasised the importance of independence in the monitoring and complaints system and recommended a similar model: Howard Broad, *Review of Children Youth and Family Complaints System: A report to the Minister of Social Development* (June 2013) 91 available at <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/corporate/review-of-cyf-complaints-system/review-of-child-youth-and-family-complaints-system-june-2013.pdf>

³⁰ Office of the Minister for Social Development and Employment, *Cabinet Paper to Social Wellbeing Committee* (June 2021) p.13.

³¹ *ibid* [6].

and whānau who receive services or support through the Oranga Tamariki system.³² These functions should be broadened so that the Monitor can undertake wider system analysis and thematic reviews.

48. Under the current Children's Commissioner Act 2003, the monitoring function enables the Children's Commissioner to monitor and assess the policies and practices of the Oranga Tamariki department and any other person, body or organisation that relate to the performance or exercise under the Oranga Tamariki Act.³³ The Children's Commissioner has the function to encourage the development, within the department, of policies and services that are designed to promote the welfare of children and young persons, to advise the Minister on any matter that relates to the Oranga Tamariki Act and to keep under review, and make recommendations on, the working of the Oranga Tamariki Act.³⁴

49. Cabinet papers indicate that broader monitoring functions were envisaged for the Monitor:³⁵

I envisage that the independent monitoring function should initially focus on monitoring compliance with the NCS Regulations, but should not be limited to these areas. Over time, the function could extend to cover intake, referral and assessment processes and monitoring the delivery of services within, and outcomes achieved by, the Oranga Tamariki system, across their core operating model. This could encompass monitoring for example, the effectiveness of early intervention practices, successful transition from care, Family Group Conferences, and the State's use of powers to remove children from their families.

Oversight of the Oranga Tamariki Act will mean that monitoring and assurance will also apply to other agencies providing services (eg health and education services) to children and young people in the Oranga Tamariki system, in line with requirements of that Act.

50. Accountability is a crucial feature of good governance, democracy, and human rights. Constructive accountability consists of three elements: monitoring, independent review in relation to agreed

³² Section 14 states for the purposes of monitoring the performance of the Oranga Tamariki system in the context of its interface with other systems, the functions include (without limitation) - (a) assessing compliance with the Oranga Tamariki Act 1989, national care standards regulations, and other regulations and standards made under that Act by the chief executive of Oranga Tamariki and approved providers: (b) assessing the quality and impacts of service delivery, service mix, service resourcing, and practice on the experiences of children, young people, families, and whānau: (c) assessing outcomes for children, young people, families, whānau, and iwi who receive services or support through the Oranga Tamariki system, and changes in outcomes over time, with particular regard to Māori children and young people and their whānau.

³³ Children's Commissioner Act 2003, s 13(1)(b).

³⁴ Children's Commissioner Act 2003, ss 13(1)(c) - (e).

³⁵ Office of the Minister for Social Development, *Cabinet paper: Strengthening Independent Oversight of the Oranga Tamariki System and Children's Issues* (9 April 2019) at [53]-[54] available at: <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/strengthening-independent-oversight/cabinet-paper-strengthening-independent-oversight-of-oranga-tamariki-and-childrens-issues.pdf>

standards and promises, and remedial action. The Oranga Tamariki system must be subject to constructive accountability, i.e., initiatives must be independently assessed against children's rights as set out in the Children's Convention, Te Tiriti o Waitangi, indigenous rights and other human rights standards and New Zealand law. Constructive accountability must be, transparent, effective and accessible to those in need.

51. The objectives and functions of the Independent Monitor need to be matched with adequate powers. The Bill does not provide for the Independent Monitor to make recommendations to promote and advancing the rights of taitamariki and taiohi in care. The Commission recommends that the functions of the Independent Monitor are broadened so that the Monitor can undertake wider system analysis and thematic reviews.

The Children's Convention should be expressly incorporated into the Independent Monitor's objectives.

52. The Bill gives the Children and Young People's Commission functions under the Children's Convention,³⁶ including a reporting function. This is encouraging.
53. The Commission welcomes the inclusion in clause 5 of the Children's Convention and the Convention on the Rights of Persons with Disabilities in the principles that a person must performing a function, or duty or exercising a power must have regard to. However, the Commission recommends that the Bill would be strengthened by the express incorporation of the Children's Convention into the Independent Monitor's objectives in Part 2 of the Bill.³⁷

Adherence to Te Tiriti o Waitangi and the Declaration should be strengthened, including by establishing an additional Independent Tino Rangatiratanga Monitor.

Tino Rangatiratanga over kainga and the right to self-determination

54. The state is required, under Te Tiriti o Waitangi and the Declaration, to ensure that the rights of Tangata Whenua to exercise their tino rangatiratanga over kainga and self-determination is realised adequately in the independent monitoring mechanism proposed in this Bill. Central to this, is the responsibility of the state to ensure that Tangata Whenua are afforded adequate authority and autonomy to conduct independent monitoring of the Oranga Tamariki system. These monitoring priorities and standards of care should be developed by Tangata Whenua and recognise the rights of taitamariki and taiohi Māori affirmed under Te Tiriti o Waitangi and the Declaration.
55. Clause 13 of the bill states that in developing its monitoring approaches and functions, the Independent Monitor should ensure that these approaches and functions prioritise improving outcomes for Māori children and young people. The Independent Monitor is also required to

³⁶ While there was reference to the Children's Convention in past legislation, the Commission is encouraged by the inclusion of reference to the Convention in this Bill.

³⁷ The Children's Convention could be included in clause 13 in a similar manner to how it has been incorporated into the principles of the Children and Young Person's Commission in clause 84.

produce an annual report on the performance of the Oranga Tamariki system in respect of outcomes being achieved for Māori children and young people and their whanau. Despite the bill requiring the Independent Monitor to have regard to the advice of the Māori Advisory Group in developing and determining monitoring priorities and approaches, the primary authority and responsibility to develop and administer these monitoring measures is vested in the Independent Monitor. The monitor maintains the responsibility to report on the performance of the Oranga Tamariki system regarding taitamariki and taiohi Māori outcomes.

56. The Commission welcomes the commitment to prioritising and improving outcomes for taitamariki and taiohi Māori in the monitoring system proposed by the bill. We also recognise the importance of providing a comprehensive report into the performance of the Oranga Tamariki system with respect to outcomes being achieved for taitamariki and taiohi Māori and their whanau. However, the Bill does not provide any viable avenues for Tangata Whenua (under tino rangatiratanga authority) to exercise their right to tino rangatiratanga and self-determination in developing and leading these key monitoring and reporting functions.
57. Recognising the tino rangatiratanga and right to self-determination of Tangata Whenua over the monitoring and review of taitamariki and taiohi Māori within the Oranga Tamariki care system is a foundational measure in upholding Te Tiriti o Waitangi and the rights set out in the Declaration. An appropriate approach would enable Tangata Whenua to monitor the Oranga Tamariki system against standards of care and protection that are based in kawa and tikanga including Māori understandings of care and support. It would also enable Tangata Whenua to highlight key areas of improvement required for the care and protection system in New Zealand, including providing additional advice and assessment information to support the transition to alternative Tiriti o Waitangi and declaration centred care systems that are by Māori for Māori as proposed in the recent *Ko Te Wa Whakawhiti: It's Time for Change – A Maori Inquiry into Oranga Tamariki* report (2020),³⁸ the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report (2021),³⁹ by the Oranga Tamariki Ministerial Advisory Board, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report (2021) by the Waitangi Tribunal.
58. To enhance the tino rangatiratanga over kainga and self-determination of Tangata Whenua as proposed above, the Commission recommends that the Bill establish an additional Independent Tino Rangatiratanga Monitor. In reflection of the Waitangi Tribunal's 2021 findings, the Tino Rangatiratanga monitor should be developed by and accountable to a tino rangatiratanga authority. The Bill should ensure that the Independent Tino Rangatiratanga Monitor is empowered and authorised to:
- (i) lead and complete the monitoring functions set out in clause 14 (2) (c) which include assessing *outcomes for children, young people, families, whānau, and iwi who receive services or support through the Oranga Tamariki system, and changes in outcomes*

³⁸ available at <https://whanauora.nz/wp-content/uploads/2021/06/OT-REVIEW-REPORT.pdf>

³⁹ available at <https://www.beehive.govt.nz/sites/default/files/2021-09/SWRB082-OT-Report-FA-ENG-WEB.PDF>

over time, with particular regard to Māori children and young people and their whānau.

- (ii) develop and produce the annual report on the performance of the Oranga Tamariki system in respect of outcomes being achieved for Māori children and young people and their whanau and any other requirements under clause 23.
- (iii) engage with members of the working group to develop and implement a tikanga, kawa, Tiriti o Waitangi, and declaration based set of care and protection standards and models that will be used to complete its assessment, monitoring and reporting functions. This standard will be informed by the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal.
- (iv) share equal authority and responsibility with the Independent Monitor to deliver all of its general monitoring and reporting responsibilities.
- (v) determine and undertake any additional monitoring, assessment and review measures over the Oranga Tamariki system and the wider care and protection framework proposed by a tino rangatiratanga authority.

Partnership and the right to participate

59. The state must give adequate effect to its obligations under Te Tiriti o Waitangi and the declaration in designing and delivering the monitoring mechanism proposed in this bill. Central to these obligations is the responsibility of the state to ensure that the Treaty principle of partnership and shared authority between kawanatanga and tino rangatiratanga is reflected in the composition and accountability frameworks of the Independent Monitor. Consistent with this, is the responsibility of the state ensure that these composition and accountability frameworks realise the rights of Tangata Whenua to participate in decision making matters regarding independent monitoring.
60. The Commission supports the efforts of the Bill to introduce a more independent and targeted approach to the monitoring and assessment of the Oranga Tamariki system. However, the independent monitoring system proposed by the bill is limited in its ability uphold the principle of partnership and the right of Tangata Whenua to participate in decisions that affect their rights. Opportunities for Tangata Whenua participation and partnership in the systems and processes of the independent monitor are limited to the provisions set out in clauses 17 through to 19 of the Bill. Clauses 17 and 18 require the monitor to appoint a Māori Advisory Group to provide advice to the monitor in their development and delivery of monitoring approaches, work programmes, and priorities. In appointing this advisory group, the monitor must be satisfied that the members of the group have sufficient knowledge of children’s rights within the context of Oranga Tamariki and tikanga and te ao Māori.

61. This arrangement is inconsistent with article 18 of the Declaration, as it centres complete authority over the appointment and delivery of Tangata Whenua participation in the oversight of Oranga Tamariki with the Independent Monitor. This fundamentally excludes Tangata Whenua from participating in decisions pertaining to the monitoring process through their own mandated representatives and in accordance with their own traditional practices. It also fails to place any requirement on the monitor to act in accordance with the advice of the advisory group when conducting its functions, or to seek agreement or endorsement from the advisory group before enacting any of these same functions. This is an inadequate degree of authority that does not provide effective and equitable participation for Tangata Whenua in the decision-making processes of the monitor.
62. The Commission recommends that a tino rangatiratanga authority is authorised to determine and appoint a Māori advisory mechanism to inform, guide, and advise the co-monitors. This will strengthen the ability of this proposed independent monitoring mechanism to realise and protect the rights of Tangata Whenua to participate meaningfully in the monitoring process. Further to this, the Commission recommends that there should be firm requirements on the co-monitors to incorporate the advice of Tangata Whenua advisory mechanism in conducting their individual and collective monitoring and reporting functions.
63. The primary provision offering a degree of consistency with the Tiriti principle of partnership is clause 19 of the bill. This clause outlines that the Independent Monitor ‘must make reasonable efforts to develop arrangements with iwi and Māori organisations’ to provide opportunities and invite proposals on how the oversight of the Oranga Tamariki system can be improved. This clause does not provide the adequate and binding requirements on the independent monitoring system to realise the Crown's obligation to develop and maintain partnerships with Iwi and Māori Organisations.
64. To enhance and affirm the commitment of the bill to developing and maintaining comprehensive partnerships with Iwi and Māori organisations, the Commission recommends that the clause 19 of the bill is strengthened to ensure that developing and maintaining equal partnerships with Iwi and Māori organisations is a specific requirement and priority of the independent co-monitors.

Options and the obligation on the state to collaborate with Tangata Whenua

65. The state has an obligation to ensure that the independent monitoring system proposed in this bill protects and realises the rights of Tangata Whenua under Te Tiriti o Waitangi and the declaration. Central to these rights is the right to have the Tiriti o Waitangi principle of options⁴⁰ upheld by the state in designing and delivering any monitoring functions over systems responsible for protecting taitamariki and taiohi Māori.
66. This principle provides that the Crown protect the availability and viability of kaupapa Māori solutions and ensures that the monitoring system it is proposing constructively engages and partners with those currently engaged in the provision of services to Māori whānau and with those seeking to build and restore the strength of whānau. As a supporting party to the declaration, the

⁴⁰ See paragraph 6 above. Also, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua fishing claim* (1988) 195.

state is also responsible under article 22 (2) to work in conjunction with Tangata Whenua to ensure that taitamariki and taiohi Māori are guaranteed protection against all forms of violence and discrimination.

67. There is no positive requirement on the Independent Monitor to constructively engage with Tangata Whenua currently working in the provision of services to whanau Māori and those seeking to build and restore the strength of whanau. It is unclear how this Bill supports and aligns with proposed and existing kaupapa Māori solutions for improving the care of taitamariki and taiohi Māori currently in the Oranga Tamariki System. Tangata Whenua experts have produced a range of comprehensive reports and alternative models for the care and protection of taitamariki and taiohi Māori that outline tikanga and kawa based care and protection systems and standards that address the inequitable outcomes and discrimination experienced by taitamariki and taiohi Māori.
68. The findings and recommendations of reports such as the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal, emphasise the need for a comprehensive review of the Oranga Tamariki system, its policies and foundational legislations, and its interagency relationships.
69. These reports recognise review and monitoring as an interim measure to inform and determine a wider systemic transition of the care and protection system administered by Oranga Tamariki to a by Māori for Māori framework of care. Both the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee report, provide immediate and long term recommendations to improve the standard of care for taitamariki and taiohi that are foundational for informing a metric and standard of care that realises the specific needs and rights of taitamariki and taiohi and whanau Māori.
70. For the state to uphold its obligations to uphold the Tiriti o Waitangi principle of options and to collaborate with Tangata Whenua when developing and administering this monitoring system, the findings of these reports must inform how the Oranga Tamariki system is to be assessed. The Commission recommends that the Bill establish an additional Tangata Whenua working group comprised of representatives from the governance group of the Māori-led Inquiry into Oranga Tamariki, the Ministerial Advisory Committee that produced the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report, and other Tangata Whenua groups involved in the review and development of care and protection for Māori children.
71. This working group should be established for the primary purpose of working with the Independent Tino Rangatiratanga Monitor to develop and implement a tikanga, kawa, Tiriti o Waitangi, and declaration-based set of care and protection standards and models that will be used to complete its assessment, monitoring and reporting functions. This standard will be informed by the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal.

Recommendations: The Independent Monitor

The Commission recommends:

- h. That the Independent Monitor is independent from government in the form of an independent Crown entity.
- i. That the Independent Monitor's functions are broadened to undertake wider system analysis and thematic reviews
- j. The bill establishes an additional Independent Tino Rangatiratanga Monitor. The bill should ensure that the Independent Tino Rangatiratanga Monitor is empowered and authorised to:
 - lead and complete the monitoring functions set out in clause 14 (2) (c) which include assessing *outcomes for children, young people, families, whānau, and iwi who receive services or support through the Oranga Tamariki system, and changes in outcomes over time, with particular regard to Māori children and young people and their whānau.*
 - develop and produce the annual report on the performance of the Oranga Tamariki system in respect of outcomes being achieved for Māori children and young people and their whanau and any other requirements under clause 23.
 - engage with members of the working group to develop and implement a tikanga, kawa, Tiriti o Waitangi, and Declaration based set of care and protection standards and models that will be used to complete its assessment, monitoring and reporting functions. This standard will be informed by the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal.
 - share equal authority and responsibility with the independent monitor to deliver all of its general monitoring and reporting responsibilities.
 - determine and undertake any additional monitoring, assessment and review measures over the Oranga Tamariki system and the wider care and protection framework proposed by a tino rangatiratanga Authority.
- k. A tino rangatiratanga authority is authorised to determine and appoint a Māori advisory mechanism to inform, guide, and advise the co-monitors. This will strengthen the ability of this proposed independent monitoring mechanism to realise and protect the rights of Tangata Whenua to participate meaningfully in the monitoring process. Further to this, the Commission recommends that there should be firm requirements on the co-monitors to incorporate the advice of Tangata Whenua advisory mechanism in conducting their individual and collective monitoring and reporting functions.
- l. Clause 19 of the bill is strengthened to ensure that developing and maintaining equal partnerships with Iwi and Māori organisations is a specific requirement and priority of the independent co-monitors.
- m. The bill establishes an additional Tangata Whenua working group comprised of representatives from the governance group of the Māori-led Inquiry into Oranga Tamriki, the Ministerial Advisory

Committee that produced the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report, and other Tangata Whenua groups involved in the review and development of care and protection for Māori children.

- n. This working group should be established for the primary purpose of working with the Independent Tino Rangatiratanga Monitor to develop and implement a tikanga, kawa, Tiriti o Waitangi, and declaration-based set of care and protection standards and models that will be used to complete its assessment, monitoring and reporting functions. These standards should be informed by the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal.

Implications of the Royal Commission of Inquiry into Abuse in Care

72. The Bill should reflect the recommendations of the Royal Commission of Inquiry into Abuse in Care (**the Royal Commission**). The Royal Commission’s interim report - *He Purapura Ora, he Māra Tipu: From Redress to Pūretumu Torowhānu* – was published in December last year and has a number of recommendations that are relevant to the Bill. In particular, it identifies the principles that should apply to monitoring bodies or monitoring activities that relate to children in care and adults at risk. These principles should be reflected in the Bill:⁴¹

- nurtures the trust of children, young people and adults at risk
- is consistent with the Crown’s te Tiriti o Waitangi obligations
- is organised to reflect the Māori-Crown relationship
- is independent of other oversight mechanisms and the organisation(s) being monitored
- complies with all relevant human rights obligations
- operates regularly, or is conducted regularly, using staff with appropriate skills and expertise.

73. The Royal Commission is approximately 18 months away from its final report.⁴² It will make findings on the causes of abuse in care and recommendations for safeguarding the care system to ensure such abuse does not happen in future.⁴³ It seems premature, therefore, to make legislative changes in this area prior to the Royal Commission’s final report. However, should this Bill move forward at this time, we strongly urge that a review of the Bill is included at the conclusion of the Royal Commission of Inquiry’s final report in order to incorporate its recommendations.

⁴¹ Royal Commission of Inquiry into Abuse in Care, *He Purapura Ora, he Māra Tipu: From Redress to Pūretumu Torowhānu* (Dec 2021) 347 (Recommendation 90).

⁴² Clause 39 of the Terms of Reference Amendment Order 2021, sets the final reporting date of 30 June 2023: <https://www.abuseincare.org.nz/our-progress/library/v/3/terms-of-reference>

⁴³ Terms of Reference, clause 32A.

Recommendations on responding to the Royal Commission of Inquiry into Abuse in Care

The Commission recommends:

- o. that the Select Committee ensures that Bill adequately reflects the principles of monitoring from the Royal Commission of Inquiry into Abuse in Care report; and
- p. that the Bill includes a review of the legislation following the publication of the Royal Commission's final report, in order to respond to the Royal Commission's findings and incorporate its additional relevant recommendations.

Appendix: Summary of Human Rights Commission recommendations

On the Children and Young People's Commission

- a. The Children and Young People's Commission's ability to promote and advance children's rights should be strengthened by a reporting to the Prime Minister function, a named Children's Commissioner, and the incorporation of the investigations and complaints function.
- b. Clause 92 (2) is amended to also require the specified half of the board to be of whakapapa Māori.
- c. The board members required under clause 92 (2) are nominated, selected and appointed by a tino rangatiratanga authority in accordance with their procedures. These board members should be exempt from any other appointment processes.
- d. The functions of the Children and Young People's Commission are extended to include promoting and advancing the rights of children and young people by raising awareness and understanding of the rights of taitamariki and taiohi Māori as set out in Te Tiriti o Waitangi and the UN Declaration on the Rights of Indigenous Peoples. The functions should be extended to include advocating for the advancement of the application of the Te Tiriti o Waitangi and the UN Declaration on the Rights of Indigenous Peoples, including (without limitation) by departments, other instruments of the Crown and the public.
- e. Clause 111(3)(a) should be strengthened to specifically require the chief executive of the Children and Young People's Commission to work in equal partnership with iwi and Māori organisations to recognise and give effect to the tino rangatiratanga and data sovereignty of Tangata Whenua when making information rules relating to the collection, use, and disclosure of information by the Commission.
- f. Clause 118 should be extended to require a comprehensive review on whether the functions, duties and powers set out in the bill enable the Commission to give full effect to its commitments and obligations under Te Tiriti o Waitangi. The Commission also recommends that the bill specifically require the Children and Young People's Commission have its obligations and responsibilities under Te Tiriti o Waitangi upheld in all its policies, processes, and actions.
- g. Clause 85 should explicitly identify the Children and Young People's Commission as being situated in the relational sphere as specified in the Matike Mai models on constitutional transformation. The clause should specifically refer to the report.

On the Independent Monitor

- h. That the Independent Monitor is independent from government in the form of an independent Crown entity.
- i. That the Independent Monitor's functions are broadened to undertake wider system analysis and thematic reviews

- j. The bill establishes an additional Independent Tino Rangatiratanga Monitor. The bill should ensure that the Independent Tino Rangatiratanga Monitor is empowered and authorised to:
- lead and complete the monitoring functions set out in clause 14 (2) (c) which include assessing *outcomes for children, young people, families, whānau, and iwi who receive services or support through the Oranga Tamariki system, and changes in outcomes over time, with particular regard to Māori children and young people and their whānau.*
 - develop and produce the annual report on the performance of the Oranga Tamariki system in respect of outcomes being achieved for Māori children and young people and their whanau and any other requirements under clause 23.
 - engage with members of the working group to develop and implement a tikanga, kawa, Tiriti o Waitangi, and Declaration based set of care and protection standards and models that will be used to complete its assessment, monitoring and reporting functions. These standards should be informed by the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga Tamariki* report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal.
 - share equal authority and responsibility with the independent monitor to deliver all of its general monitoring and reporting responsibilities.
 - determine and undertake any additional monitoring, assessment and review measures over the Oranga Tamariki system and the wider care and protection framework proposed by a tino rangatiratanga Authority.
- k. A tino rangatiratanga authority is authorised to determine and appoint a Māori advisory mechanism to inform, guide, and advise the co-monitors. This will strengthen the ability of this proposed independent monitoring mechanism to realise and protect the rights of Tangata Whenua to participate meaningfully in the monitoring process. Further to this, the Commission recommends that there should be firm requirements on the co-monitors to incorporate the advice of Tangata Whenua advisory mechanism in conducting their individual and collective monitoring and reporting functions.
- l. Clause 19 of the bill is strengthened to ensure that developing and maintaining equal partnerships with Iwi and Māori organisations is a specific requirement and priority of the independent co-monitors.
- m. The bill establishes an additional Tangata Whenua working group comprised of representatives from the governance group of the Māori-led Inquiry into Oranga Tamriki, the Ministerial Advisory Committee that produced the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report, and other Tangata Whenua groups involved in the review and development of care and protection for Māori children.
- n. This working group should be established for the primary purpose of working with the Independent Tino Rangatiratanga Monitor to develop and implement a tikanga, kawa, Tiriti o Waitangi, and declaration-based set of care and protection standards and models that will be used to complete its assessment, monitoring and reporting functions. This standard will be informed by the *Ko Te Wa Whakawhiti: Its Time for Change – A Maori Inquiry into Oranga*

Tamariki report, the *Hipokingia Ki Te Kahu Aroha Hipokingia ki te Katoa* report by the ministerial advisory Committee, and the *He Pāharakeke, he Rito Whakakīkinga Whāruarua* report by the Waitangi Tribunal.

As regards the Royal Commission of Inquiry into Abuse in Care

- o. That the Select Committee ensures that Bill adequately reflects the principles of monitoring from the Royal Commission of Inquiry into Abuse in Care report; and
- p. That the Bill includes a review of the legislation following the publication of the Royal Commission's final report, in order to respond to the Royal Commission's findings and incorporate its additional relevant recommendations.