

ERU RUANUI TIA KAPA-KINGI

**KA MATE, KA ORA RĀNEI? ORANGA
TAMARIKI ACT NOT ENOUGH TO
ADDRESS MĀORI
OVERREPRESENTATION IN STATE
CUSTODY AND OUT OF HOME
PLACEMENTS – A WAY FORWARD
THROUGH CROWN-MĀORI
PARTNERSHIP**

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Te Pae Tawhiti – Abstract

This paper is a statutory note. It aims to critically analyse some of the incoming amendments to the Oranga Tamariki Act 1989. Those amendments were enacted in 2017 with one of the objectives being to improve Māori overrepresentation generally in both state care and youth justice in New Zealand. This paper focuses on two amending provisions and asserts that those provisions are insufficient in achieving this purpose. This paper then asserts how these amending provisions can be improved and thereby utilised in practice to reduce Māori overrepresentation and harm to whānau Māori, specifically within the context of state custody and out of home placements. This paper concludes the law should be revised and improved. Also, that it should thereby be used to devolve power to allow Māori to provide services and make decisions as they are best placed to do so, whilst maintaining some Crown responsibility based on the principle of partnership. This will do better to achieve the reduction of tamariki Māori in state custody and out of home placements. Ina pērā, kāhore e kore kua ora pai te iwi Māori ki tua o ākengokengo. Nō reira, ki te hoe!

Key Words: Family Law, Treaty of Waitangi, Oranga Tamariki, State Custody, Child Placement.

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I. Te Terenga o Te Waka – Introduction

This paper argues the incoming amendments to the Oranga Tamariki Act 1989 (the Oranga Tamariki Act) are insufficient in addressing the fundamental issues which contribute to Māori overrepresentation in the custody of Oranga Tamariki Ministry for Children (Oranga Tamariki) and out of home placements.¹ In considering this argument, the following points will be made. First, there will be an account of the background of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (the Legislation Act). This will outline the history of the predecessor of the Oranga Tamariki Act, namely, the Children, Young Persons, and Their Families Act 1989 (the CYPTFA). This will also include a discussion of the motivations behind changing the CYPTFA regime and the political and public responses which surrounded the reform. Secondly, specific amendments will be discussed. These are; ss 7(1) and 14 of the Legislation Act. This paper will analyse the te reo Māori terms to be introduced² as principles, and the duty on the Chief-Executive of Oranga Tamariki to form policies and strategic partnerships with Māori to recognise the principles of the Treaty of Waitangi (the Treaty).³ It will be shown these incoming sections are flawed and thereby deficient. Thirdly, this paper will conclude the amendments to be made to the Oranga Tamariki Act, though ostensibly impressive, are likely to have a minimal impact on the overrepresentation of Māori in state custody and out of home placements and will thereby fail to achieve the high aspirations set out for Māori in the reform process. Finally, this paper will assert the necessary changes required for these amendments to become effective as well as demonstrate how these might be used in practice as a better way

¹This reform was introduced in 2017 by way of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

²Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 7(1); to become part of s 2(1) of the Oranga Tamariki Act 1989.

³Section 14; to become s 7AA of the Oranga Tamariki Act 1989.

forward in reducing Māori overrepresentation in state custody and out of home placements. This discussion will centre around the Crown using an improved version of the amendments to devolve power to Māori whilst still upholding the principle of partnership.

II. Tō Te Ture Whakapapa – Legislative Background

History of the CYPTFA

Enacted in 1989, the CYPTFA was contextualised by the Puao-Te-Ata-Tu Report of 1988. This was produced by the Ministerial Advisory Committee on a Māori Perspective (the Advisory Committee). That report ultimately called for direct Māori involvement in social welfare policy and the implementation of unique Māori practices and values in social welfare practice to improve social outcomes for Māori who were also significantly overrepresented at that time.⁴ The CYPTFA did not realise the ambitions of the Advisory Committee because it did not devolve power, nor did it make way for Māori to manage their own tamariki within a uniquely Māori framework. The reform provided only a principle of whānau-prioritisation in decisions around the care of children which was subject to other principles and equally applicable to non-Māori,⁵ as well as a qualified duty on the Chief-Executive to wherever possible, “have particular regard for the values, culture, and beliefs of the Māori people”.⁶ There was no realisation of the plea for Māori to manage their own social services.

⁴Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare *Puao-Te-Ata-Tu (Day break)* (New Zealand Government, September 1988) at 18 and 24.

⁵Children, Young Persons, and Their Families Act 1989, s 13(2)(b).

⁶Section 7(2)(c)(ii).

The Issue

The main object of the CYPTFA was to “promote the well-being of children, young persons, and their families and family groups”⁷. Whether this object was met for Māori children, Māori young people and whānau Māori is clear; it was not. In the recent reform process, the Ministry of Social Development (MSD) admitted there is no evidence the CYPTFA has resulted in any meaningful change for Māori to this day.⁸ The statistics prove the continuing disservice to Māori. MSD noted the overrepresentation of Māori children and young people in the system has progressively worsened. In 2001, Māori made up 45 percent of the total client group, with 55 percent in care and 48 percent in youth justice. Presently, 60 percent of children in state care are Māori.⁹ This is so despite the fact only 30 percent of all children born in New Zealand at any given time are Māori.¹⁰ Currently in the youth justice system, Māori comprise 60 percent of all young people, and 70 percent of young persons placed in secure youth justice residence, while only making up 25 percent of children and young people aged 10 to 16 years in New Zealand.¹¹ Māori-related figures have also increased in other respects over time. Up to 40 percent of initial intake inquiries, and 50 percent of all investigations involve Māori.¹² These statistics highlight the grossly disproportionate effect on Māori in comparison to the general population. The fact these figures have only increased since 1989 re-iterates the CYPFTA has always failed Māori. The CYPFTA merely continued to circulate these

⁷Section 4.

⁸Ministry of Social Development *Regulatory Impact Statement Investing in Children: Legislative support for improving outcomes for Māori children and young people* (New Zealand Government, November 2016) at [43].

⁹The Modernising Child, Youth and Family Panel *Modernising Child, Youth and Family Expert Panel: Interim Report* (Ministry of Social Development, Version 1.0, July 2015) at 8.

¹⁰At 34.

¹¹The Modernising Child, Youth and Family Panel *Expert Panel Final Report: Investing in New Zealand's Children and their Families* (Ministry of Social Development, December 2015) at 49.

¹²Ministry of Social Development *Regulatory Impact Statement Investing in Children: Foundations for a child-centred system* (New Zealand Government, August 2016) at [49].

failures in serving Māori and the nation generally. The wero¹³ laid down by the Advisory Committee was and is left wanting in response. Recent governments have tried to respond through amending the CYPTFA. Some of these amendments within the Legislation Act, and their wider context and motivations, will now be discussed.

Background to Amendments

The history and statistics outlined above, as well as the commentary surrounding the Legislation Act provide evidence as to the motivation behind the amendments. Ultimately, the amendments are intended to be a fundamental overhaul of the old system.¹⁴ The Hon Anne Tolley (then Minister for Children) stated the changes would shift the focus of the regime to prevention by first investing in families, and recognising that children exist within a wider network of family, community, culture, and genealogy.¹⁵ The Expert Panel (the Panel) which contributed to the policy of the amendments reported that a fundamental shift in the original scheme is necessary to achieve better outcomes for vulnerable children,¹⁶ and recognised the importance of upholding a child's connection to their whakapapa and wider family context.¹⁷ The Panel also stated the social sector should recognise the value in the Treaty partnership within its new operating model.¹⁸

¹³Challenge.

¹⁴The Modernising Child, Youth and Family Panel *Modernising Child, Youth and Family Expert Panel: Interim Report*, above n 9, at 79.

¹⁵(29 June 2017, Volume 723) Hon Anne Tolley, *Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill — Second Reading* <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20170629_20170629>.

¹⁶The Modernising Child, Youth and Family Panel *Expert Panel Final Report: Investing in New Zealand's Children and their Families*, above n 11, at 8.

¹⁷The Modernising Child, Youth and Family Panel *Modernising Child, Youth and Family Expert Panel: Interim Report*, above n 9, at 9 and 85.

¹⁸The Modernising Child, Youth and Family Panel *Expert Panel Final Report: Investing in New Zealand's Children and their Families*, above n 11, at 61.

MSD in several Regulatory Impact Statements released in 2016 noted that for any reform to address the gap between Māori and non-Māori, there must be a modern perspective on culture and identity, and its importance to the well-being of Māori.¹⁹ Also, that the new system must recognise a decision-making mandate for Māori leadership, namely iwi organisations as they are best placed to work with and support Māori.²⁰ MSD concluded that amending the care and protection principles to reflect mana tamaiti, whakapapa and whanaungatanga would achieve a more culturally inclusive and responsive practice, promote systemic change and durable long-term solutions, addressing the overrepresentation of Māori.²¹ As to the duty on the Chief-Executive in respect of the Treaty, MSD concluded that such would embed the importance of focusing on achieving better outcomes for Māori, provide accountability for achieving those outcomes, and ultimately reduce Māori overrepresentation by innovating strategic partnerships with iwi to deliver more appropriate services to Māori.²² These policy statements are directly linked to the focus sections discussed in the latter parts of this paper.

Public Response

The New Zealand Human Rights Commission and the New Zealand Law Society submitted that the new principles (specifically; mana tamaiti) were progressive and positive, and recommended they be retained.²³ Similarly, te Rūnanga o Ngāpuhi and te Rūnanga o Ngāi Tahu praised the idea of mana tamaiti within the new principles, though both iwi argued the terms and their respective explanations did not go far enough to

¹⁹Ministry of Social Development *Regulatory Impact Statement Investing in Children: Legislative support for improving outcomes for Māori children and young people*, above n 8, at [35].

²⁰At [39]-[40].

²¹At 13; see impact analysis table.

²²At 13; see impact analysis table.

²³New Zealand Law Society “Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill: NZLS submission” at 1; New Zealand Human Rights Commission “Submission on Children, Young Persons and their Families (Oranga Tamariki) Amendment Bill” at 7-8.

recognise the place of a Māori child within their whānau, hapū and iwi.²⁴ The Human Rights Commission also saw merit in the duty on the Chief-Executive in respect of the Treaty but recommended the duty be strengthened as there is no direct obligation to form strategic partnerships with iwi, only an obligation to seek to develop such partnerships.²⁵ The New Zealand Māori Council expressed their preference for a system which wholly devolves responsibility for Māori children to Māori, citing the Puaoteata Report of 1988, and criticised the provisions for giving too much power to officials.²⁶

Select Committee Report

The majority of the Social Services Committee (the Committee) supported the Bill. The Committee acknowledged that ‘mana tamaiti’ needed to place greater efficacy on whānau, hapū and iwi in relation to tamariki Māori.²⁷ The original definition was changed from; “in relation to a person who is Māori, means their intrinsic worth, well-being, and capacity and ability to make decisions about their own life”, to “means the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person”.²⁸ A definition of ‘tikanga Māori’ was also added to accompany this revised definition.²⁹ These definitions remain in the Legislation Act and are subject to analysis in the latter parts of this paper. The Committee also recommended that the principle of mana tamaiti be placed higher in the purpose section to make it the focus, recognising the importance of that principle.³⁰

²⁴Te Rūnanga o Ngāi Tahu “Submission to the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill” at 3 and 7; Te Rūnanga-Ā-Iwi O Ngāpuhi “Submission to the Social Services Select Committee: Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill” at 5.

²⁵New Zealand Human Rights Commission, above n 23, at 8.

²⁶New Zealand Māori Council “Our Children, Our Right: The Māori Council submission” at 1.

²⁷Social Services Committee *Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill* (13 June 2017) at 6.

²⁸At 43.

²⁹At 43.

³⁰At 6-8.

Mana tamaiti is now to be expressed as the first purpose under s 4(1)(a)(i) of the Oranga Tamariki Act.³¹ Regarding the duty on the Chief-Executive in respect of the Treaty, the Committee recommended iwi authorities be included and defined in the Bill, not limiting partnerships to iwi generally.³² However, no recommendation was made to strengthen the duty on the Chief-Executive to form these strategic partnerships. Finally, the Committee added an explicit reference to mana tamaiti within this duty provision in respect of the Treaty, where this was not the case prior.³³ This provides the necessary context for the following discussion.

The Relevant Amendments

This paper will now hone in on the focus sections of the Legislation Act and analyse their form and substance. The amending sections of the Legislation Act which are the focus of this paper are ss 7(1) and 14. Necessarily, other sections implicated by the focus sections will be mentioned in brief. It must be noted both ss 7(1) and 14 of the Legislation Act are not yet in force. These provisions require an Order in Council to gain legal force, though all provisions not yet made enforceable will automatically be made so on 1 July 2019, without an Order in Council.³⁴ Given the parties within the current Government opposed the amendments to the Oranga Tamariki Act,³⁵ and the Royal Commission of Inquiry into abuse in state care is now on the political agenda,³⁶ it is unlikely these amending provisions will be made enforceable before July 2019. However, these amendments are incoming and will be the incumbent law.

³¹Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 9.

³²Social Services Committee, above n 27, at 13.

³³At 54.

³⁴Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 2.

³⁵Social Services Committee, above n 27, at 22-25.

³⁶Rt Hon Jacinda Ardern “Inquiry into abuse in state care” (1 February 2018) Beehive.govt.nz <<https://www.beehive.govt.nz/release/inquiry-abuse-state-care>>.

Statistics for Custody and Out of Home Care

This paper focuses on statistics of tamariki Māori either; under the custody of the Chief-Executive of Oranga Tamariki or placed in out of home care, as the point of measurement for reducing the overrepresentation of Māori. Overrepresentation generally is unlikely to provide enough ground for measuring positive outcomes. According to Oranga Tamariki's national and local level data, in the last five financial years there has been a significant and steady increase in both state custody and out of home placements for Māori.³⁷ In June 2013, there were 2,711 Māori in the custody of the Chief-Executive. As at June 2017 this increased significantly to 3,518. In terms of Māori in out of home care, the increase is not as significant but an increase nonetheless, growing by almost 800 children in these last five years. A loss of custody and the removal of a child is horrific for any family, and this is especially so for whānau Māori. This piece does not claim that all removals of Māori children are unwarranted, indeed some are necessary. Such is also the case with non-Māori children who are placed under state custody or removed out of their home where there are serious risks of harm.

However, the mana of a Māori child in respect of their whakapapa ought to be recognised in making decisions as to custody and placement. Indeed, Tā Mason Durie has long maintained the centrality of maintaining kinship connections for the overall health of Māori. Durie states that whānau is the prime cultural and physical support system for Māori which provides care as well as a sense of identity and purpose.³⁸ This shows the true extent of the cultural harm caused when a Māori child is removed from the care of their own whānau into a non-kin setting. The statistics directly above also show that the

³⁷Ministry of Social Development *Kids in care – National and local level data – June 2017* (June 2017) <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/statistics/cyf/kids-in-care.html>>; see Microsoft Excel spreadsheet on website.

³⁸Mason Durie *Whaiora : Māori health development* (2nd ed, Oxford University Press, Auckland, 1998) at 72.

significance of kinship connections to the well-being of Māori is hardly considered in the scheme of family law and child placement. Williams J has made the observation that this principle has not advanced as a value in family law since the 1989 model was adopted and urges the acceptance that the best interests of a Māori child is necessarily attached to the kin matrix.³⁹ As will be explained in the final parts of this paper, re-centralising the importance of kinship relationships by delegating placement decisions to the wider hapū and iwi (who are best placed to make such decisions) to which the child belongs would lead to a reduction in these statistics and the cultural harms experienced by tamariki Māori in the state care system. This will guide the ensuing discussion as to the effectiveness of the incoming amendments to the Oranga Tamariki Act.

III. He Reo Hou – Section 7(1) of the Legislation Act: New Terminology

Context

Section 7(1) of the Legislation Act will insert new terms and definitions into the Oranga Tamariki Act. The new terms to be introduced by s 7(1) of most interest here are; ‘mana tamaiti’, ‘tikanga Māori’, ‘whakapapa’ and ‘whanaungatanga’. These terms will operate as principles within the Oranga Tamariki Act and contribute to the purpose of the legislation. As will be further explained below, this means the terms can influence the exercise of discretion under the Oranga Tamariki Act (which could influence decisions as to child placements, for example) and the interpretation of its provisions. The first two terms will be discussed separately below, while the last two terms will be discussed together as they are closely linked.

i) Mana Tamaiti

³⁹Joseph Williams J “Lex Aotearoa: an heroic attempt to map the Maori dimension in modern New Zealand law. (Harkness Henry Lecture)” (2013) 21 WLR 1 at 24-26.

Mana tamaiti is defined as “the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person”.⁴⁰ This term appears 14 times in total in the Legislation Act across five different sections. The most notable of these sections are the purpose section⁴¹ and the principle sections.⁴² Including mana tamaiti within the purpose section means it will be relevant to the overall interpretation of the Oranga Tamariki Act.⁴³ Including mana tamaiti in the two principle sections means it must be considered when exercising a general power⁴⁴ and/or when determining the well-being and best interests of a child.⁴⁵ Mana tamaiti is also included in the duty on the Chief-Executive to respect and recognise the Treaty. This will be discussed alongside the analysis of that section in the latter part of this paper.

ii) Tikanga Māori

Tikanga Māori is defined as “Māori customary law and practices”⁴⁶. This term appears twice in the Legislation Act in the interpretation section; once as its own defined term, and another as part of the definition of mana tamaiti. Although the words ‘tikanga Māori’ appear very little across the Legislation Act, its essence is reflected wherever the words ‘mana tamaiti’ appear because it is so included in that definition. This definition of tikanga Māori is alarmingly thin. It provides no explanation or assistance as to what Māori customary law and practices are or how they operate. It might be said a prescriptive framework for what is inevitably a wide concept is inappropriate and risks diluting the

⁴⁰Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 7(2).

⁴¹Section 9.

⁴²Sections 11 & 16.

⁴³Interpretation Act 1999, s 5(1).

⁴⁴Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 11.

⁴⁵Section 16.

⁴⁶Section 7(2).

essence of tikanga Māori. However, a lack of clarity as to tikanga Māori will lead to confusion and therefore apathy in application and practice. It cannot be assumed that these concepts are the subject of common knowledge. Decision-makers and practitioners who are unfamiliar with tikanga Māori would not know how to apply it, and the lack of a fuller definition means they will not have the means to learn. The result being that decisions cannot and will not be made in accordance with tikanga Māori and will thereby fail to uphold mana tamaiti under the Oranga Tamariki Act. This is a significant flaw.

iii) Whakapapa & Whanaungatanga

Whakapapa is defined as “the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend”⁴⁷. This term appears 12 times within the Legislation Act across five different sections. The definition of whanaungatanga is threefold: “the purposeful carrying out of responsibilities based on obligations to whakapapa” (an express link to whakapapa), “the kinship that provides the foundations for reciprocal obligations and responsibilities to be met”, and “the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity and connection”.⁴⁸ This term appears eight times within the Legislation Act across five different sections. Just like mana tamaiti, whakapapa and whanaungatanga are expressed in the purpose, principle, and duty sections of the Legislation Act. These terms will have the same influence over interpretation of and the exercise of discretion under the Oranga Tamariki Act.

⁴⁷Section 7(2).

⁴⁸Section 7(2).

Application of New Terms

It must be noted that although these terms owe their existence to mātauranga Māori⁴⁹, their application is not limited to Māori. The Committee were clear in their report that these terms would apply equally to non-Māori who come to the attention of Oranga Tamariki.⁵⁰ However, the analysis of this essay is limited to the effect of these provisions on tamariki Māori. The question now to be explored is just how decision makers empowered by, or interpreters of, the Oranga Tamariki Act are to account for these terms, and whether they are likely to help reduce the number of Māori in state custody and out of home care.

The terms outlined above are inextricably linked to each other and revolve particularly around the term *mana tamaiti*, providing a wider scheme for interpretation and the regulation of discretion. Indeed, all terms (except for *tikanga Māori*, however this is implicit in *mana tamaiti*) expressly appear side-by-side in the same five provisions of the Legislation Act. There is no section where one appears, and the others do not. It is likely these terms will operate in conjunction when influencing interpretation or decisions pursuant to the Oranga Tamariki Act. It is postulated that *mana tamaiti* (which includes *tikanga Māori*), *whakapapa* and *whanaungatanga*, will and should operate as one inseparable structure under the new legislative regime. An appropriate analogy here is the *whare tūpuna* of Māori, as part of the *marae*. This is the traditional meeting house which was used as a central convergence of all things Māori, a vital part of Māori culture and a place where generations carry out *tikanga Māori* for ceremony and social purposes.⁵¹ *Tikanga Māori* would be the *tūāpapa* (the foundation) of the *whare*.

⁴⁹The base/source of Māori knowledge.

⁵⁰Social Services Committee, above n 27, at 5.

⁵¹Hirini Moko Mead *Tikanga Māori: living by Māori values* (ProQuest, 2016) at 78-79.

Whakapapa and Whanaungatanga would be the two poupou (beams) which stem from the tūāpapa. These two poupou would ultimately uphold mana tamaiti, which would be the tāhūhū (the central raft beam) of the whare. This whare would be aptly named; Te Oranga o Ngā Tamariki.

So, if this structure rests on the foundation of tikanga Māori, this necessitates the means of ascertaining what tikanga Māori is. This is because the term mana tamaiti contains explicit reference to tikanga Māori and this term is implicitly and inextricably linked to whakapapa and whanaungatanga. This is supported by Hirini Moko-Mead, who states whanaungatanga is a component value of tikanga Māori, which also embraces whakapapa as it concerns relationships between people.⁵² Therefore, a decision-maker empowered by, or an interpreter of, the Oranga Tamariki Act ought to be familiar with tikanga Māori to account properly for the purpose and principles in upholding mana tamaiti. However, as stated the definition of tikanga Māori is thin. This lacuna threatens the integrity of Te Oranga o Ngā Tamariki. If a decision is to be made by a judge or any other relevant statutory actor who is unfamiliar with tikanga, these principles are at risk of neglect.

Defining Tikanga – Other Legislation and the Common Law

Te Ture Whenua Māori Act 1993 defines tikanga in much the same way as the Legislation Act.⁵³ The same can be said for most Treaty settlement legislation, where one would expect to see deeper explanations of tikanga. Therefore, other legislation is of no assistance. This shifts the discussion to the common law.

⁵²At 31.

⁵³Section 4; defines tikanga Māori as “Māori customary values and practices”.

The Supreme Court decision of *Takamore v Clarke* concerned the burying of the remains of a deceased Māori male. The case considered how Māori custom and tikanga is to be recognised in the Court. In this case, the family of the tūpāpaku⁵⁴ buried their mokopuna⁵⁵ at an urupā⁵⁶ in accordance with their own tikanga. This was done without the permission of the deceased's non-Māori wife, who then made a claim for the exhumation of his remains so he could be relocated closer to her in what was consequentially a non-traditional burial ground.⁵⁷ On appeal to the Supreme Court, it was recognised the entitlement to bury someone was not prescribed by statute, and therefore fell within the bounds of the common law, which the appellants rightly contended gives effect to custom and tikanga Māori.⁵⁸ The result was in favour of the wife who was also the executor of the deceased's estate. However, some comments by the Chief Justice expressly recognised the place of tikanga Māori in the common law. The Chief Justice stated what may constitute Māori custom or tikanga is a strict question of fact or expert evidence in most cases, and that the Court can give effect to custom or tikanga so long as it is consistent with statute, fundamental principles and policies of law.⁵⁹ This dictum could well be invoked to supplement the meaning of tikanga Māori within the Legislation Act. This could be beneficial for interpretation and informing judicial decisions to be made pursuant to the Oranga Tamariki Act.

However, relying completely on the judiciary to ascertain what is tikanga Māori through an evidential process is inappropriate. The judiciary currently lacks the capacity to deal with tikanga in the Courts. Williams J notes that because of mainstreaming most judges who are tasked with weighing up tikanga will have never heard of or learnt of its essential

⁵⁴Corpse, dead body.

⁵⁵Child/grandchild.

⁵⁶Māori place of burial

⁵⁷*Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [3].

⁵⁸At [4].

⁵⁹At [95].

principles and states the judiciary “needs to up its game”.⁶⁰ Relying on the judiciary then is likely to lead to the misapplication or even ignoring of tikanga. It is also especially inappropriate considering the Oranga Tamariki Act’s wider policy objectives and the fact that many decisions are made by non-judicial parties. As stated, considering tikanga Māori, whakapapa and whanaungatanga in upholding mana tamaiti, is done by those who exercise discretion under the Oranga Tamariki Act. This is not limited to the judiciary. For example, the Chief-Executive in forming policies, practices, services and strategic partnerships with iwi and other Māori groups must have regard to mana tamaiti,⁶¹ which of course involves having regard to tikanga. This discretion is granted as part of the Legislation Act’s policy shift towards prevention and early intervention for the care of children.⁶² A court-based mechanism to determine tikanga Māori would be redundant here. A court would usually intervene if there was a subsequent review of the Chief-Executive’s decision which, ideally, would be prevented in all circumstances. Therefore, if these provisions are to give effect to mana tamaiti, the means of knowing and applying tikanga Māori must be proactively provided to all those empowered by the Oranga Tamariki Act. This should be provided expressly by Parliament with the guidance of tikanga Māori practitioners. It should not be left entirely to the judicial branch or any other to determine.

Balancing Principles

Another point to be made is that the purposes and the principles of mana tamaiti, whakapapa and whanaungatanga are not mandatory and must be weighed against other such provisions. This puts these principles which have some potential to work favourably

⁶⁰Williams J, above n 39, at 33.

⁶¹Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s 14; to insert s 7AA into Oranga Tamariki Act.

⁶²Tolley, above n 15.

for Māori at risk of being ignored. For example, if the principle of mana tamaiti is at odds with the principle to make and implement decisions in a prompt manner within a time frame appropriate to the age and development of the child⁶³, the decision as to which principle will trump the other will fall to the discretion of the decision-maker having regard to the circumstances in question. There is no certainty as to whether mana tamaiti and its wider structural framework will be recognised and thereby upheld. This dilutes the effectiveness of these provisions. This is exacerbated by the fact the Legislation Act contains a significant number of principles and sub-principles, all of which are subject to each other, and none of which have any superior status expressly recognised in the Legislation Act.

The new terminology to be inserted as principles by the Legislation Act shows a shift in policy to improve the situation for Māori in state custody and out of home placements in New Zealand and indeed presents some promise. However, these terms as purposive indicators and principles are insufficient in themselves to make any notable changes in practice more appropriate to Māori in the context of care and custody. Section 7(1) of the Legislation Act needs to clarify, at the very least, a procedure to ascertain and apply tikanga Māori in decision-making. Also, these principle provisions ought to be bolstered and given a status superior to the many other principles listed in the Legislation Act, lest they become completely ineffective.

IV. Te Whakamana i Te Tiriti – Section 14 of the Legislation Act: Duty on the Chief Executive in Relation to the Treaty

The relevant parts of s 14 of the Legislation Act are set out as follows;⁶⁴

⁶³Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act, s11.

⁶⁴Section 14.

After section 7, insert:

7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)

(2) The chief executive must ensure that—

(a) the policies and practices of the department that impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori...

(b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:

(c) the department seeks to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to—

(i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori...

(ii) set expectations and targets to improve outcomes for Māori...

(iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations

The purpose of this duty is to recognise and provide for practical commitment to the principles of the Treaty. Paragraphs (a) and (b) are directed at decisions of policy, practice and service (policy paragraphs), while paragraph (c) is directed at forming partnerships with iwi organisations to better provide for Māori (partnership paragraph).

The policy paragraphs will make it incumbent on the Chief-Executive to form policies

and practices which have the objective of reducing Māori overrepresentation through setting measurable outcomes, as well as have regard to mana tamaiti, whakapapa and whanaungatanga responsibilities of whānau, hapū, and iwi. It is noted this too will entail the application of tikanga Māori. The flaws outlined above as to the absence of a definition of tikanga Māori are also reflected here. The partnership paragraph will make it incumbent on the Chief-Executive to “seek to develop” strategic partnerships with iwi organisations. This is followed by several subparagraphs which shape the objectives of Crown-Māori strategic partnerships in the social sector. As will be explained in the following, this provision does not go far enough to address the fundamental issues of the state care system and will not of itself reduce the overrepresentation of tamariki Māori in state custody and out of home placements.

The Potential Effectiveness of s 14

Qualifications within this section inhibit its full potential. The duties under s 7AA(2), though framed as mandatory, are diluted. The section states the Chief-Executive “must” ensure all duties are discharged appropriately. However, what is an appropriate discharge of these duties is prescribed by the more specific wording of the paragraphs which follow. The wording in those subsequent paragraphs, especially that under the partnership paragraph, weakens the duty on the Chief-Executive to uphold mana tamaiti and the principles of the Treaty. This is because it sets a low threshold by which the Chief-Executive must act. For example, paragraph (a), the first of the policy paragraphs, imposes a duty to set measurable outcomes which “have the objective of reducing disparities” between Māori and non-Māori in the system. This could go some way in providing goals specific to reducing the number of Māori in state custody and out of home placements. However, it does not necessarily follow that such goals will be achieved. The Chief-Executive, by simply having an objective to reduce disparities, can

discharge this duty. There is no scope to question the effectiveness of the measures in meeting this objective. This is a very low bar. Feasibly, the Chief-Executive could set measurable outcomes alongside poor policy, and so long as there is an objective to reduce disparities, it is immaterial to the duty whether that objective can or will be achieved.

Paragraph (b), the second of the policy paragraphs sets a similarly low standard. The policies, practices and services formed under this paragraph must simply “hav[e] regard” to mana tamaiti, whakapapa, and whanaungatanga. Having regard to something is not equal to ensuring something is ultimately upheld. The Chief-Executive in instructing Oranga Tamariki could form a policy which has some regard to mana tamaiti, yet is insufficient to ensure it is upheld, and still be relieved of this statutory duty. This is another significant flaw, also exacerbated by the absence of a definition of tikanga Māori which is an essential ingredient of mana tamaiti, whakapapa and whanaungatanga. The Chief-Executive, without the means of ascertaining what is tikanga Māori, is unlikely to achieve any policy, practice or service which has regard to mana tamaiti, whakapapa or whanaungatanga, let alone policy that ultimately upholds any of those things.

The partnership paragraph has potential to achieve the reduction of Māori in state custody and out of home placements. Its value as policy rests on the importation of the expertise and natural attributes of iwi and other Māori organisations who are well placed to deal with tamariki and whānau Māori.⁶⁵ However, this duty is similarly diluted by the statutory wording. The Chief-Executive is only bound to “seek to develop” strategic partnerships with iwi, Māori organisations and iwi authorities. The Chief-Executive through Oranga Tamariki, by simply contacting these entities with a view to forming a partnership would discharge this duty. The Chief-Executive is not statutorily bound to

⁶⁵The Modernising Child, Youth and Family Panel *Expert Panel Final Report: Investing in New Zealand's Children and their Families*, above n 11, at 61.

see through the formation, nor the continuation, of a strategic partnership with any of these entities, nor the delegation of power. This was one criticism of the Legislation Act submitted by the Human Rights Commission which recommended this provision be strengthened by placing a more direct duty to develop and implement strategic partnerships, as opposed to the current duty which it criticised as nebulous.⁶⁶

There is a similar provision within s 33 of the Resource Management Act 1991. Under this provision local authorities may legally transfer any of their own powers or functions (except the power of transfer) to another public authority, which includes iwi authorities.⁶⁷ However, since its inception in 1991, this section has never been invoked by local council to delegate power to any iwi authority.⁶⁸ This shows the ineffectiveness of such discretionary provisions and the risk that the same thing may happen to the incoming s 7AA above, namely that it is ignored by Oranga Tamariki.

Therefore, the effectiveness of s 7AA as it stands in reducing the number of Māori in state custody or out of home placements is diminished by its wording and is not likely to lead to significant positive changes. Though potentially influential, it has severe limitations which inhibit its effectiveness in achieving better outcomes for Māori in state custody and out of home placements. Its biggest flaws: the fact the duties set a low threshold, and the Chief-Executive is under no direct duty to form strategic partnerships with iwi and Māori organisations. These flaws need to be remedied if better social outcomes for Māori are to be achieved by way of the Oranga Tamariki Act.

Ultimately, it is concluded that both incoming provisions fail to provide a structure for positive change in the law of state custody and out of home placement for the benefit of

⁶⁶New Zealand Human Rights Commission, above n 23, at 8.

⁶⁷Resource Management Act 1991, s 33(2)(b).

⁶⁸Ministry for the Environment *Section 33: Transfer of Functions, Powers or Duties - a stocktake of council practice* (Ministry for the Environment, ME 1200, May 2015) at 7.

Māori, who currently suffer to the highest degree in both respects. A purely ostensible view would lead one to think these changes are significant and can therefore achieve better social outcomes for Māori. However, a deeper analysis reveals their flaws. These provisions are ineffective and serve merely as window dressing over a more fundamental issue within this area of the law. Namely, that it has never made way for Māori to manage their own affairs, even though Māori are grossly overrepresented and have been for a long time in almost all the negative aspects. A *by Māori, for Māori* model has never been realised nor have the legislative tools been provided to make one. This is likely to be the reason the system looks the way it does today.

V. He Anga Whakamua – A Way Forward

As already stated, the provisions introduced by the Legislation Act have potential to address the fundamental issues within the state care system which unduly affect Māori. However, there is much room for improvement so that this potential may be realised. This part will explain the improvements to be made and how the law can then be used going forward to reduce the overrepresentation of tamariki Māori in state custody and out of home placements. This part will ultimately outline what partnership should look like.

Ka Tahi – Changing the Provisions

To re-iterate the points made above, the provisions are inhibited by the lack of clarity in the application of tikanga Māori, as well as the fact the pro-Māori principles are subject to other principles. There is also the dilution of the duties on the Chief-Executive in forming policy and strategic partnerships with and for Māori in honouring the Treaty. These provisions ought to define, or at least provide a readily available means of defining tikanga Māori and uplift the principle of mana tamaiti to a superior status. Furthermore,

the duties on the Chief-Executive in forming policy and partnerships with iwi ought to be made more directly mandatory. Making these changes will go further in achieving the high aspirations for Māori which underpin the Legislation Act and the Oranga Tamariki Act.

Ka Rua – Devolution of Power

However, this is not all that is required. The law on its own is not the entire answer; implementation and practice are also key. It is submitted Oranga Tamariki ought to use these new-and-improved provisions to devolve more control to iwi or other Māori organisations who are willing and able to provide services in the care and custody of their own. It is submitted this can be achieved through s 14 of the Legislation Act, soon to be s 7AA of the Oranga Tamariki Act, through the formation of Crown-Māori partnerships. However, this is only likely to happen if the suggested changes are made, as there is no direct duty and therefore no guarantee of devolution or partnership. Section 7AA(2)(c)(iv), which allows for the Chief-Executive to delegate functions under the Oranga Tamariki Act to Māori entities in agreement with Oranga Tamariki, is envisaged as the primary means of moving forward into a partnership model.

Greater scope should be provided for devolving state power to Māori who are willing and able to exercise such power, specifically within policy and decision-making pertaining to child custody. Functions and decisions around placement ought to be delegated to Māori so they may provide for the care and custody of tamariki within a uniquely Māori framework. This submission echoes that of the New Zealand Māori Council in its scrutiny of the Legislation Act,⁶⁹ and reflects the aspirations of the Puao-ata-tu Report.⁷⁰ Those being, that social welfare powers should be devolved to Māori

⁶⁹New Zealand Māori Council, above n 26, at 1.

⁷⁰Ministerial Advisory Committee on a Maori Perspective, above n 4, at 18 and 24.

who are best placed to use them for the betterment of Māori. However, it is also submitted that devolution can and should be based on the principle of partnership. That is to recognise that the state should not relieve itself entirely of its duty to provide for the equality of Māori, as promised under Article III of the Treaty.⁷¹ The Crown must provide the infrastructure and resource to iwi and Māori organisations for this proposed framework.

Contemporary Examples

There are current examples where the recognition of mana Māori in state and judicial services has become a reality and led to better outcomes for Māori. These examples include the Rangatahi Court system and the Whānau Ora initiative. The Rangatahi Court, an initiative of the judiciary, is a form of Youth Court which often takes place on marae. Its aim is to reduce rates of Māori youth offending “by encouraging strong cultural links and meaningful involvement of whānau, hapū and iwi in the youth justice process”.⁷² It also implements tikanga Māori process such as pōwhiri and karakia and is typically held within a whareniui (traditional meeting house).⁷³ Since the inception of the first Court, 15 have been adopted nationwide.⁷⁴ According to a 2012 report by the Ministry of Justice, the Court process has been successful in; engaging young Māori, encouraging more positive behaviour by young Māori, connecting young Māori with their wider community and building a sense of Māoritanga within the rangatahi who participate.⁷⁵ Judge Taumaunu, the initiator of the first Rangatahi Court in Gisborne, states that it provides

⁷¹*The New Zealand Maori Council v The Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

⁷²Judge Heemi Taumanu “Rangatahi Courts of Aotearoa New Zealand – an update” (November 2014) Māori Law Review <<http://Māorilawreview.co.nz/2014/11/rangatahi-courts-of-aotearoa-new-zealand-an-update/>>.

⁷³Taumanu, above n 70.

⁷⁴Ministry of Justice “About Youth Court: Rangatahi Courts & Pasifika Courts” justice.govt.nz <<https://www.youthcourt.govt.nz/about-youth-court/rangatahi-courts-and-pasifika-courts/>>.

⁷⁵Kaipuke Consultants *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi Final Report* (Ministry of Justice, 17 December 2012) at [8.4].

opportunity for young people to understand who they are as Māori and for the local community to participate and contribute.⁷⁶ Williams J however notes that despite early positive signs, the Rangatahi Court has some important limitations; those being that the mainstream Youth Court is always the first port of call, and that the jurisdiction of the Rangatahi Court only operates if the victim and offender agree to such a referral.⁷⁷ Also, being a judge-led, bottom-up type of initiative, the executive branch is yet to really get behind and tautoko⁷⁸. However, it is a fine example of practice influencing real change. As stated earlier, the law in and of itself is not enough.

The Whānau Ora initiative was established in 2010 by the New Zealand Government, as it recognised mainstream ways of delivering social and health services in New Zealand do not work for Māori. Whānau Ora provides a platform for whānau Māori to become more self-managing and independent.⁷⁹ In the second phase of Whānau Ora in 2014, implementation powers were given to three non-government Commissioning Agencies to invest directly into their communities, two of which are; Te Pou Matakana, and Te Pūtahitanga o Te Waipounamu. Both these agencies are committed to helping whānau Māori across New Zealand. The Government recognised these agencies are better placed to make funding decisions, which has given greater flexibility for funding outside the Whānau Ora provider collectives to iwi and marae.⁸⁰ There is evidence that Whānau Ora has delivered many positive outcomes for whānau Māori.⁸¹ However, it might be said that funding decisions are a limited form of power devolution and might not be truly representative of partnership.

⁷⁶Taumanu, above n 70.

⁷⁷Williams J, above n 39, at 27.

⁷⁸To support.

⁷⁹Te Puni Kōkiri “Whānau Ora” <<https://www.tpk.govt.nz/en/whakamahia/whanau-ora>>.

⁸⁰Te Puni Kōkiri “Whānau Ora”, above n 77.

⁸¹Te Puni Kōkiri “Our Whānau Ora Stories” <<http://www.tpk.govt.nz/en/whakamahia/whānau-ora/our-whānau-ora-stories>>.

These examples, admittedly, do not go to the full extent of devolution pushed by this paper and do not directly align with decisions of state custody and out of home placements. However, at the very least they provide evidence of two things. One, structures that are more cognisant of Māori ways of being work better for Māori. Two, Māori are best placed to provide for and make decisions which involve Māori and, therefore, should not be inhibited from doing so.

It should also be noted there is an apparent willingness by the state to devolve decision-making power and resources to Māori who are willing and able. In 2012, Ngāi Tūhoe formed a partnership with the Crown as part of the settlement of their historic Treaty claim, whereby the mana motuhake of Tūhoe was recognised by specific agencies of the Crown. This was effectively a mandate for Tūhoe to provide services to their own people which are usually provided by the state. Among these services, are those currently provided by Oranga Tamariki within state care and youth justice.⁸² The Service Management Plan agreed between Tūhoe and the Crown states that both parties will support each other and undertake to the best of their ability to achieve the aspiration that Tūhoe “manage their affairs to the maximum autonomy possible in the circumstances”,⁸³ and where possible and necessary will “work in partnership... to achieve the aspirations and goals of Tūhoe”.⁸⁴ It can be said this instrument marks the beginning of the devolution of authority to iwi Māori. This also recognises that Māori are best placed to provide for their constituencies.

Another example of partnership between iwi and the Crown can be seen in Taupō where Ngāti Tūwharetoa (through Ariki⁸⁵ Tumu Te Heuheu and his adviser) have formed a

⁸²Ngāi Tūhoe & Government of New Zealand *Service Management Plan* (November 2012) at 32.

⁸³At 6.

⁸⁴At 6.

⁸⁵A paramount tribal leader.

relationship with Oranga Tamariki and the Police whereby there is provision of advice by Tūwharetoa on major issues involving whānau Māori in the area and the formation of strategies for working with these whānau in general practice.⁸⁶ This relationship has been positive for all parties involved and shows the benefit of the Crown and iwi working together.

What Partnership Looks Like

Here, the devolution of power framework is given more detail, drawing inspiration from the examples above, balancing what will be most effective and representative of partnership. It is submitted that willing iwi or other Māori authorities should be delegated the power through the suggested amendments above (specifically; s 7AA) to decide the most appropriate placement of a child as the first port of call in such cases where tamariki Māori are involved. This could take the form of a social services arm as a part of a wider governance entity or other type of Māori organisational body. Setting up and maintaining the infrastructure for iwi to make these decisions should be financed directly by Oranga Tamariki. The Crown should also provide administrative support throughout. This recognises the utmost importance of kinship bonds to Māori and the fact that Māori are best placed to make these decisions as well as consider tikanga Māori and whakapapa in the decision-making process. It is submitted that this model will reduce overrepresentation and the cultural harm suffered by Māori within the current state custody and child placement system. This strikes a balance between practice on the ground and having an appropriate legal infrastructure, and best reflects the principle of partnership as the Crown would maintain a vital role of support.

⁸⁶New Zealand Law Foundation & Henwood Trust *Rangatahi Māori and Youth Justice: Oranga Rangatahi (Research Paper prepared for the Iwi Chairs Forum)* (Iwi Chairs Forum, March 2018) at 30-31.

Recent developments in government policy show that the legal and political recognition of rangatiratanga⁸⁷ Māori is becoming a reality. Some oppose devolution, arguing these responsibilities should remain with the Crown. The Hon Pita Sharples during his time as Minister of Māori Affairs stated that devolution of power reflects badly on the state, criticising it as “symptomatic of a failure of successive governments to provide for the social needs of iwi and Māori”.⁸⁸ However, it is submitted that so long as the principle of partnership remains central, optimal outcomes can be achieved. It is not envisaged the Crown will be fully relieved of its duties to Māori.

It is reinforced here that a system whereby Oranga Tamariki devolves power to iwi and Māori organisations to make decisions and provide services within the context of state custody and out of home placements, whilst still providing the necessary resources and support, should be adopted. This will give greater prospect to achieving the reduction of Māori overrepresentation, as well as preventing the disproportionate harms suffered by Māori in this area. The incoming s 7AA provisions could serve as the means to this end. However, as stated above that provision is hamstrung by its frail statutory wording, and ought to be bolstered if it is to be used as such. The other provisions ought also to be amended as recommended above to contribute to that same end.

The history of state care in New Zealand as outlined in the earlier parts of this paper, is evidence of the continual failure by the Crown in respect to Māori. It has been argued the recent amendments to take effect as part of the Oranga Tamariki Act are not likely to change this, specifically within the context of state custody and out of home placements.

A new approach of the Crown devolving authority to Māori to provide services and make

⁸⁷Leadership, autonomy.

⁸⁸Hon Pita Sharples “Treaty relationships need rebalancing: Sharples” (22 October 2010) Beehive.govt.nz <<https://www.beehive.govt.nz/release/treaty-relationships-need-rebalancing-sharples>>.

decisions around care, whilst also providing resource and support to uphold the principle of partnership, is what is required to make any real change. It is true the Crown holds primary responsibility; this paper does not claim otherwise. However, this does not preclude the opportunity for the Crown and Māori to work together for better outcomes in the care and oranga of tamariki Māori.

VI. Te Taunga o te Waka – Conclusion

The position outlined in the introduction of this paper remains. The amending provisions of the Legislation Act to take effect on the Oranga Tamariki Act, namely ss 7(1) and 14, as well as the provisions implicated by those sections, will not in themselves reduce the growing and disproportionately high number of Māori in state custody and out of home placements in Aotearoa. Ostensibly, these provisions seem to do good by Māori and indeed the policy outlined by the Expert Panel supports a genuine effort to achieve such outcomes. However, the amending sections are fundamentally flawed. The absence of a definition of tikanga Māori, the fact the principles for Māori such as mana tamaiti are subject to other provisions, and the fact the duty on the Chief-Executive to recognise the Treaty through policy and strategic partnerships is severely diluted by the statutory wording, all lead to the conclusion that the new Oranga Tamariki Act will do little to address the gross overrepresentation of Māori in those areas. At the very least these provisions need to be re-amended and improved if they are going to make the necessary changes to a system which has long misunderstood Māori. Additionally, it has been shown how these improved provisions should be utilised in practice to devolve power in social services from the state to Māori, on the basis of partnership, to reduce Māori overrepresentation. Making way for the rangatiratanga of Māori in managing the paramount affairs of child custody through an improved Oranga Tamariki Act which

embodies the principle of partnership, will be most effective in the endeavour to improve the situation for Māori and thereby Aotearoa whānui⁸⁹ in the care of tamariki.

To finish, a poignant whakatauki⁹⁰ which encapsulates the value of partnership;

Nāu te raurau, nāku te raurau, e ora ai te iwi;

With your basket, as well as mine, all will flourish.

⁸⁹New Zealand as a whole/generally.

⁹⁰Māori proverbial saying.

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